KEEPING IT IN – KEEPING IT OUT
PRESERVATION OF ERROR THROUGH MAKING AND MEETING OBJECTIONS IN TEXAS FAMILY LAW

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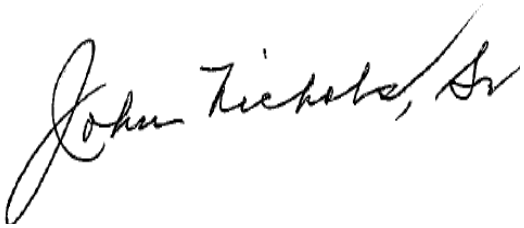
CHAPTER 12

SPECIAL THANKS

Nichols Law, P.L.L.C. would like to specially thank our legal assistant, Tina Gibson, for her tireless efforts in bringing this article to final form. Additionally, we would like to thank Judge Lisa Millard and her legal intern, Deborah Verret, for their editorial review of this article for formatting, punctuation, spelling and sentence structure corrections, and finally, for the index of authorities to the statutes, cases, rules and treatises cited herein



LISA K. HOPPES

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Education/Licenses

- J.D., Louisiana State University, Paul M. Hebert School of Law, 1993
- B.S., Louisiana State University-Shreveport, 1989
- Texas State license: 1994
- Louisiana State license: 1993

Awards/Recognition

- *Texas Rising Star*, Texas Monthly magazine and Texas Rising Stars magazine: 2007
- *Texas Rising Star*, Texas Monthly magazine and Texas Rising Stars magazine: 2006
- *Texas Rising Star*, Texas Monthly magazine and Texas Rising Stars magazine: 2005
- *Texas Rising Star*, Texas Monthly magazine and Texas Rising Stars magazine: 2004
- *Attorney of Excellence* – Fort Worth Business Press: 2003
- *Top Attorneys 2006, family law*, Fort Worth, Texas Magazine 2006
- *Top Attorneys 2005, family law*, Fort Worth, Texas Magazine 2005
- *Top Attorneys 2004, family law*, Fort Worth, Texas Magazine 2004
- *Top Attorneys 2003, family law*, Fort Worth, Texas Magazine 2003
- *Top Attorneys 2002, family law*, Fort Worth, Texas Magazine 2002
- *Top Attorneys 2001, criminal law*, Fort Worth, Texas Magazine 2001
- *"Special Achievement in Bar Leadership" award* - Tarrant County Family Law Bar Association 2001-2002

Law Related Presentations and Publications

- Panel member, Advanced Family Law Course, August 2009, San Antonio, Texas, "*Keeping It In – Keeping It Out, Preservation of Error Through Making and Meeting Objections In Texas Family Law."*
- Speaker, People's Law School, March 2009, Fort Worth, Texas, "*Property Issues in Divorce."*
- Speaker, Pro Bono Committee of the Family Bar Section of the State Bar of Texas, October 3, 2008, San Angelo, Texas, *Getting It In and Keeping It Out – A Family Lawyer's Mini Guide to Evidentiary Rules*.
- Speaker/Author, Marriage Dissolution, April 2008, Galveston, Texas, *Grandparents and Other Third Parties.*
- Speaker, Pro Bono Committee of the Family Bar Section of the State Bar of Texas, April 11, 2008, Wichita Falls, Texas, *Standing*.
- Speaker, People's Law School, April 2008, Fort Worth, Texas, *Divorce-Property*.
- Member, Marriage Dissolution 2008 Planning Committee.
- Director, State Bar of Texas Marriage Dissolution "Boot Camp," May 2007, El Paso, Texas.

- Speaker, Pro Bono Committee of the Family Bar Section of the State Bar of Texas "Family Law Essentials for $2000 or Free," April 20, 2007, Mineral Wells, Texas, *All You Need To Know About Protective Orders*.
- Speaker, *What Every Mental Health Professional Should Know About Family Law*, January 2007.
- Speaker, *What Every Mental Health Professional Should Know About Family Law*, June, 2006.
- Speaker/Author, Fort Worth Paralegal Association, March 23, 2006, *Improving Time Management and Productivity in Your Law Office*
- Speaker/Author, 2005 Poverty Law Conference, *Other Players in Family Law Cases*
- Speaker/Author, Fort Worth Paralegal Association, Family Law Specialty Section, May 9, 2005, *Property Division: What is Separate? What is Community?*
- Speaker, "Ten Minute Mentor," Texas Bar CLE and Texas Young Lawyers On-line Continuing Legal Education, Taped January 28, 2005, available at www.texasbarcle.com
- Speaker/Author, Advanced Family Law Boot Camp, August 2004, *Litigation Outside the Box: Basic Definitions of Things to Expect at the Inception of You Case*
- Speaker/Author, State Bar of Texas Annual Meeting: San Antonio, *Litigation Outside the Box: Basic Definitions of Things to Expect at the Inception of Your Case*, June 2004
- Speaker/Author, Legal Assistant University, September 2004, *Litigation Outside the Box: Basic Definitions of Things to Expect at the Inception of Your Case*
- Moderator, New Judge's Panel, "Local Rules of each Court," Tarrant County Bench Bar XI: Lake Travis, April 2004
- Co-speaker/Co-Author, West Texas Legal Services Pro Bono Continuing Legal Education: Fort Worth, August 2003, *The ABC's of Dealing with Difficult Clients*,
- Speaker, Tarrant County Bench Bar X, Tanglewood Resort, April 2003, *Juvenile Law: An Overview*.
- Speaker, Tarrant County Bench Bar X: Tanglewood Resort, April 2003, *Marketing*.
- Speaker, *Mental Health and Ethical Considerations in Criminal Law*, Tarrant County and Dallas County Criminal Defense Lawyer's Associations' Annual Winter Retreat: Colorado, January 2002

Law Related Periodical/Magazine Publications

- Featured/Interviewed/Quoted "We are Women, We are Attorneys," *Fort Worth Business Press*, February 6, 2004 edition.
- Featured/Interviewed/Quoted "The Dream Team," *Divorce Magazine*, 2003-2004

Professional Activities

- President, Tarrant Family law Bar Associatoion: 2009
- President Elect, Tarrant County Family Law Bar Association: 2008
- Treasurer, Tarrant County Family Law Bar Association Board of Directors: 2007
- Barrister, Eldon B. Mahon Inn of Court: 2006-present
- Secretary, Tarrant County Family Law Bar Association Board of Directors: 2006
- Board of Directors, Tarrant County Family Law Bar Association: 2003-2005
- Co-Leader, Collaborative Lawyer's of Tarrant County: 2006
- Member, Collaborative Lawyer's of Tarrant County: 2002-present
- President, Tarrant County Criminal Defense Lawyers Association: 2002
- Member, Tarrant County Family Law Bar Association: 1994 - present
- Fellow, Tarrant County Bar Foundation: 2002 - present
- Fellow, Texas Bar Association Foundation: 2002-present
- Member, College of the State Bar of Texas: 2002 – present
- Member, Fee Arbitration Committee, Tarrant County Bar Association: 2001-2002

- Associate member, Eldon B. Mahon Inn of Court: 1997-1998
- Member, Tarrant County Bench Bar Committee: 2002-present
- Member, Women's Bar Association: 2002 – present
- Member, Tarrant County Bar Association: 1994 – present
- Member, Tarrant County Criminal Defense Lawyers Association: 1994 – present
- Member, Texas Criminal Defense Lawyers Association: 1994 – present
- Member, Louisiana State Bar Association: 1993 – present
- Member, Tarrant County Young Lawyers Association: 2002-2003
- Member, Collaborative Lawyers of Tarrant County: 2002- present
- President Elect, Tarrant County Criminal Defense Lawyers Association: 2001
- 1st Vice President, Tarrant County Criminal Defense Lawyers Association: 2000
- Secretary, Tarrant County Criminal Defense Lawyers Association: 1999
- Board of Directors, Tarrant County Criminal Defense Lawyers Association: 1998, 2003 – present

JUDGE ROBERT J. KERN

Robert J. Kern, Judge 387th District Court, Fort Bend County, Texas, born Paducah, Kentucky, February 6, 1943. Naturalized Texan.

BAR ADMISSIONS
Admitted to bar, 1968, Texas, also admitted to practice before U.S. District Court, Southern and Western Districts of Texas.

PREPATORY AND LEGAL EDUCATION
University of Texas 1961-8. The University of Nevada at Reno Advanced Advocacy College, 1979.

CERTIFICATIONS
Board Certified, Family Law, Texas Board of Legal Specialization 1975 and re-certified each five years thereafter (one of the original Board Certified Attorneys). Advisory Director Texas Board of Legal Specialization 2006 to present. Certified in Family and Juvenile Jurisprudence, Texas College for Judicial Studies 2006.

JUDICIAL EXPERIENCE
Judge of the 387th District Court, 1999 to present. Appointed initially by Governor Bush to the new Court, elected to full term in 2000 and each 4 years since. The 387th is a general jurisdiction District Court emphasizing family law. Currently member of Council of Judges, Board of District Judges, Juvenile Board, CSCD (adult probation board), Purchasing Board, Chair Courthouse Security Committee and Presiding Local Administrative District Judge Ft. Bend County 2002-4.

PROFESSIONAL MEMBERSHIPS
Gulf Coast Family Law Specialists Association, 1975-93, four term director, founding member. State Bar of Texas, 1968 to present. Fort Bend County Bar Association, 1989 to present, received award for Outstanding Service on Bench-Bar Committee 2006. Director, Family Law Tactics Forum, 1980-present, received Founders Award and Lifetime Achievement Award. Burta Raborn Inns of Court, Master, 2000 to present. The College of the State Bar, 2002-present. Texas Academy of Family Law Specialists, 1990 to present. Former member Houston Bar Association, Unauthorized Practice of Law Committee, Speakers Committee and Family Law Section, Two term Director of Family Law Section.

LEGAL EXPERIENCE
Practiced civil and family law for 31 years before assuming the bench. AV rated by Martindale-Hubbell.

CONTINUING EDUCATION Adviser and Lecturer, Houston Volunteers Lawyers Program, Houston Bar Association, 1992-1999. Ft. Bend County Bar Association

1999 to present. State Bar of Texas Advanced Family Law Course. Friday Afternoons in Court CLE programs 1999-2007. Contributor, lecturer and supporter of Ft. Bend Lawyers Care. Attended most Advanced Family Law Courses since 1975 and with other CLE, accumulated in excess of 2,000 hours CLE.

PERSONAL married to Suzanne, 4 children between us, 8 grandchildren. Active rancher and collector of vintage automobiles, the exact number of which are a military secret.

JUDGE LISA A. MILLARD

EDUCATION/EXPERIENCE

1995 through present
Judge, 310th Judicial District Of The State of Texas

1991 through 1993
Hirsch, Glover, Robinson & Sheiness (Associate)

1987 through 1991
Private Practice

1985 through 1986
Harris County District Attorney's Office (Intern)

1987 – South Texas College of Law, Doctor of Jurisprudence

1983 – University of Houston, Bachelor of Science in Education

PROFESSIONAL ACTIVITIES

- Speaker: Family Law Mediation Training Center Seminar— "Mediation – When, Temporary v. Permanent, Earlier v. Later in the Litigation Process" (October 1996)
- Speaker: Family Law Mediation Training Seminar – "Symposium: Pitfalls In Mediation" (October 1997)
- Family/Probate Bench Bar Conference – "How To Win Your Case – The Judges Tell It Like It Is" (October 1998)
- Gulf Coast Family Law Specialists – "Top Ten Blunders Good Lawyers Make" (September 1998)
- Moderator: Harris County Judge Orientation – "Panel Discussion By Judges" (December 1998)
- Speaker: Hamilton Junior High School Career Day Speaker (February 1999)

- Speaker: Second Annual HBA Family Law Section Family Law Section Law Institute – "The Top Ten Mistakes Made By Lawyers" (March 1999)
- Speaker: 22nd Annual Marriage Dissolution Institute – "Disqualification of Lawyers And Judges And Recusals Of Judges, Including The Visiting Judiciary: Inappropriate Behavior – Point/Counterpoint" (May 1999)
- 25th Advanced Family Law Course – "Disqualification and Recusal" (August 1999)
- Faculty (Group Facilitator) – National Judicial College, General Jurisdiction Course, Reno, Nevada (April 2000)
- Speaker and Chair: 26th Advanced Family Law Course – "Who Ya' Gonna Call When CPS Comes A Knockin"' (August 2000)
- Speaker: Texas Association of Domestic Relations Offices – "A View From The Bench On Visitation Enforcement" (October 2001)
- Host with The Safe Family Program of "Child Abuse Awareness Month" (April 2002)
- Speaker: The Bench Live: The Latest from the Judges on Practice in Their Courts (Houston Bar Association, August 2003)
- Speaker: 2005 Family Law Institute – "How To Prosecute And Defend a Family Violence Protective Order—Mock Trial" (March 2005)
- Speaaker: The Trial Of A Family Law Jury Case – " Closing Argument" (January 2008)
- South Texas College of Law – Visitors Committee 2008 to present

MEMBERSHIPS

- State Bar of Texas, including Family Law Section
- Family Law Council – Judicial Education for Associate Judges (1997)
- State Bar College
- Texas Center Of the Judiciary – Associate Judges Issues Committee (1997)
- Texas Bar Foundation

- Houston Bar Association (Family Law Section, Litigation Section, Computer Law Section)
- Houston Bar Association Planning Committee for CLE – 1999
- Houston Bar Association Executive Team – Computer and Online Section – Counsel Position At Large (2002-2003)
- Planning Committee Member – 22nd Annual Marriage Dissolution Institute (1999)
- South Texas College of Law – Affinity Group Steering Committee (2000)
- Harris County Board of District Judges

1) Education & Entertainment Committee Chair 1998 to 2005
2) Coordinator of Harris County Judge Orientation 1998
3) Legislative Committee 1998 to 2005
4) Purchasing Agent Committee 2001 to 2007
5) Chairman, Purchasing Agent Committee 2008 to present
6) Technology Committee 1997
7) Rules Committee 2006 to present
8) Juvenile Board Member 2008 to present

AWARDS

JUDGE OF THE YEAR AWARDS FOR 2001 (Awarded January 30, 2002) by Peace Officers Looking Into Courthouse Excellence (P.O.L.I.C.E., inc.)

BIOGRAPHICAL INFORMATION ON JOHN NICHOLS, SR.[1]

EDUCATION

B.S., Rice University – 1964
LL.B., University of Houston – 1967

PROFESSIONAL ACTIVITIES

Board Certified: Family Law, Personal Injury Law and Civil Trial Law
Past Chairperson: Litigation Section, State Bar of Texas
Diplomate: American Board of Trial Advocates
Fellow: International Society of Barristers
Fellow: American College of Family Trial Lawyers
Fellow: American Academy of Matrimonial Lawyers
Fellow: International Academy of Matrimonial Lawyers

LAW RELATED PUBLICATIONS

Author of articles on family law, personal injury law and civil trial law.

HONORS

State Bar of Texas – Gene Cavin Award (2008)
Rice University – Athletic Hall of Fame (Football)
Texas Center for the Judiciary Outstanding Article Award (2007)

Appreciation

John Nichols extends his grateful appreciation to the following people who worked on this article: Tina Gibson, and summer intern Victor Brooks of Rice University.

John Nichols extends his special appreciation to Susan Myres for her grant of authority to use her article on Third Party Actions in this presentation.

[1]See also www.nicholslaw.com/attorneys

TABLE OF CONTENTS

KEEPING IT IN – KEEPING IT OUT PRESERVATION OF ERROR THROUGH MAKING AND MEETING OBJECTIONS IN TEXAS FAMILY LAW

I. INTRODUCTION.

This article, by general overview, is intended to cover the process of laying predicates and "preserving error" through making and meeting objections in Texas in all phases of family law cases.

Texas family law cases are prepared, prosecuted, or defended in ten phases, to wit:

(1) Pre-Trial Hearings, Motions and Conferences;

(2) Jury Selection;

(3) Opening Statements;

(4) Presentation of Evidence;

(5) Motion for Directed Verdict;

(6) Preparation of the Jury Charge;

(7) Final Arguments;

(8) Receipt of Verdict and Discharge of the Jury;

(9) Post-verdict Motions for Entry of Judgment and Judgment N.O.V.; and,

(10) Request for Findings of Facts and Conclusions of Law.

The "rules" governing these ten phases are statutory, (Texas Family Code), quasi-statutory (Texas Rules of Civil Procedure, Texas Rules of Evidence and Local Rules of Court), and case law, and will be repeated throughout the article in abbreviated form as follows: Texas Family Code ("Tex. Fam. Code"), Texas Rules of Civil Procedure ("Tex. R. Civ. P."), Texas Rules of Evidence ("Tex. R. Evid."), and case law by case name. Other statutes will be referred to from time to time that have special application by their Harvard Blue Book/Texas Rules of Citation form.

II. SCOPE OF ARTICLE.

This article is split into ten basic parts covering the ten phases of a Texas family law case.

III. LIBRARY REFERENCES.

The author has found the following references to be outstanding quality and are recommended as a basic tool of reference in the Texas family lawyer's library, to wit:

(1) Hon. Harvey Brown and Hon. Ken Curry, "Texas Objections" – 2008 Edition, $99.00. Contact James Publishing, www.jamespublishing.com.

(2) State Bar of Texas – Family Law Section, "The Family Lawyer's Essential Tool Kits" – 2008 Edition, $65.00. Contact: christil@idworld.net.

(3) State Bar of Texas – Family Law Section, "Predicates Manual" Texas Family Law Foundation, 2000 Edition.

(4) Peter T. Hoffman "O' Connor's Texas Rules of Evidence" – 2008-2009 Edition, $85.00. Contact: 1-800-O'Connor or www.JonesMcClure.com.

(5) Joan Jenkins and Randy Wilhite, "O'Connor's Texas Family Law Handbook" 2008-2009 Edition, $125.00. Contact: 1-800-O'Connor or www.JonesMcClure.com.

(6) Hon. Robert A. Wenke, "Making and Meeting Objections" Second Edition, $21.95. Contact: www.Amazon.com.

(7) Hon. Michol O'Connor and Byron P. Davis, O'Connor's Texas Rules – Civil Trials - 2009 Edition, $74.00. Contact: 1-800-O'Connor or www.JonesMcClure.com.

(8) Steven Lubet, "Modern Trial Advocacy," 2nd Edition, Nat'l Inst. For Trial Advocacy 1997, Chapter 9, $65.00. Contact: www.nita.org

(9) Anthony J. Boccihino and David A. Sonenshein, "Federal Rules of Evidence with Objections," Nat'l Inst. For Trial Advocacy, 2008, $35.00. Contact: www.nita.org

(10) James W. McIlhaney, "Trial Notebook," 4th Edition, ABA Press. Contact:

www.Amazon.com. Cost: $40.92.

(11) John J. Curtin, Jr., "The Litigation Manuel - Objections," p. 591, et. seq., American Bar Association (1999).

(12) Hon. Walter E. Jordan, "Texas Trial Handbook," Bancroft - Whitney Co. (1981). Contact: www.Amazon.com. Cost: $17.50.

(13) Robert E. Keeton, "Trial Tactics and Methods," 2nd Edition (1973). Contact: www.Amazon.com. Cost: $12.00.

IV. TEXAS BAR CLE REFERENCES.

The following articles published in CLE courses, sponsored by the State Bar of Texas, are recommended reading on the topic of preservation of error in family law litigation, to wit:

(1) Warren Cole, "Objections and Predicates" (Checklists and Reminders), State Bar of Texas – Ultimate Trial Notebook: Family Law 2006, Chapter 10.

(2) Warren Cole, "Predicates and Presumptions," State Bar of Texas – Family Law Drafting Course 2005, Chapter 11.

(3) Sherri A. Evans, "Predicates and Presumptions and Privileges," State Bar of Texas – Advanced Family Law Course 2001, Chapter 30.

(4) Warren Cole, "Objections and Predicates: Child Hearsay Demonstrations," State Bar of Texas – Ultimate Trial Notebook: Family Law 2000, Chapter 14.

(5) Georganna L. Simpson, "Predicates, Objections and Preserving Error," State Bar of Texas – Family Law: Ultimate Trial Notebook 2004, Chapter 8.

(6) Stewart W. Gagnon, "Predicates and Presumptions," State Bar of Texas – Advanced Family Law Course 1999, Chapter p.

(7) Sydney Aaron Beckman, "Effective Evidence: What Works, What Doesn't Work and How to Get it In!" State Bar of Texas – Advanced Family Law Course 2004, Chapter 16.

(8) Warren Cole, "Special Evidentiary Problems in Family Law Cases," State Bar of Texas – Advanced Family Law Course 1998, Chapter h.

(9) Hon. Douglas R. Woodburn and Jon R. Waggoner, State Bar of Texas – Ultimate Trial Notebook: Family Law 2000, Chapter 12.

(10) Michelle May O'Neil, "Speak Now or Waive It – Preserving Error for Trial Lawyers," State Bar of Texas – Advanced Family Law Course 2006, Chapter 50.

(11) Hon. Leta S. Parks, "Evidence – A Judicial Perspective," State Bar of Texas – Advanced Family Law Course 1999, Chapter 01-1.

(12) Richard R. Orsinger, "Martial Property Issues: Tracing, Reimbursement, and Claims for Economic Contribution," State Bar of Texas – New Frontiers in Marital Property 2002, Chapter 3.1.

(13) Frank Herrera, Jr., "Closing Argument," State Bar of Texas – Advanced Civil Trial Course (1999), Tab Z.

PRACTICE NOTE: For $295.00 plus tax, per year, the reader can access the State Bar of Texas Online Library for all CLE articles (11,000 +), in all areas of the law, from 1998 to present. Contact: www.TexasBarCLE.com, or Michelle Townley at Michelle.Townley@TexasBar.com.

V. APPENDICES.

Attached to this article are appendices, which are ready references and trial aids as follows:

(1) ***Appendix 1*** – Common Objections and Comments Thereon, Short List of Common Objections, Excerpts from the Federal Rules of Evidence.

(2) ***Appendix 2*** – Index to Predicates, Quick Reference Guide to Commonly Used Predicates and Foundations.

(3) ***Appendix 3*** – SBOT Tool Kit Objections Checklist.

(4) ***Appendix 4*** – Table of Authorities.

GENERAL OVERVIEW

This paper is intended to serve as a quick reference tool for the family law practitioner in assessing evidentiary issues when preparing a case for trial. It includes a discussion on objections, preservation of error, and predicates. Also discussed are some of the more common oversights that every advocate has experienced at least one time in their career. Attached as ***Appendix 1*** are lists of some of the more common objections and the proper form required to preserve error. ***Appendix 2*** represents a partial list of commonly used predicates and foundations. Also, included as ***Appendix 3*** is a list of testimonial and nontestimonial objections provided by the State Bar of Texas – Family Law Section. ***Appendix 4*** is the Table of Authorities. These appendices are for quick reference *only*. They should not serve as a substitute for complete research of complex evidentiary issues which may exist. The author would like to thank Warren Cole of Houston, Texas for his generous contributions of time and materials to the Texas Family Lawyers and the State Bar of Texas.

THE TEN PHASES OF A TRIAL

VI. PRE-TRIAL HEARINGS, CONFERENCES AND MOTIONS.

A. Pre-Trial Hearings for Temporary Relief.

This portion of the article was taken from Chapter 5, page 529 et. seq. of O'Connor's Texas Family Law Handbook, 2009. For an in-depth discussion of this topic, the author recommends Chapter 5, pages 529-565 for further reading.

1. Temporary Restraining Orders (TROs).

a. TEX. FAM. CODE §6.501 and §105.001 authorize the issuance of TROs in family law cases. TROs are used to "preserve the status quo" by restraining a party from doing some act. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004).

b. Unlike TROs under the Texas Rules of Civil Procedure, most TROs under the Texas Family Code can be issued without the court having to find that immediate and irreparable injury will result before notice can be served and a hearing can be held. TEX. FAM. CODE §6.503(a)(1), §105.001(b). However, TEX. FAM. CODE §105.001(c)(3) requires the court to find irreparable injury if a TRO seeks to exclude a parent from possession of or access to a child.

c. If the motion (or petition) is not verified and the petitioner asks the court to attach the body of the child, take a child into possession of the court or a person designated by the court, or excludes a parent from possession of or access to a child, the motion (or petition) must be supported by an affidavit. TEX. FAM. CODE §105.001(b)(c).

d. A TRO expires on the earlier of: (1) the time specified by the court, but no more than 14 days after the order is signed, or (2) the date of the hearing on the temporary injunction. TEX. R. CIV. P. 680; *In re Walkup*, 122 S.W.3rd 215, 218 (Tex. App. – Houston [1st Dist] 2003 orig. proceeding). For good cause, the court can extend the TRO for an additional 14 days, or the party restrained by the court may consent to a longer extension of time. TEX. R. CIV. P. 680. The respondent can file a motion to dissolve or modify the TRO with two days' notice to the petition or with shorter notice as permitted by the court. TEX. R. CIV. P. 680. The court must hear and determine the motion to dissolve or modify as soon as possible. TEX. R. CIV. P. 680.

e. TROs issued under the Texas Family Code are not subject to interlocutory appeal. TEX. FAM. CODE §6.507, §105.001(e). However, TROs issued under the Texas Family Code are reviewable by mandamus. *In re Jones*, 263 S.W.3d 120, 122 (Tex. App. – Houston [1st Dist.] 2006, orig. proceeding). Mandamus is appropriate only to correct a clear abusive discretion or a violation of a legal duty. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992).

2. Temporary Injunctions.

a. TEX. FAM. CODE §6.502, §6.709, §105.001 and §109.001 authorize the issuance of temporary injunctions in family law cases.

b. Temporary injunctions are used to "preserve the status quo" by enjoining a party from engaging in a specified activity until the case is finally resolved. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993).

c. A temporary injunction is used mainly to extend the duration of the protection granted in a TRO. Unlike temporary injunctions under the Texas Rules of Civil Procedure, most temporary injunctions under the Texas Family Code can be issued without notice and without the court having to define the injury and state why it is irreparable. However, TEX FAM. CODE §105.001(c)(3) requires the court to define the injury and state why it is irreparable if the injunction seeks to exclude a parent from possession of or access to a child.

d. A temporary injunction granted during a suit for dissolution of a marriage, or in a suit affecting the parent-child relationship, will usually remain effective until a final judgment is rendered. *Brines v. McIlhaney*, 596 S.W.2d 519, 523 (Tex. 1980).

e. A temporary injunction granted during an appeal of a suit for dissolution of a marriage, or a suit affecting the parent-child relationship, will remain effective until the appeal is final or the trial court issues other orders affecting the temporary injunction. TEX. FAM. CODE §6.709(b), §109.001(b); *In re Sheshtawy*, 154 S.W.3d 114, 125 (Tex. 2004); *In re Gonzalez*, 981 S.W.2d 313, 314 (Tex. App. – San Antonio 1998, pet. denied).

f. A party can file a motion to dissolve or modify temporary injunction, or the court can do so on its own motion. *Rafferty v. Finstad*, 903 S.W.2d 374, 378 (Tex. App. – Houston [1st Dist.] 1995, writ denied). To dissolve or modify a temporary injunction, the respondent must plead and prove changed circumstances, a void order, or fundamental error. *Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956). To prove a change of circumstances, the movant must show that a change in conditions either altered the status quo after the temporary injunction was granted, or made the temporary injunction unnecessary or improper. *Universal Health Service v. Thompson*, 24 S.W.3d 570, 580 (Tex. App. – Austin 200, no pet.).

g. To prove a temporary injunction is void, the movant must show the temporary injunction order did not meet the statutory and procedural prerequisites. *Lancaster v. Lancaster*, 291 S.W.2d 303, 308 (Tex. 1956).

h. To prove fundamental error, the movant must show: (1) the record reflects the court lacks jurisdiction, or (2) the public interest is directly and adversely affected by the injunction, as that interest is declared in the statutes or the Texas Constitution. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

i. To dissolve a temporary injunction before a final trial on the merits, the respondent must deny the material allegations in the injunction and the denial must be verified. TEX. R. CIV. P. 690; *Kendrick v. Lynaugh*, 804 S.W.2d 153, 154 (Tex. App. – Houston [14th Dist.] 1990, no writ).

j. Temporary injunctions issued under the Texas Family Code are not subject to interlocutory appeal. TEX. FAM. CODE §6.507, §105.001(e).

k. Temporary injunctions issued under the Texas Family Code are reviewable by a mandamus. *Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991).

3. Temporary Orders.

a. Temporary orders are considered "non-injunctive" even though they may have some mandatory and prohibitory effects. *Querner v. Querner*, 668 S.W.2d 801, 802 (Tex. App. – San Antonio 1984, writ ref'd n.r.e.).

b. A request for temporary orders sought during an appeal of a suit for dissolution of marriage, or suit affecting the parent-child relationship, should be filed with the court and rendered the final judgment. TEX. FAM. CODE §6.709(a), §109.001(a); *Love v. Bailey-Love*, 217 S.W.3d 33, 36 (Tex. App. – Houston [1st Dist.] 2006, no pet.).

c. The respondent is entitled to notice and an opportunity to be heard on temporary orders. TEX. FAM. CODE §6.502(a), §6.709(a), §105.001(b), §109.001(a); *In re Alsenz*, 152 S.W.3d 617, 621 (Tex. App. – Houston [1st Dist.] 2004, orig. proceeding).

d. Temporary orders other than those governed by TEX. FAM. CODE §6.502, §6.709, §105.001 and §109.001 can be issued in a family law proceeding. Such orders include audits,

counseling, social studies, parent-stabilization courses and psychological evaluations.

e. An appeal challenging a temporary order is moot if a final order disposing of all parties and issues in the proceeding has been rendered, when a party seeks to prosecute the appeal. *In re K.L.R.*, 162 S.W.3d 291, 301 (Tex. App. – Tyler 2005, no pet.).

f. Temporary orders issued under TEX. FAM. CODE §6.502, §6.709, §105.001 and §109.001 cannot be reviewed by interlocutory appeal.

g. A temporary order appointing a receiver under TEX. FAM. CODE §6.507 can be reviewed by interlocutory appeal.

h. A temporary order appointing an auditor under TEX. R. CIV. P. 172 cannot be reviewed by interlocutory appeal.

i. Temporary orders can be reviewed by mandamus. *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1992).

B. Pre-Trial Conferences.

1. The Rule - T.R.C.P. 166.

Pre-trial conferences are governed by TEX. R. CIV. P. 166 (West Desk Copy 2009), which states its purpose, to wit:

In an appropriate action, to assist in the disposition of the case without undue expense or burden to the parties, the court may in its discretion direct the attorneys for the parties and the parties or their duly authorized agents to appear before it for a conference to consider:

(1) All pending dilatory pleas, motions and exceptions;

(2) The necessity or desirability of amendments to the pleadings;

(3) A discovery schedule;

(4) Requiring written statements of the parties' contentions;

(5) Contested issues of fact and simplification of issues;

(6) The possibility of obtaining stipulations of fact;

(7) The identification of legal matters to be ruled on or decided by the court;

(8) The exchange of a list of direct fact witnesses, other than rebuttal or impeaching witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial, stating their address and telephone number, and the subject of the testimony of each such witness;

(9) The exchange of a list of expert witnesses who will be called to testify at trial, stating their address and telephone number, and the subject of the testimony and opinion that will be proffered by each expert witness;

(10) Agreed applicable propositions of law and contested issues of law;

(11) Proposed jury charge questions, instructions, and definitions for a jury case or proposed findings of facts and conclusions of law for a non-jury case;

(12) The marking and exchanging of all exhibits that any party may use at trial and stipulation to the authenticity and admissibility of exhibits to be used at trial;

(13) Written trial objections to the opposite party's exhibits, stating the basis of each objection;

(14) The advisability of a preliminary reference of issues to a master or auditor for findings to be used as evidence when the trial is to be by jury;

(15) The settlement of the case, and to aid such consideration, the court may encourage settlement;

(16) Such other matters as may aid in the deposition of the action;

The Court shall make an order that recites the action taken at the pre-trial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the

agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such orders when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar to jury actions or extend it to all actions.

2. Matters That May be Covered in Pre-Trial Conferences.

(1) Offer of stipulations under T.R.C.P. 11;

(2) Determination of compliance with "local rules" of the County or Court;

(3) Exchange of exhibits lists and witness lists;

(4) Tenders and exchange of jury charges, that is, questions, definitions and instructions;

(5) Rulings on requests or motions to strike witnesses for failure to timely or properly state (address, phone number, subject matter of testimony);

(6) Tender of admissions of fact;

(7) Determination of judicial admissions on "ultimate issues";

(8) Determination of order of proceeding, open and close of evidence and argument;

(9) Determination of number of venireman;

(10) Determination of number of peremptory challenges;

(11) Determination of alignment of parties;

(12) Determination of procedure for "challenges for cause", under statutory or case law disqualifications;

(13) Determination of *Daubert/Kelly/Nenno* challenges;

(14) Determination of use of jury questionnaires;

(15) Determination of motions-in-limine; and

(16) Taking judicial notice of adjudicated facts, laws of other states, and laws of foreign countries, under Article II of the Texas Rules of Evidence.

3. Daubert/Kelly/Nenno: Inquiries and Caveats - Daubert/Kelly/Nenno Proofing Your Expert.

Hard Sciences – Reliability of All Scientific Evidence

(1) The underlying scientific theory must be valid.

(2) The technique applying the theory must be valid.

(3) The technique must have been properly applied on the occasion in question.

Factors relating to the determination of reliability include, but are not limited to:

(1) Acceptance by the relevant scientific community.

(2) Qualifications of the expert.

(3) Literature concerning the technique.

(4) The potential rate of error of the technique.

(5) The availability of other experts to test and evaluate the technique

(6) The clarity with which the underlying theory or technique can be explained to the court.

(7) The experience and skill of the person applying the technique.

The proof required under *Daubert v. Merrill Dow*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d (1983) and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992) for the "hard sciences" is stated above.

Soft Sciences – Mental Health - Psychological Evidence

(1) Whether the field of expertise is legitimate.

(2) Whether the subject matter of the expert's testimony is within the scope of that field.

(3) Whether the expert's testimony properly relies

upon or uses the principles involved in that field.

Nenno v. State, 970 S.W.2d 549 (Tex. Crim. App. 1998), applied a relaxed standard of proof to qualifying experts in the "soft sciences," as stated above.

PRACTICE NOTE: Under the *Daubert/Kelly/Nenno* cases, the courts have emphasized that the reliability question is a flexible one, and the general approach of the rules of evidence is to relax the traditional barriers to opinion testimony.

C. Motions in Limine.

1. In General.

a. Motion in Limine – A motion in limine can serve several useful purposes, but it has its limitations. *Collins v. Collins*, 904 S.W. 792, 798 (Tex. App. – Houston [1st Dist.] 1995, writ denied) (trial court's ruling on motion in limine does not preserve error, if evidence [audio tape of telephone conversation] is offered at trial, the party who wants it excluded must object when it is offered).

b. Purpose – A motion in limine should call to the court's attention all evidence and arguments which you believe the other side will attempt to introduce and which you believe the jury should not be allowed to hear.

c. Strategy -- You do not need to, and should not, raise in your motion in limine all evidence the other side will present which you consider to be objectionable. Rather, the points in your motion in limine should address evidence about which you do not want the jury to even hear.

d. Effect of Motion -- If a point in a motion is granted, it does not exclude the evidence. Rather, the ruling requires the party who wants to present the challenged evidence to approach the bench during trial and inform the court that it is about to get into the challenged evidence. The objecting party must then make the objection on the record and the judge will enter a binding, appealable ruling. *Schwartz v. Forest Pharm., Inc.*, 127 S.W.2d 118 (Tex. App.– Houston [1st Dist.] 2003, pet. denied); *Norfolk S. Ry. Co. v. Bailey*, 92 S.W. 3d 577, 581 (Tex. App.– Austin 2002, no pet.) (railroad failed to preserve for appellate review claim that district court erred in personal injury action in failing to exclude evidence about former employee's fear of getting cancer; although ruling was issued on railroad's motion in limine to exclude cancer evidence, railroad failed to move to exclude cancer evidence such that there was no final ruling on whether to exclude evidence); *Turner v. Peril*, 50 S.W. 3d 742, 745 (Tex. App.– Dallas 2001, pet. denied). A denial of a motion in limine does not preserve error on appeal if the objectionable evidence is later admitted without objection. *Schwartz v. Forest Pharm., Inc.*, 127 S.W.2d 118(Tex. App.– Houston [1st Dist.] 2003, pet. denied); *Hiroms v. Scheffey*, 76 S.W. 3d 486, 489 (Tex. App.– Houston [14th Dist.] 2002, no pet.); *In re R.V.*, 977 S.W.2d 777, 780 (Tex. App.– Fort Worth 1998, no pet.). In *R.V.*, the Fort Worth court held that the father in parental rights termination trial had failed to preserve any alleged error regarding trial court's admission of his sexual abuse conviction that was more than 10 years old, noting that the trial court's adverse ruling on father's motion in limine did not preserve error, and that the father's objections at trial to conviction testimony was made on other grounds. *In re R.V.*, 977 S.W. 2d 777, 780 (Tex. App. – Fort Worth 1998, no pet.).

e. Informing the Judge -- A secondary purpose of a motion in limine is to inform the judge in advance of trial of contested evidentiary issues on which he or she will have to rule during the trial. The motion may cause the judge to give some thought to the admissibility of the evidence before it is actually offered. *Lohmann v. Lohmann*, 62 S.W. 3d 875, 881 (Tex. App.– El Paso 2001, no pet.).

f. Motions to Exclude Evidence – A motion to exclude evidence is a pretrial motion which requests the judge to enter a ruling which actually excludes evidence, as opposed to a ruling which requires the offering counsel to approach the bench before asking questions about the contested evidence.

Example: When you know your opposing counsel intends to call a witness who has not

been identified in response to a proper interrogatory.

Example: A *Daubert/Kelly/Nenno* challenge to an expert witness made immediately prior to trial, is in effect, a motion to exclude testimony.

Example: When you know your opposing counsel intends to introduce evidence that is not relevant to the case and is highly prejudicial. Filing the motion to exclude, rather than as part of a motion in limine, avoids a protracted argument at the bench and allows the issue to be settled prior to commencement of trial.

2. Time of Filing Motion.

The motion in limine may be filed:

(1) At pre-trial.

(2) At time of trial to avoid disclosure of your case.

(3) Prior to pretrial to limit discovery, force settlement, or to determine the basis of fact allegations.

(4) After trial has started and opponent's strategy becomes clear. *City of Houston v. Watson,* 376 S.W.2d 23 (Tex. Civ. App.– Houston 1964, writ ref'd, n.r.e.).

3. Practical Considerations.

Practical considerations for filing motions in limine are:

(1) Determine potentially prejudicial evidence.

(2) Submit motion in limine in writing.

(3) Limit motion in limine to the most important items.

(4) Support motion in limine with memorandum of law.

(5) Submit order with motion in limine.

(6) Terms of motion in limine should be broad and general.

(7) Emphasize that motion is for fairness and not delay.

(8) Includes prohibition of acts as to all parties and witnesses.

(9) Make certain that the judge rules without prejudice to later reasserting the motion, if necessary.

(10) Request opposing counsel to submit list of questions in area of concern.

(11) Exclude issues by excluding evidence.

(12) Anticipate denial of motion.

(13) Plan timing of motion in limine.

a. Early motions may tip your hand so that your opponent will prepare the case accordingly.

b. Early motions may limit or direct discovery.

(14) Granting of motion in limine may cause opponent to completely change strategy.

(15) Coordinate motion in limine with other pretrial strategy.

(16) Do not neglect other pretrial motions while awaiting ruling on motion.

(17) Do not hesitate to request motion in limine during trial.

(18) If opponent violates his/her motion in limine, door may be opened for you.

4. Subject Matters of the Motion in Limine.

Proper subject matters of the motion in limine are:

(1) Character evidence to prove conduct in conformity therewith. *See,* TEX. R. EVID. 404 (a).

(2) Extraneous wrongs or bad acts to prove a specific bad act. *See,* TEX. R. EVID. 404 (B).

(3) Settlement negotiations and agreements. *See,*

TEX. R. EVID. 408; *Bounds v. Scurlock, Oil Co.*, 730 S.W.2d 68 (Tex. App. - Corpus Christi 1987, writ ref'd n.r.e.).

(4) Liability insurance. *See*, TEX. R. EVID. 411.

(5) Privileged information. *See*, TEX. R. EVID. Article V.

(6) Remote criminal convictions. *See*, TEX. R. EVID. 609.

(7) Services rendered without charge and gratuitous compensation. *Greyhound Lines Inc. v. Craig*, 430 S.W.2d 573 (Tex. Civ. App.-Houston [14th Dist.] 1968, writ ref'd n.r.e.).

(8) Failure to call a particular witness. *See, Brazos Graphics, Inc. v. Arvin Industries*, 574 S.W.2d 240 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.) per curiam 586 S.W.2d 841 (Tex. 1979).

(9) Beliefs on matters of religion. *See,* TEX. R. EVID. 610.

(10) Reference to the fact that the motion in limine was filed.

(11) Advice to the jury as to the effect of their answers. *See, Magic Chef Inc. v. Sibley*, 546 S.W.2d 851 (Tex.Civ. App.-San Antonio 1977, ref. n.r.e.).

(12) Sexual activities outside the presence of the children. *Schwartz v. Jacob*, 394 S.W.2d 15 (Tex. Civ. App.-Houston 1965, writ ref'd n.r.e.).

(13) Existence of illegitimate children.

(14) Future marital prospects.

(15) Dishonorable discharge from the military.

(16) Temporary orders in the case.

(17) Conduct of the parties during discovery.

(18) Personal habits of a party.

(19) Tax consequences. *See*, *Caterpillar Tractor Co. v. Gonzales*, 599 S.W.2d 633 (Tex. Civ. App.-El Paso 1980, writ ref'd n.r.e.).

(20) Marital prospects of spouses in wrongful death action. *See*, *Exxon Corp. v. Brecheen*, 526 S.W.2d 519 (Tex. 1975).

(21) Reference to emotional problems of a party.

(22) Tape recordings not produced during discovery pursuant to a proper request.

(23) Polygraph results.

(24) Sexual activity prior to marriage.

(25) Personal characteristics or lifestyle of lawyers.

(26) Matters or witnesses disallowed because of dilatory or incomplete discovery.

(27) Pregnancies terminated prior to term.

(28) Hearsay evidence. *See*, TEX. R. EVID., Article VIII.

(29) Prior marriages and controversies related to children.

(30) Charges or arrests, not resulting in conviction, for driving while intoxicated or similar offenses.

(31) Results of blood alcohol tests.

(32) Subsequent or prior claims, settlements, or suits unrelated to the present litigation.

(33) Former divorce proceedings not relevant to the current proceeding.

(34) Evidence of a spouse's conduct before the parties' marriage.

(35) Reference to the motion in limine or the court's ruling on it.

(36) Referring to or offering evidence on any issues or elements of a cause of action not raised by the pleadings.

(37) Any attempt to introduce private investigator reports, including videotapes, unless such reports or videotapes have been properly disclosed.

(38) Any references to events or actions occurring before [date of divorce/last order], the date of the prior order sought to be modified.

(39) Referring to or attempting to introduce into evidence any evidence which was the subject of a discovery request but not produced in response to such request or which was not provided in a timely or proper fashion by way of supplementation.

(40) Any attempt by [name of party] to bring before the jury testimony of any expert witness or fact witness not named in [name of party]'s Responses to Requests for Disclosure.

5. Limine Order.

Be sure that the order on motion in limine:

(1) Is in writing;

(2) Is specific;

(3) Directs the parties, attorneys, and other witnesses not to refer to the subject matter of the motion while testifying;

(4) Instructs the attorneys to present any evidence pertaining to the subject of the motion outside the presence and hearing of the prospective jurors and the jurors ultimately selected; and

(5) Requests the judge to orally read to parties, attorneys and witnesses in open court and outside of the presence of jury.

6. Opposition to Motion in Limine.

Opposition to a motion in limine should be taken into consideration when the motion is not based on:

(1) Texas Rules of Evidence; and,

(2) Prevailing case law.

7. Preservation of Error.

a. If Motion is Granted.

(1) Is not reversible error. *Schutz v. S. Union Gas Co.*, 617 S.W.2d 299 (Tex. Civ. App.-Tyler 1981, no writ hist.).

(2) Granting of motion in limine is not a ruling on the admissibility of evidence and does not preserve error. Offer the evidence at trial ("offer of proof") and secure a ruling from the Court, failure to do so will not preserve error. *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980).

b. If Motion is Denied.

(1) Is not reversible error. *Hartford Accident and Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963). *Crawford v. Deets*, 828 S.W.2d 795 (Tex. App.– Ft. Worth 1992).

(2) Denial of motion does not preserve error.

(3) Ruling on a motion in limine is not an evidentiary ruling.

(4) Object each time the evidence is offered to preserve error. *Wilkins v. Royal Indemnity Co.*, 592 S.W.2d 64 (Tex. Civ. App.-Tyler 1979, no writ).

c. If Motion is Granted and Limine Order is Violated.

(1) Objection is required to preserve error.

(2) Failure to object precludes raising the violation on appeal.

8. Violation of Order.

a. To Whom Does the Order Apply?

(1) Parties;
(2) Lawyers; and

(3) Witnesses.

b. Sanctions and Remedies for Violation of Order.

(1) One may be held in contempt of court. *Brazell v. State*, 481 S.W.2d 130, (Tex. Crim. App. 1972).

(2) Jury may be instructed to disregard the violating language. *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986).

(3) Motion for new trial may be granted.

(4) Mistrial may be declared. *Atchison Topeka and Santa Fe Ry. Co. v. Acosta*, 435 S.W.2d 539 (Tex. Civ. App.-Houston [1st Dist.] 1968, writ ref'd n.r.e.).

(5) May create reversible error on appeal. *Cody v. Mustang Oil Tool Co. Inc.*, 595 S.W.2d 214 (Tex. App.-Eastland 1980, writ ref'd n.r.e.).

(6) Instanter Default Judgment may be granted. *Lassiter v. Shavor*, 824 S.W.2d 667 (Tex.App.-Dallas 1992, no writ).

VII. JURY SELECTION.

A. Introduction.

This part of the article is an amalgamation of articles, speeches and lectures collected or prepared by the author over the last 40+ years. It was prepared in outline form for easy use before and during trial. Outstanding resources available to the Texas practitioner and used herein by the author, as well as resources covered in this article are:

(1) O'Connor's Texas Rules – Civil Trials 2008, Chapter 8-A: The Trial: Jury Selection, pp. 563-577.

(2) West's Texas Practice Guide – Family Law 2007, Chapter 5, B. Motions in Limine §§ 5.54-5.57; Form- Juror Questions §5.371.

(3) State Bar of Texas – Family Law Section, "Checklists," VII Trial, C2 (Jury Questionnaire) and C3 (Voir Dire) 1997.

B. The Law.

Much of the work of selecting jury panels happens behind the scenes. For example, petit juries may be selected in various ways pursuant to TEX. GOV'T CODE ANN. §62.001-62.021. After these jurors are selected and summoned—the courts eliminate those jurors who are disqualified from serving, those who are entitled statutory exemptions and those few who may be excused due to a judge's discretion. The way that this is accomplished varies depending on whether the county is one with interchangeable juries (multiple courts), or counties without interchangeable juries (smaller counties).

1. Purpose.

The purpose of voir dire is to:

(1) test the qualifications of the venire for the exercise of a challenge for cause; and

(2) obtain information for exercise of peremptory challenge. *Implement Dealers Mut. Ins. Co. v. Castleberry*, 368 S.W.2d 249 (Tex. Civ. App.– Beaumont 1963, writ ref'd n.r.e.).

2. Trial Court Discretion.

Voir dire is discretionary with court as to how it is conducted. *Lubbock Bus Co. v. Pearson*, 277 S.W.2d 186 (Tex. Civ. App.– Austin 1955, writ ref'd n.r.e.). Included in this discretion, is the right of the trial judge to exclude questions which seek to gauge the weight a juror will place on certain evidence. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006). The Texas Supreme Court has ruled that a trial court can exclude questions from voir dire if the trial court could have reasonably determined the question sought to gauge the jurors verdict instead of bias. *Hyundai*, at 5.

While a court may exclude questions, with wide discretion, a court may not foreclose a line of questioning if the questions posed are proper. *Hyundai*, at 8. For example, the form of a question may be improper but the area of inquiry may be proper. The court may not preclude inquiry into this area based on the improper form of the question. *Hyundai*, at 8. The court may only preclude the improperly asked question. *Hyundai*, at 8.

PRACTICE NOTE: If you are restricted as to time or method by the court, make a bill of exceptions by showing:

(1) that you cannot effectively exercise peremptory challenges or challenges for cause.

(2) offer a list of questions you are prevented from asking.

No rule of procedure governs the content or time allowed for voir dire. Instead, control of voir dire is left to the trial court. *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989); *TEIA v. Loesch*, 538 S.W.2d 435, 440 (Tex. Civ. App. – Waco

1976, writ ref'd n.r.e). The trial court does not abuse its discretion when not allowing counsel to ask all the questions he or she intended to ask, if counsel was given a fair opportunity to question the jury panel. *McCoy v. Wal- Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App. – Texarkana 2001, no pet.).

3. Record.

No record, no complaint. Always request a record.

4. Challenge to the Array.

A challenge to the array is an obscure complaint that is made to protest a group of jurors drawn from either a jury wheel or other mechanical means. Rule 221 allows a challenge to be made in writing and supported by an affidavit, before a jury panel is drawn from the array. This technique is seldom used and is generally used only when unusual numbers of excuses are given to prospective jurors. The complaint must be made to the judge in charge of organizing and empaneling jurors at the time the irregularity occurs. *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984). This generally happens behind the scenes in central jury rooms where counsel is seldom invited. However, the Fort Worth Court of Appeals allowed the complaint to be made to the trial judge when it was discovered that the jury panel consisted largely of teachers who had been granted transfers of their jury service from March, April and May, until June. *Mendoza v. Ranger Ins. Co.*, 753 S.W.2d 779, 780 (Tex. App. – Fort Worth 1998, writ denied). In that case, the court held that Rule 220 put an unreasonable and impracticable burden on a party who was asserting the constitutional complaint that the jury panel was impermissibly selected. *Id.* In reality, bad things can happen with the full jury array in the central jury room. A good example is *Valezula v. St. Paul Ins. Co.*, 878 S.W.2d 667 (Tex. App. – San Antonio 1994, no writ). In that case, a judge, who was qualifying the array, and handling the exemptions and excuses, made "unfortunate" remarks about juries being tough on crime and "lawsuit abuse."*Id.* at 669.

5. Excusing Jurors.

Only a judge, not the sheriff or a clerk, can excuse a juror. *Sendigar v. Alice Physicians & Surgeons Hosp., Inc.*, 555 S.W.2d 817 (Tex. Civ. App.– Tyler 1977, no writ).

PRACTICE NOTE: Check the county of residence in voir dire because the drivers license address now determines residence for jury service purposes. Those records can run two years behind or be out dated.

6. Shuffle.

TEX. R. CIV. P. 233 provides for a shuffle upon demand if it is made **before** voir dire begins. In counties with interchangeable juries, any party may demand that the jury panel be shuffled after assignment to a particular court and before voir dire. TEX. R. CIV. P. 223. A motion for shuffle must be granted, even if the clerk's office has scrambled or shuffled the juror's name before the assignment to a particular court. *S.C. v. State*, 715 S.W.2d 379, 382 (Tex. App. – San Antonio 1986, no writ). However, there is only one shuffle per case. A denial of the jury shuffle is not automatically reversible error. Instead, the harmless error rule applies. *See Rivas v. Liberty Mut. Ins. Co.*, 480 S.W.2d 610, 611- 12 (Tex. 1972). Once again, the motion for shuffle must occur before voir dire begins. Otherwise, error is waived.

7. Failure of Venire to Meet Statutory Qualifications [Tex. Gov't Code Ann. § 62.102].

Statutory disqualifications from jury service are:

(1) not age 18;
(2) not a citizen of Texas;

(3) not a resident of county;

(4) not qualified to vote or does not have Texas driver's license;

(5) not of sound mind;

(6) not of good moral character;

(7) has not served on petit jury for six days during previous six months in district court or three months in county court;

(8) no felony convictions;

(9) not currently under indictment of misdemeanor or felony theft, or any other felony; or

(10) not able to read and write the English language.

PRACTICE NOTE: The trial court has considerable discretion in deciding if a juror is literate. When the juror shows his ability to speak and understand English, it is not reversible error for the juror not to be able to read and write English very well. Failure to detect lack of literacy by not asking questions of the juror waives the complaint even where the trial judge supposedly qualified the jury on literacy during the preliminary examination of the venire. It is only where an unqualified juror is selected without fault or lack of diligence of counsel that the reliance on the juror's silence in response to general questions will justify a new trial. *Mercy Hosp. of Larado v. Rios*, 776 S.W.2d 626 (Tex. App.– San Antonio 1989, writ ref'd n.r.e.).

8. Statutory Disqualification of Venire for Cause [TEX. GOV'T CODE ANN. § 62.105].

Statutory disqualifications of venire for cause are:

(1) The venire person is a witness in the case. *See also* TEX. R. EVID. 606.; or

(2) The venire person is pecuniarily interested directly or indirectly in the subject matter of the suit, or its outcome.

Examples:

(1) Company employees. *Stevens v. Smith*, 208 S.W.2d 689, 690 (Tex. Civ. App.– Waco 1958, writ ref'd n.r.e.).

(2) Stockholders. *Tex. Power & Light Co. v. Adams*, 404 S.W.2d 930, 943 (Tex. Civ. App.– Tyler 1966, no writ).

(3) Related to party by blood or marriage, within the third degree.

(4) Was a juror in a prior trial of the case.

(5) Blindness or deafness, if the condition would prevent them from serving adequately. But see TEX. GOV'T CODE ANN. § 62.104.

(6) *Bias or prejudice in favor of or against a party*. [emphasis added]

PRACTICE NOTE: Because this challenge is the most frequent challenge made, it is treated separately below.

9. Determining Bias and Prejudice.

A juror is disqualified, by law, if he or she is materially biased or prejudiced in favor of, or against a party to a case. TEX. GOV'T CODE ANN. § 62.105(4), and *Cortez* and *Hafi* cases, *infra*. This bias, which disqualifies a prospective juror against or in favor of a party has, by earlier discussions, been extended by judicial interpretations include bias for or against the subject matter of the suit. *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963). However, it has not been extended to the facts of a case so that a potential juror is disqualified for the weight he or she would give certain facts. *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App. – Dallas 1931, writ ref'd). The record must conclusively establish a potential juror's disqualification. *Buls v. Fuselier*, 55 S.W.3d 204, 210 (Tex. App. – Texarkana 2001, no pet.). Neither bias nor prejudice is presumed. Instead, even if potential jurors acknowledge the possibility of not being fair, the matter must be pursued until the court has good grounds to believe that the juror has a bias against one of the parties. *Id*. at 209. See *Cortez* and *Hafi*, *infra*.

10. Material Bias and Equivocal Bias.

The Texas Supreme Court considered two cases on the question of whether a veniremember is biased as a matter of law in *Cortez v. HCCI – San Antonio, Inc.*, 159 S.W. 3d 87 (Tex. 2005) and *Hafi v. Baker*, 164 S.W. 3d 383 (Tex. 2005), and stated the distinction between *material bias* and *equivocal bias*. The court also reiterated several longstanding points of law, to wit:

(1) If the record, taken as a whole, clearly shows that a veniremember is *materially biased*, his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the veniremember's disqualification for cause. *Cortez*, 159 S.W. 3d 92.

(2) An expression of a bias that is subject to more than one interpretation or is uncertain, referred to herein as *equivocal bias*, is not a ground for disqualification of prospective juror. V.T.C.A., Government Code §62.105(4).

(3) A prospective juror's initial "leaning" is not disqualifying if it represents skepticism rather than an unshakeable conviction. *Cortez,* 159 S.W.3d 94.

(4) When the challenge of a veniremember for cause is erroneously denied by the trial court, that error can be corrected if the challenging party strikes the veniremember peremptorily, and thus, the error is harmful only if the peremptory challenge would have been used on another objectionable veniremember. Tex.. R. Civ. P. 233*; Cortez,* 159, S.W. 3d 90.

(5) To preserve error when a challenge of a veniremember for cause is denied, a party must use a peremptory challenge of its remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury list. TEX. R. CIV. P. 233; *Cortez,* 159 S.W.3d 90-91.

(6) Veniremembers can be "rehabilitated" by counsel, through further questioning, after expressing an apparent bias which would warrant disqualification for cause; disapproving of *State v. Dick*, 69 S.W.3d 612 (Tex. App. – Tyler 2001); *White v. Dennison*, 752 S.W. 2d 714 (Tex. App.–Dallas 1988, writ denied); *Gum v. Schaefer*, 683 S.W. 2d 803; *Erwin v. Consolvo*, 521 S.W.2d 643 (Tex. Civ. App. – Fort Worth 1975); *Carpenter v. Wyatt Constr. Co.*, 501 S.W.2d 748 (Tex. Civ. App. – Houston [14th Dist.] 1973, writ ref'd n.r.e.); and *Lumbermen's Ins. Corp. v. Goodman*, 304 S.W.2d 139 (Tex. Civ. App. – Beaumont 1957, writ ref'd n.r.e.). *Cortez,* 159 S.W. 3d 91-92

(7) The proper stopping point in efforts by counsel to "rehabilitate," through further questioning, when a veniremember has expressed an apparent bias is left to the sound discretion of the trial court. *Cortez,* 159 S.W. 3d 92.

(8) Challenges for cause do not turn on the use of "magic words." Veniremembers may be disqualified for cause, even if they say they can be "fair and impartial," so long as the rest of the record shows they cannot. *Cortez,* 159 S.W. 3d 93.

(9) Bias and prejudice form a trait common in all people, but to disqualify a veniremember, certain degrees thereof must exist. *Cortez,* 159 S.W.3d 94.

(10) For bias to disqualify a prospective juror, it must appear that the state of mind of the juror leads to the natural inference that he will not act with impartiality, and thus, the relevant inquiry is not where the juror starts but where he or she is likely to end. *Cortez,* 159 S.W.3d 94.

(11) Asking a veniremember which party is starting out "ahead" is often an attempt to elicit a comment on the evidence, and such attempts to preview a veniremember's likely vote are not permitted. *Cortez,* 159 S.W.3d 94.

(12) A statement that one party is "ahead" cannot disqualify if the veniremember's answer merely indicates an opinion about the evidence. *See* Jim M. Perdue, *A Practical Approach to Jury Bias*, 54 Tex. B.J. 936, 940 (1991) (recommending that disqualification turns on follow-up question "Had you formed this opinion before you entered this courtroom?"). A statement that is more a preview of a veniremember's likely vote than an expression of an actual bias is no basis for disqualification. Litigants have the right to an impartial jury, not a favorable one. *Cortez,* 159 S.W.3d 94.

(13) A bias is disqualifying if it appears that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. The relevant inquiry regarding bias of jurors is not where jurors start but where they are likely to end. *Cortez,* 159 S.W.3d 93; *Haf v. Bakeri*, 164 S.W. 3d 383 (Tex. 2005); *Compton v. Henrie*, 364 S.W. 2d 179, 182 (Tex. 1963).

Additionally, the Texas Court of Appeals in Beaumont, Texas followed on the heels of *Cortez,* with its opinion reaffirming additional longstanding points of law on veniremember bias and prejudice in *Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284, 295-296 (Tex. App.–Beaumont 2005, pet. denied), when it stated:

a. A prospective juror who has a bias or prejudice in favor of or against a party is

disqualified to serve on the jury;

b. An expression of a bias that is subject to more than one interpretation or is uncertain, referred to as equivocal bias, is not a grounds for disqualification;

c. The purpose of jury selection is to provide jury composed of persons who are not biased or prejudiced;

d. "Bias" has been defined as an inclination toward one side of an issues rather than to the other, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality;

e. With respect to veniremembers, the trial court refuses to strike, the court of appeals will imply that the court ruled that they were not biased or prejudiced; and

f. Harm is presumed where other objectionable jurors made the jury by virtue of the failure to strike the disqualified juror.

(14) A prospective juror who has a bias or prejudice in favor of or against a party is disqualified to serve on the jury. TEX. GOV'T CODE ANN. § 62.105(4).

(15) Harm is presumed with regard to trial court's error in refusing to strike prospective jurors for cause where other objectionable jurors made the jury by virtue of the failure to strike the disqualified jurors.

(16) Harmful error in jury selection requires the court of appeals to reverse and remand the case for new trial.

Conclusion and Practice Note:

The courts have made a distinction between *material bias* v. *equivocal bias*:

(17) *Material* bias– If the record, taken as a whole, clearly shows that a veniremember is *materially* biased, (i.e., an unshakable conviction,) his or her ultimate recantation of that bias at the prodding of counsel will normally be insufficient to prevent the veniremember's disqualification for cause.

(18) *Equivocal* bias– An expression of a bias that is subject to more than one interpretation or is uncertain, referred to as *equivocal* bias, is not a ground for disqualification of prospective juror. TEX. GOV'T CODE ANN. § 62.105(4).

It is suggested that an affirmative answer to a question, by jury questionnaire or during voir dire examination establishes material bias.

11. Bias or Prejudice Disqualification For Cause.

Cases on bias and prejudice causing inquiry into disqualification are:

(1) "Bias" is an inclination toward one side of an issue rather than to the other. *Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963).

(2) To disqualify for bias, it must appear that the state of mind of the juror leads to the natural inference that he/she cannot act with impartiality. *Compton, supra.*

(3) "Prejudice" means prejudgment, which necessarily includes bias. *Compton, supra.*

(4) Once material bias and prejudice have been established, the juror is disqualified and cannot be rehabilitated. *Cortez, supra* at 92.

(5) Having a "fixed opinion" is sufficient to justify disqualification. Subsequent recantation does not prevent disqualification. *Tex. Elec. Serv. Co. v. Boyce*, 486 S.W.2d 111, 113 (Tex. Civ. App.– El Paso 1972, no writ).

(6) The judge has no discretion once material bias or prejudice is established. *Cortez, supra* at 92.

(7) Where bias and prejudice are not clearly established, the trial judge has considerable discretion. *Swap Shop v. Fortune*, 365 S.W.2d 151 (Tex.1963); *Glen v. Abrams/Williams Bros.*, 836 S.W.2d 779 (Tex. App.– Houston [14th Dist.] 1993, writ denied).

(8) Juror Disqualified:

a. A juror who does not believe in the cause of action is disqualified from service in such a case. *Compton v. Henrie, supra* at 181.

b. A juror who stated in a child custody case involving "social drinking" that she was against "drinking" of any kind, was disqualified as prejudiced. *Flowers v. Flowers*, 397 S.W.2d 121 (Tex. Civ. App.– Amarillo 1965, no writ).

(9) Juror not disqualified:

a. A juror's economic hardship is not a disqualifying condition. TEX. GOV'T CODE ANN. § 62.110(c). But see *Singleton v. State*, 881 S.W.2d 207, 214 (Tex.App.– Houston [1st Dist. 1994], writ ref'd).

b. There is no authority to *sua sponte* excuse a prospective juror unless the juror is "absolutely disqualified" by statute to serve. *Alvarado v. State*, 822 S.W.2d 236, 239 (Tex. App.– Houston [14th Dist.] 1991, writ ref'd).

c. A juror expressing doubt whether he could follow court's definition or instruction was not disqualified because he did not say he would not follow it; he questioned his ability to do so. *Sullemon v. U.S. Fidelity and Guaranty Co.*, 734 S.W.2d 10, 15 (Tex. App.– Dallas 1987, no writ).

d. Where juror who was a friend of defendant's relative expressed concern whether the relationship might cause a problem, but never actually stated that he could not be fair, is not disqualified. *Swap Shop v. Fortune*, 365 S.W.2d 151 (Tex. 1963).

e. It is error to grant challenge for cause because the defendant's lawyer had represented the juror's wife, in the absence of any other facts. *TEIA v. Godwin*, 194 S.W.2d 593 (Tex. Civ. App.– Dallas 1946), rev'd on other grounds, 195 S.W.2d 347. *Compare Gum v. Schaefer*, 683 S.W.2d 803 (Tex. App.– Corpus Christi 1984, no writ).

f. Expressing doubts about awarding damages on a disfigurement claim, but saying they could be fair, does not disqualify jurors for cause. *Powers v. Palacios*, 794 S.W.2d 493 (Tex. App.– Corpus Christi 1990) *rev'd on other grounds*, 813 S.W.2d 489.

(10) "Concealed Bias" will allow a party a new trial upon proof under TEX. R. CIV. P. 327 of:

(i) the deliberate giving of an incorrect answer,

(ii) to a material question,

(iii) which probably caused harm.

PRACTICE NOTE: Direct and specific questions must be asked. General, vague, ambiguous or multifarious questions will not support a charge of concealment. *Texaco v. Pennzoil*, 729 S.W.2d 768 (Tex. App.– Houston [1st Dist.] 1987, writ ref'd n.r.e.). Answers on the jury information form that are left blank must be inquired into in order to prove a claim of concealed bias.

12. Preserving Error on Challenges for Cause.

The following steps for preserving error on challenges for cause are stated in *Hallet v. Houston N.W. Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985), as follows:

(1) demonstrate that the juror should be removed for cause because the juror is disqualified from serving;

(2) move to strike the juror for cause;

(3) get a ruling from the court on the challenge for cause;

(4) object to the court's denial of the challenge for cause;

(5) before using peremptory challenges, the objecting party must inform the court that having overruled the challenge for cause you will exhaust your peremptory challenges; and,

(6) that after exercising your peremptory challenges on the juror(s) previously

challenged for cause, specific objectionable juror(s) that you would have struck [name them] remain on the jury list.

13. Proper and Improper Questions and Comments.

O'Connor's Texas Rules - Civil Trials (2009) has listed the following appropriate and inappropriate questions and comments for voir dire, to wit:

a. Proper Questions and Comments.

(1) Whether the juror is related or acquainted with counsel or the parties. *Anderson v. Owen*, 269 S.W.2d 454 (Tex. Civ. App.– Galveston 1924, no writ).

(2) Membership in clubs or societies; i.e., Masons, Mothers Against Drunk Driving. *Burgess v. Singer Mfg. Co.*, 30 S.W. 1110 (Tex. Civ. App.– 1895, no writ) (Odd Fellows).

(3) Whether juror is acquainted with potential witnesses in case. *Gonzales v. T.E.I.A.*, 419 S.W.251 (Tex. Civ. App.– Austin 1967, no writ) (whether jurors knew the treating doctors).

(4) Whether the juror has a financial interest in litigation. *Carey v. Planter's State Bank*, 280 S.W.251 (Tex. Civ. App.– San Antonio 1926, no writ).

(5) Whether party's prior conviction for use of marijuana will create bias. *City Transp. Co. v. Sisson*, 365 S.W.2d 216 (Tex. Civ. App.– Dallas 1963, no writ).

(6) Bias as to use of intoxicants. *Flowers v. Flowers*, 397 S.W.2d 121 (Tex. Civ. App.– Amarillo 1965, no writ).

(7) Whether juror has tendency to give more credence to particular class of witnesses (i.e., medical people, policemen, civil servants.) *Travelers Ins. Co. v. Beisel*, 382 S.W.2d 515 (Tex. Civ. App.– Amarillo 1964, no writ).

(8) Counsel may summarize the facts from his client's viewpoint. *Dallas Ry. & Terminal Co. v. Flowers*, 284 S.W.2d 160 (Tex. Civ. App.– Waco 1955, writ ref'd n.r.e.) (Plaintiff's attorney summarized Defendant's pleadings); *Lubbock Bus Co. v. Pearson*, 277 S.W.2d 186 (Tex. Civ. App.– Amarillo 1955, writ ref'd n.r.e.) (Plaintiff attorney explained facts as to how plaintiff suffered a permanent injury).

(9) Defense counsel may comment that there is no process to screen cases before they are filed such as a grand jury. *Flores v. T.E.I.A.*, 515 S.W.2d 938 (Tex. Civ. App.– El Paso 1974, no writ).

(10) Counsel may refer to plaintiff's previous injuries, if they are otherwise admissible. *Alcocer v. Travelers Ins. Co.*, 446 S.W.2d 927 (Tex. Civ. App.– Houston [14th Dist.] 1969, no writ).

(11) Counsel may question jury whether they could award a specific amount of money (or none) if the evidence supports it. *Cavnar v. Quality Control Parking, Inc.*, 678 S.W.2d 548 (Tex. Civ. App.– Houston [14th Dist.] 1984), rev'd on other grounds, 696 S.W.2d 549 (Tex. June 5, 1985) (juror struck for cause because he could not consider damages of $1,000,000).

(12) Whether the jurors are aware of any publicity concerning a "liability crisis" or "lawsuit crisis". *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705 (Tex. 1989) [The Texas Supreme Court took notice of the extensive public concern over tort reform, and the possible effect on jurors' attitudes. With the continuing publicity given to the subject, we can anticipate that courts will allow inquiry into juror's attitudes towards personal injury lawsuits, nuisance suits, and tort damages in general.]. While some courts have refused to allow counsel to refer to an "insurance crisis", such a reference was held appropriate in *Nat'l County Mut. v. Howard*, 749 S.W.2d 618 (Tex. App.– Ft. Worth, 1988, writ denied) (fact that an insurance company was a party made mention of insurance much less important).

(13) Prospective juror's bias and prejudice in favor or against a party in the case. TEX. GOV'T CODE ANN. § 62.105(4)(b).

(14) A party's feeling on publicity generated by the debate over "tort reform" and "lawsuit crisis." *Babcock*, 767 S.W.2d at 706.

(15) The statement of the facts from either party's point of view. *Dallas Ry. Co. & Terminal Co. v. Flowers*, 284 S.W.2d 160, 163 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.); *Lubbock Bus Co. v. Pearson*, 277 S.W.2d 186, 190 (Tex. Civ. App.– Amarillo 1955 , writ ref'd n.r.e.).

(16) The potential juror's likelihood of giving greater credibility to testimony from certain individuals rather than others. *Travelers Ins. Co. v. Beisel*, 382 S.W.2d 515, 518 (Tex. Civ. App.—Amarillo 1964, no writ).

(17) Prospective jurors' attitudes towards the purpose of punitive damages. *Haryanto v. Saeed*, 860 S.W.2d 913, 918 (Tex. App.— Houston [14th Dist.] 1993, writ denied).

b. Improper Questions and Comments.

(1) No inquiry whether the juror is convicted of an offense which disqualifies him or that he stands charged with theft or any felony. TEX. R. CIV. P. 230.

(2) No mention of matters not admissible into evidence. *Travelers Ins. v. DeLeon* 456 S.W.2d 544 (Tex. Civ. App.– Amarillo 1970 writ ref'd n.r.e.).

(3) Cannot advise the jury of the effect of their answers. *T.E.I.A. v. Loesch*, 538 S.W.2d 435 (Tex. Civ. App.– Waco 1976 writ ref'd n.r.e.).

(4) Cannot require the jury to commit to certain conclusions, verdict or views. *Campbell v. Campbell*, 215 S.W.134 (Tex. Civ. App.– Dallas 1919, writ ref'd).

(5) Injection of prejudice. *T.E.I.A. v. Loesch, supra.*

(6) Ordinarily proper questions may be refused if their prejudicial effect outweighs their usefulness. *Gulf States Util. v. Reed*, 659 S.W.2d 849 (Tex. App.– Houston [14th Dist.] 1983, writ ref'd n.r.e.).

(7) Injection of insurance. Ordinarily it is error for a plaintiff to mention fact before jury that defendant has insurance to protect it from plaintiff's claim or that plaintiff has no protecting insurance. Nor may defendant refer to fact that plaintiff is protected by some form of insurance. *Ford v. Carpenter*, 216 S.W.2d 558 (Tex.1949). However, no error occurs if plaintiff informs jury that she has health insurance and has an obligation to reimburse the insurer out of any recovery. *Univ. of Tex. at Austin v. Hinton*, 822 S.W.2d 197 (Tex.App.– Austin 1991, no writ).

While not every mention of insurance will necessarily be reversible error, the line is very fine. Asking jurors whether they have any connection with the insurance industry and whether they thought the verdict in the case would affect their insurance rates was held to be error. *Brockett v. Tice*, 445 S.W.2d 20 (Tex. Civ. App.– Houston [1st Dist.] 1969, writ ref'd n.r.e.). Under the rule of *Dennis v. Hulse*, 362 S.W.2d 308 (Tex.1962), the appealing party must show that the reference to insurance probably caused the rendition of an improper judgment and that the probability that the insurance caused harm exceeds the probability that the verdict was grounded on proper proceedings and evidence. The reason behind the rule against mentioning insurance is the thought that a jury is more likely to find against a party who is insured. *Pride Transp. Co. v. Hughes*, 591 S.W.2d 631 (Tex. Civ. App. – Fort Worth 1979, writ ref'd n.r.e.). Current practice allows plaintiff to inquire whether jurors are connected with the insurance industry, as long as the inquiry is limited and in good faith. *Cavnar v. Quality Control Parking, Inc.* 678 S.W.2d 548 (Tex. App.– Houston [14th Dist.] 1984), rev'd on other grounds, 696 S.W.2d 549 (Tex. June 5, 1985).

(8) Mention of matters that are not admissible into evidence. *Travelers Ins. Co. v. Deleon*, 456 S.W.2d 544, 545 (Tex. Civ. App. – Amarillo 1970, writ ref'd n.r.e.).

(9) Whether a party is or is not insured. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962).

(10) Comments which inform the jury the legal effect of their answers to certain questions. *Robinson v. Lovell*, 238 S.W.2d 294, 297-98 (Tex. Civ. App.– Galveston 1951, writ ref'd n.r.e.).

(11) Commitment Questions: Texas courts have long held that it is improper to attempt to commit potential jurors to a particular verdict or a particular damage figure. *See Campbell v. Campbell*, 215 S.W. 134, 137 215 S.W.134 (Tex. Civ. App.– Dallas 1919, writ ref'd); *Tex. Gen. Indem. Co. v. Mannhalter*, 290 S.W.2d 360, 365 (Tex. Civ. App. – Houston 1956, no writ).

(12) Pre-testing the Weight a Potential Juror Would Give Certain Evidence: Texas courts have condemned attempts by advocates to learn the weight that a potential juror might give certain critical evidence. *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App. – Dallas 1931, writ ref'd).

14. Peremptory Challenges.

Each party is entitled to six peremptory challenges in the district court and three in the county court. TEX. R. CIV. P. 233. In multiple party cases, the trial judge must determine whether any of the parties aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. TEX. R. CIV. P. 233. This determination must be made before the exercise of peremptory challenges.

If the court determines from the pleadings, pretrial discovery and other information brought to the attention of the court, that antagonism exists – the court may equalize the strikes to each "side" to avoid unfairness. *Id.*; *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 917 (Tex. 1979). The determination of antagonism is one of law. *Id*. If no antagonism exists, each side (not party) must receive the same number of strikes. On the other hand, if antagonism does exist—the court may equalize strikes on the motion of any party. *See Garcia v. Cent. Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986).

The determination of antagonism can be difficult for a trial judge and some zealous advocates have been able to successfully conceal the lack of antagonism until after jury selection. *Van Allen v. Blackledge*, 35 S.W.3d 641, 644-45 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In that case, the defendants claimed antagonism and each received six strikes giving the defense twelve peremptory challenges. However, the defendants evidently made an agreement in exercising the peremptory challenges. One started from the top of the venire list while the other exercised its strikes from the bottom. *Id*. As a result, there were no double strikes. Understandably, the plaintiff's lawyer objected and asked for a mistrial. The Appellate Court found that the request for a mistrial, which came after the strikes were exercised, was not too late to preserve error.

a. Allocation of Strikes.

The following general rules apply to the allocation of strikes:

(1) two parties – in district court, each side gets six strikes; county court, three strikes each.

(2) more than two parties – the court must allocate the strikes. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex.1979).

(3) the parties are aligned on the basis of antagonism between them. Antagonism is show by:

a. the pleadings;

b. the relief sought;

c. the discovery; and

d. the trial court's understanding of the issues.

Example: It was reversible error to allocate ten strikes to four defendants with six to the plaintiff because they should have been equalized. *Garcia v. Cent. Power and Light Co.*, 704 S.W.2d 734 (Tex.1986).

b. Agreements Regarding Strikes.

(1) Parties may confer concerning their strikes. *King v. Maldonato*, 552 S.W.2d 940 (Tex. App.– Corpus Christi 1977, writ ref'd n.r.e.).

(2) An unqualified agreement, such as to dismiss a party, in exchange for strikes is error. *Gen. Motors Corp. v. Herbert*, 501 S.W.2d 950 (Tex. App.– Houston [1st Dist.] 1973, writ ref'd n.r.e.).

c. Limitations on Strikes.

There are none except those exercised in a discriminatory manner against constitutionally protected classes of persons. *Batson v. Kentucky*, 476 U.S. 79 (1986).

15. "Batson" Challenges.

In 1986, the United States Supreme Court determined that the equal protection clause forbids that prosecutors challenge to potential jurors solely on the account of their race. *Batson v. Kentucky*, 476 U.S. 79 (1986). In 1991, the United States Supreme Court applied *Batson* to civil cases. *Edmonson v. Leesville Concrete, Inc.*, 500 U.S. 614 (1991).

Naturally, a Batson complaint does not become necessary until after the peremptory challenges are exercised. However, before the jury is seated—the objection must be made. In other words, if an objection is raised after the remainder of the venire panel is discharged — the Batson challenge is waived. *Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

Once the objection is raised, the Batson proceeding must be held in open court and the court must afford the parties an opportunity to fairly present their positions. *Goode v. Shoukfeh*, 943 S.W.2d 441, 445-46 (Tex. 1997). In *Goode*, the Texas Supreme Court explained the three steps of the Batson process.

a. Step One: Striking A Protected Class.

The complaining party must establish that the peremptory challenge was directed towards a venire person who is a member of a minority or other protected class. The complaining party must also demonstrate that the peremptory challenge itself raises an inference that the opposing party used the strike to exclude veniremen on account of their protected class. In doing so, the complaining party can point out that the opposing party struck all members of a protected class or that the examination revealed an intent to exclude members of the protected class. In analyzing this step, courts tend to look at the pattern of peremptory strikes. If they are made primarily against members of a protected class—a prima facie case is made. *Tex. Tech Univ. Health Science Ctr. v. Apodaca*, 876 S.W.2d 402, 408-09 (Tex. App.—El Paso 1994, writ denied).

b. Step Two: Neutral Explanation.

If the complaining party provides a prima facie case of discrimination, the burden shifts to the party who exercised the strike to come forward with a race-neutral explanation. The issue at this stage is the facial validity of the explanation—not whether the court believes it. A neutral explanation is one that explains the challenge was based from something other than the juror's status in a suspect class. Such neutral explanations have been contradictions in answers to voir dire questions, juror attentiveness, and friendship or acquaintance with party or counsel.

c. Step Three: Determining Purposeful Discrimination.

In the third step, the trial court must determine whether the explanation offered by the party who exercised their peremptory challenge is plausible or is pretext for purposeful discrimination. *Goode*, 943 S.W.2d at 445-46. In making this determination, the court can look to many things, including (1) the reason given for the peremptory challenges as related to the facts of the case; (2) whether there was a lack of questioning to challenge a juror; or (3) whether the responses of various veniremen to voir dire questions were given disparate treatment. *Id.*

d. Criminal Cases.

Batson v. Kentucky, 476 U.S. 79 (1986) - peremptory challenges can not be used in a discriminatory manner in criminal cases.

e. Civil Cases.

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991) - Batson was extended to civil cases.

f. Texas Cases.

Powers v. Palacios, 813 S.W.2d 489, 490-91 (Tex. 1991) - Batson extended to the Texas judicial system. Some of the Batson/Powers progeny are:

(1) *Dominguez v. State Farm Ins. Co.*, 905 S.W.2d 713 (Tex. App.– Corpus Christi 1995), *writ ref'd per curiam* 905 S.W.2d 517 (Tex. 1995).

(2) *In re A.D.E.*, 880 S.W.2d 241 (Tex. App.– Corpus Christi 1994, no writ).

(3) *Tex. Tech Univ. Health Science Ctr. v. Apodaca*, 876 S.W.2d 402 (Tex. App.– El Paso 1994, writ denied).

g. Procedural Guidelines.

The codification of *Batson* appears in Texas Code of Criminal Procedure § 35.261, and was adopted in civil common law cases in *Lott v. City of Fort Worth*, 840 S.W.2d 146 (Tex. App.– Fort Worth 1992, no writ).

h. Step by Step Requirements for Establishing a *Batson* Challenge.

(1) The challenging party must make a timely objection to the court. *Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.– Houston [14th Dist.] 1991, writ denied).

(2) The timely objection must be made prior to the dismissal of the jury panel and the swearing in of the jury. *Pierson, supra; see also*, Alan B. Rich, "Peremptory Jury Strikes in Texas After Batson and Edmonson," 23 St. Mary's L.J. 1055, 1060 (1992).

PRACTICE NOTE: The *Batson* Challenge made in the motion for new trial is untimely and will not be allowed. *Pierson, supra* at 508.

(3) The challenging party must then establish a *prima facie* case of discrimination in the use of peremptory challenges. *Batson, supra* at 96.

PRACTICE NOTE: It is not necessary that the challenging party be a member of cognizable minority group and that the challenges were used to strike members of that group. The challenge can be made when a party feels that the other party is striking prospective jurors based on race. *Powers v. Ohio*, 499 U.S. 400 (1991). Additionally, the challenging party is allowed to rely on the premise that peremptory challenges will be used in a discriminatory manner by those who are prone to discriminate. *Batson*, at 96. Cognizable groups include people with similar race, gender, ethnicity, disability and religion, to-wit: *Hernandez v. N.Y.*, 500 U.S. 353 (1991) [hispanics]; *JEB v. Alabama* 114 S.Ct. 1419 (1994) [gender]; *Casarez v. State*, 913 S.W.2d 468, 480-81 (Tex. Crim. App.-1994) [religion]; *U.S. v. Childs*, 5 F.3d 1328 (9th Cir. 1993) [native-Americans]; *U.S. v. Biaggi*, 853 F.2d 89 (2d Cir. 1988) [Italian-Americans]; *U.S. v. Sneed*, 34 F.2d 1570 (10th Cir. 1994) [Asian-Americans]; *Galloway v. Superior Court*, 816 F.Supp. 12 (D.D.C. 1993) [disabled persons].

(4) The challenging party must show that "these facts and any other relevant circumstances raise an inference that the other party used that practice to exclude the jury panel members from the jury panel on account of their race, gender, ethnicity, disability and religion." *Batson, supra*, at 96.

(5) Once a *prima facie* case has been established, the burden of proof shifts to the challenged party who struck the prospective juror to offer a non-discriminatory explanation for the peremptory challenge. *Batson, supra* at 96.

PRACTICE NOTE: The challenged (striking) party must refute the inference of discrimination. However, the explanation need not rise to the level of justifying exercise of a challenge for cause. *Batson, supra*, at 96; and the reasons do not have to be plausible. *Purkett v. Elem*, 115 S.Ct. 1769, 1771 (1995). In a non-exclusive list Alan B. Rich in his article, "Peremptory Strikes in Texas After Batson and Edmonson," 23 St. Mary's L.J. 1055 (1992) states acceptable and unacceptable excuses used in cases:

a. **Acceptable**:

- Prior involvement in the criminal or civil justice system.
- Problems related to the juror information card (a perennial favorite; e.g. mistakes, blanks, misspelled words).
- Problems objectively determined during voir dire (could not hear the questions, fell asleep, non-responsive answers, poor recollection of past events, inability to understand terms used, equivocal answers).

- Subjective impressions from voir dire (looked hostile, turned away, frowned at me, smiled at the opposition, bored at the proceedings[!], too much or not enough eye contact, had rapport with the opposition, chewed gum, appeared to lack intelligence, afraid of the defendant).

- Relationship with party, attorney, witness, judge (Can be a very tenuous connection that would not support a challenge for cause; e.g., knows party's ex-husband's sister, sharing common employer, in similar civic activity, knew lawyers parents, young and pretty girl who might be attracted to the party or lawyer).

- Juror has similar characteristics to party or counsel (age, financial circumstances, member of family had drug problem, both juror and lawyer ministers).

- Age of the juror (While this is controversial, courts have approved challenges based on the juror being too old, or too young).

- Marital or parental status (While being married is not a reason except in the exceptional case, jurors have been struck for being unmarried, single parents, divorced, without children).

- Prior Jury, witness or litigation experience (lack of prior jury service, prior civil suits or claims).

- Poor health of the juror.

- Expresses unwillingness to serve on jury.

- Appearance of the juror (dressed too poorly, too well, unusual attire, just a T-shirt to court, has a pony tail, long hair, skinhead).

- Employment of the juror (unemployment of juror or spouse, worked at job only a short time, works in a bar, an engineer, a clerk, a trucker, a teacher).

- Religion (While a juror cannot be challenged for cause because of religion, some courts have upheld as neutral that the juror was a member of a fringe group).

- Exposure to pre-trial publicity (this can apply to stories not related to the case; i.e., the *O.J. Simpson* case, the *Selena* murder case, etc.).

- Tenuous or insubstantial ties to the community.

- Geographic origin (New Yorkers are all opinionated).

- Numerical place on panel (a strike that was made to get at a better juror down list, but you need a really good reason why the next juror was so much better).

b. **Unacceptable**:

- Admission of racial animus.

- Juror member of a "minority club."

- Membership in NAACP.

- Based only on appearance of juror.

- No explanation for strike.

- Juror of the same race as party or counsel and might identify with him/her Ethnic haircut (i.e., afro).

- lack of intelligence not supported by the record.

(6) After the neutral explanation has been given, the challenging party must show that the reason was purely pretextual. *Dominguez*, at 716; *In Re A.D.E.*, *supra*, at 243; *Woods v. State*, 801 S.W.2d 932, 934 (Tex. App.– Austin 1990, writ ref'd). Factors that weigh heavily against the legitimacy of any race neutral explanation were announced in *Keeton v. State*, 749 S.W.2d 861 (Tex. Crim. App. 1988).

(7) An explanation based on a group trait, where that trait is not shown to be applicable to the juror.

(8) No questions (or only perfunctory questions)

addressed to juror.

(9) Disparate examination of juror, i.e., asking question to evoke a certain response without asking the same questions of other panel members (targeting minority jurors for bias, etc.).

(10) The reason given for the challenge is unrelated to facts of case (striking a juror who had a back injury, in a case not involving personal injury).

(11) Disparate treatment where there is no difference between responses given and unchallenged jurors.

PRACTICE NOTE: The challenging party should try to demonstrate that the strike was in fact discriminatory. The court can consider the conduct of counsel during voir dire, such as the type and manner of questions, including the lack of questions, or lack of meaningful questions. *Keeton v. State, supra*. Disparate treatment of venire members with the same characteristic can indicate discriminatory intent. *Lewis v. State*, 779 S.W.2d 449 (Tex. App.–Tyler 1989, pet. ref'd) [struck black juror with beard, but left on panel a white man also bearded]. Asking questions with intent to disqualify a black juror while not asking the same question of white jurors, can signal the wrong intent. *Wiese v. State*, 811 S.W.2d 958 (Tex. App.– Fort Worth 1991, writ ref'd).

(12) Following the challenging party arguments, the trial court makes a ruling. *In Re A.D.E., supra*, at 243.

PRACTICE NOTE: The ruling should be based on both the challenge and the non-discriminatory explanation. *Lott, supra*, at 150. Unless clearly erroneous, the trial court's ruling will not be overturned. *Dominguez, supra*, at 716.

(13) *Batson* Procedural Setting:

a. The hearings are evidentiary in nature. *Shields v. State*, 820 S.W.2d 831, 832 (Tex. App.– Waco 1991, no writ).

b. Certain rules and procedures necessarily follow. *Dominguez, supra*, at 715.

c. All hearings are held in open courts and on the record. *Salazar v. State*, 795 S.W.2d 187, 192 (Tex. Crim. App. 1990)

d. The challenging party may call the opposing attorney to testify under oath about the suspect strikes. *Salazar, supra* at 192-93.

PRACTICE NOTE: Under certain circumstances, the challenging party may also gain access to the opposing counsel's notes. *Salazar, supra* at 409.

VIII. OPENING STATEMENTS.

A. Reference Material.

1. Cone, Al J. and Lawyer, Verne, *Personal Injury Practice Manual*, Prentice-Hall, Inc., 1983, Englewood Cliffs, New Jersey.

2. Julien, Alfred S., *Opening Statements*, Callaghan & Co., 155 Pfingsten Road, Deerfield, Illinois, 60015, dial 1-800-323-1336.

3. Fuchsberg, J., *Opening Statements - Plaintiff's View*, 5 Am. Jur. Trials 286 (1966).

4. Lane, F., *Goldstein Trial Technique*, Ch. 10 at 3 (3d ed. 1986).

5. Kornblum, *Voir Dire, Opening Statements and Argument*, 23 The Practical Lawyer 19 (Oct., 1987).

6. Marshall, *The Telling Opening Statement*, 19 The Practical Lawyer 27 (Oct., 1973).

7. Morrill, *Anatomy of a Trial - II, Opening Statements*, Ins. L. Q. 235 (March, 1986).

8. Mitchell, A., & Gilbert, A., 15 Texas Practice § 5085 at 385 (1971).

9. Stern, I., *Opening Statements - Defense View*, 5 Am. Jur. Trials 307 (1966).

B. Statutory and Case Law.

1. Quasi-Statutory Law.

T.R.C.P. 265(a) provides:

"The party upon whom rests the burden of proof on the whole case shall state to the jury briefly the nature of his claim or defense and what said party expects to prove and the relief sought. Immediately thereafter, the adverse party may make a similar statement, and intervenors and other parties will be accorded similar rights in the order determined by the court."

2. Scope.

a. Cannot describe in detail what you propose to offer. *Ranger Ins. Co. v. Rogers,* 530 S.W.2d 162, 170 (Tex. Civ. App.–Austin 1975, writ ref'd n.r.e.).

b. It is error for counsel to discuss evidence that is not ultimately offered. *Benson v. Mo. K. & T. R. Co.,* 200 S.W.2d 233, 239 (Tex. Civ. App.–Dallas 1946, writ ref'd n.r.e.), *cert. den'd,* 332 U.S. 83 (1947).

c. It is error to inject inadmissible matters. *Sisk v. Glen Falls Indem. Co.,* 310 S.W.2d 118, 122 (Tex. Civ. App.–Houston 1958, writ ref'd n.r.e.).

d. Harmless error rule applies to opening statements. *Ranger Ins. Co. v. Rogers,* 530 S.W.2d 162 (Tex. Civ. App.–Austin 1975, writ ref'd n.r.e.).

e. The proper limitation of opening statement is a matter resting within the discretion of the trial court. *Ranger Ins. Co. v. Rogers,* 530 S.W.2d 162, 170 (Tex. Civ. App.–Austin 1975, writ ref'd n.r.e.).

3. Importance.

Only twenty percent (20%) of the jurors ever change their minds with respect to fault after the opening statement. The other eighty percent (80%) make their decision at the close of opening statement. This pretty much tells it all.

IX. PRESENTATION OF EVIDENCE

A. Predicates.

***Appendix* 2** represents a list of several common evidentiary predicates. However, before one gets to the predicate stage other prerequisites must be satisfied before evidence can be properly introduced and admitted. Set forth below is a brief discussion of some of those requirements.

1. Relevancy and its Limits.

Before any evidence can be properly admitted, it must be probative and relevant to the issues to be tried. If the tendered evidence does not meet that standard, it should be excluded on relevancy grounds.

a. Definition - Relevant evidence is evidence having any tendency to make the existence of any fact that is a consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. CIV. EVID. ANN. 401.

b. Application - The materiality test has not been abandoned in TEX. R. CIV. EVID. ANN. 401 but is subsumed in the phrase "any fact that is of consequence to the determination of the action."

c. Effect of Pleadings on the Issue of Relevancy - Before a proper ruling as to relevancy can be made by the court, it is mandatory that the pleadings include the matter to be established, relevancy of evidence and the proposition to be proved. There is no legal test, but rather, it is a test of logic and common sense. There are no degrees of relevancy. It either is or it is not relevant.

d. Exclusion of Relevant Evidence on Special Grounds - Although evidence meets the requirement of TEX. R. CIV. EVID. ANN. 401, the court may exclude evidence if its probative value is *substantially* outweighed by one of the following: TEX. R. CIV. EVID. ANN. 403.

(1) Danger of Unfair Prejudice. Prejudice as applied under this section refers to emotional, irrational or other similar improper ground on which to base a decision. *Roberts v. Dallas Ry. & Terminal,* 276 S.W.2d 575, 577-578 (Tex. App.- El Paso 1953, writ ref'd n.r.e.).

(2) Danger of Confusion of the

Issues/Misleading Jury. If the admission of the evidence may create a side issue that will unduly distract the jury from the main issue, the court may exclude. *Charter Med. Corp. v. Miller*, 605 S.W.2d 943, 953 (Tex. Civ. App. – Dallas 1980, writ ref'd. n.r.e.).

(3) Undue Delay. If admission creates or may create undue delay and that factor outweighs the probative value of the evidence, the court may exclude. *Mo. K & T Ry. v. Bailey*, 115 S.W. 601, 607-08 (Tex. Civ. App.– 1908, writ ref d n.r.e.).

(4) Needless Presentation of Cumulative Evidence. If the evidence offered is merely cumulative of other evidence already admitted, the court may exclude. *R. R. Comm'n. v. Shell*, 369 S.W.2d 363 (Tex. Civ. App.- Austin 1963), *aff'd*, 380 S.W.2d 556 (Tex. 1964).

PRACTICE NOTE: The above constitutes an *exclusive* list of factors to be balanced against probative value.

2. Illegally Obtained Evidence.

Courts have traditionally held that evidence, even though obtained illegally, is admissible in civil proceedings. *Sims v. Cosden Oil & Chem. Co.,* 663 S.W.2d 70, 73 (Tex. App. – Eastland 1983, wrt ref'd n.r.e). *Citing Allison v. Am. Sur. Co.*, 248 S.W. 829 at 832 (Tex. Civ. App.-Galveston 1923, no writ), the *Sims* court opines: "The courts do not concern themselves with the method by which a party to a civil suit secures evidence pertinent and material to the issues involved, and which he adduces in support of his contention, and hence evidence which is otherwise admissible may not be excluded because it has been illegally and wrongfully obtained." This holding was followed in *State v. Taylor,* 721 S.W.2d 541, 551 (Tex. App. – Tyler 1986, writ ref'd n.r.e) the court stated: "Evidence illegally obtained is admissible in civil cases under the common-law rule. *See generally* 8 Wigmore, *Evidence* § 2 184(a) (McNaughton ed. 1961). Texas Rules of Evidence 402 promulgated by our Texas Supreme Court, effective September 1, 1983, reads in part: 'All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.' Hence, unless its admission is prohibited by law, illegally obtained evidence should be admitted if it is relevant and probative. See however the State Bar of Texas article titled "Spy Torts" by John F. Nichols, Sr. for a different view regarding illegally obtained recordings."

3. Authentication of Documentary Evidence.

When dealing with written or documentary evidence, the proponent of the exhibit must assure that it meets the authenticity requirement. Unless the evidence sought to be admitted comports with TEX. R. CIV. EVID. ANN. 902 (Self-Authentication), extrinsic evidence must be adduced prior to its admission. When authenticity is placed in issue, a writing must be accompanied by proof it is genuine and was executed by the proper party. *Hannum v. Gen. Life and Accident Ins. Co.*, 745 S.W.2d 500, 501 (Tex. App. – Corpus Christi 1988, no writ); *W. Fed. Savings & Loan Ass'n v. Atkinson Fin. Corp.*, 747 S.W.2d 456,464-65 (Tex. App. – Fort Worth 1988, no writ). *See, City of Corsicana v. Herod*, 768 S.W.2d 805, 8 16-17 (Tex. App. – Waco 1989, no writ).

4. Witness is Competent and Possesses Personal Knowledge

As long as the witness is sane at the time of the event they are called to testify or when the testimony is offered, they are competent to testify. If the witness possesses sufficient intellect to relate transactions with respect to which they are questioned, they are competent to testify. All witnesses are presumed to be competent to testify. TEX. R. CIV. EVID. ANN. 601(a); *Handel v. Long Trusts*, 757 S.W.2d 848,854 (Tex. App. – Texarkana 1988, no writ). The party contesting the witness's competency bears the burden to prove same by a preponderance of evidence. *Handel* at 854. The witness must have personal knowledge of the matter to which he testifies. Tex. R. Civ. Evid. Ann. 602. This does not require certainty of memory or perfect attention to the observation. Cochran, C., *Texas Rules of Evidence Handbook*(6th Ed.) *2005*, p. 551. A simple predicate should always be laid prior to interrogating a witness to establish his/her personal knowledge of the event.

B. The Rules and Annotations on Evidentiary Objections.

1. Rulings Generally.

a. TRE 103 Rulings on Evidence.

(1) *In the Matter of the Marriage of DMB and RLB and in the Interest of RLB, a Child*, 798 S.W.2d 399 (Tex. App. – Amarillo 1990, no writ). Child custody proceeding.

1. Presiding judge must conduct the trial in a fair and impartial manner and refrain from making unnecessary comments or remarks during the course of trial which may tend to result in prejudice to a litigant or are calculated to influence the minds of the jury, but judge is necessarily allowed discretion in expressing himself while controlling the trial of the case.

2. Trial court's comment, in response to objection to witness' answer to question, that the witness had answered the question did not amount to an assessment of the validity of the witness' testimony or an indication of the judge's opinion of credibility.

(2) *Masi v. Scheel*, 724 S.W.2d 438 (Tex. App. - Dallas 1987, writ ref'd n.r.e.). Suit to enforce oral settlement agreement. Party must have presented to trial court timely request, objection or motion, stating specific grounds for ruling he desired trial court to make, in order to preserve complaint for appellate review.

(3) *Portland Sav. and Loan Ass'n v. Bernstein*, 716 S.W.2d 532 (Tex. App. - Corpus Christi 1985, writ ref'd n.r.e.), *cert denied*, 106 S.Ct. 1200 (1986). Special appearance in response to charges of misrepresentation arising out of securities transaction.

1. Evidence of settlement negotiations between savings and loan and nonresident was admissible to show statements which were alleged to be misrepresentations.

2. Letter from party's attorney to trial judge was not privileged as no such privilege exists in Constitution, statute, or rules.

3. Error may not be predicated upon a ruling which excludes evidence, unless substantial right of complaining party is affected.

4. Under Rule 611, it is within trial court's discretion whether to require production of documents relied upon by witness to refresh his memory before testimony.

(4) *Fifty-Six Thousand, Seven Hundred Dollars in U.S.. Currency v. State*, 710 S.W.2d 65 (Tex. App. – El Paso 1986), *rev'd on other grds*, 730 S.W.2d 659 (Tex. 1987). Forfeiture of illegal drug money proceeding.

1. In reviewing no-evidence point, court is to look at all supporting evidence and disregard all evidence contrary to judgment.

2. In reviewing insufficiency of evidence point, appellate court is to look at all evidence.

3. Defendant must obtain precise ruling on objection, in order to preserve alleged error on appeal.

(5) *Perez v. Baker Packers*, 694 S.W.2d 138 (Tex. App.– Houston [14th Dist.] 1985, writ ref d n.r.e.). Premises liability action.

1. Evidence Rule 403 requires trial judge to use balancing test, weighing probative value of evidence against its prejudicial nature.

2. Objection must actually be overruled before it preserves error for review.

b. TRE 103(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.

(1) *In the Matter of the Marriage DM13 and RLB*,

supra, at 405. Child custody proceeding.

(2) *Evans v. Pollock,* 793 S.W.2d 14, 24 (Tex. App. - Austin 1989), *rev'd on other grounds,* 796 S.W.2d 465 (Tex. 1990). Declaratory judgment action on residential use restrictions.

In reviewing legal sufficiency point, appellate court will consider only evidence and reasonable inferences drawn from that evidence in light most favorable to verdict, disregarding all evidence and inferences to contrary.

Trial court's findings of fact have same force and dignity as jury verdict and will not be disturbed on appeal if supported by some competent evidence unless so against overwhelming weight of evidence as to be clearly and manifestly wrong.

To obtain reversal based upon admission of evidence, appellant must show that admission was error and that error was reasonably calculated to cause and probably did cause rendition of improper judgment.

Fact that answer may not be responsive to question does not mean that evidence elicited is incompetent.

(3) *Neily v. Aaron,* 724 S.W.2d 908, 912 (Tex. App. - Fort Worth 1987, no writ). Revocation of acceptance case.

Reference to record when complaint of factual or legal sufficiency are combined is extremely important in points of error alleging that finding of court is "against the great weight and preponderance of the evidence," as court must review all relevant evidence, both evidence which tends to prove the existence of vital fact, as well as evidence which tends to disprove its existence.

"No evidence" point of error may only be sustained when record discloses: complete absence of evidence of vital fact; court is barred by rules of court or evidence from giving weight to only evidence offered to prove vital fact; evidence offered to prove vital fact is no more than mere scintilla of evidence; or evidence establishes conclusively the opposite of a vital fact.

In reviewing point of error asserting that finding is "against the great weight and preponderance" of the evidence, court must consider and weigh all of the evidence, both evidence which tends to prove existence of vital fact as well as evidence which tends to disprove its existence; so considering the evidence, if court's finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, point must be sustained, regardless of whether there is some evidence to support it.

(4) *Knesek v. Witte,* 715 S.W.2d 192, 197 (Tex. App.– Houston [1st Dist.] 1986, writ ref'd n.r.e.). Will construction case.

Appellants' objection, prior to submission of special issue to jury, stating that no evidence had been heard as to testatrix' intention, other than what was set forth in will itself, adequately preserved for appeal claim that appellants were entitled to judgment as matter of law, in suit seeking declaratory judgment with regard to construction of will.

Statements by testatrix' former husband to witness that he and testatrix had made their wills and that all of the property was to go to former husband's nieces and nephews were statements of former husband's existing state of mind so as not to be hearsay, and were admissible to show oral contract for wills.

(5) *State v. Buckner Constr. Co.,* 704 5 .W.2d 837, 842 (Tex. App. - Houston [14th Dist.] 1985, writ ref'd n.r.e.). Suit on a contract.

Tender of evidence must reveal answer its proponent expected to be given in the testimony if the trial court had not excluded it; even if excluded evidence were on file with trial court and were sent to the appellate court, this would not be sufficient to preserve the error.

(6) *Singleton v. Terrel,* 727 S.W.2d 688 (Tex. App. – Texarkana 1987, no writ).

Exclusion of documentary and other evidence concerning matters which occurred before land patent was issued was not abuse of discretion in trespass to try title action, since

nothing which occurred before patent was issued altered fact that previous owners had forfeited land to state, so that no substantial rights of previous owners were affected.

c. TRE 103(a)(1) Objection.

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.

(1) *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.– Corpus Christi 1990, no writ). Toxic tort case.

(2) *Haney v. Purcell Co., Inc.*, 796 S.W.2d 782 (Tex. App. – Houston [1st Dist.] 1990, writ denied). Tort, strict liability and DTPA actions.

(3) *MCI Telecommunications v. Tarrant Co.,* 723 S.W.2d 350, 353 (Tex. App. - Fort Worth 1987, no writ). Review of appraisal board order. *Crider v. Appelt*, 696 S.W.2d 55, 57 (Tex. App. - Austin 1985, no writ). Negligence action brought arising out of automobile collision.

d. TRE 103(a)(2) Offer of Proof.

In case the ruling is one excluding evidence, the substance of he evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(1) *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App. - Houston [1st Dist] 1990, no writ). Divorce and child custody action -Whether court-ordered social study regarding child was inadmissible hearsay in divorce proceeding was not preserved for appellate review, where study was not included in appellate record.

(2) *Foster v. Bailey*, 691 S.W.2d 801, 803 (Tex. App. – Houston [1st Dist.] 1985, no writ). Tort action against beauty salon for burns to scalp.

e. TRE 103(b) Record of Offer and Ruling.

The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may, or at request of a party shall, direct the making of an offer in question and answer form.

(1) *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986). Tort case for loss of companionship of adult son.

(2) *Life Ins. Co. of Sw. v. Brister,* 722 S.W.2d 764, 776 (Tex. App. - Fort Worth 1986, no writ). Class action regarding disability benefits under employee benefit plan. Where cross-examination testimony has been excluded, it is not necessary for appellant to show what answer was expected to be elicited; appellant need only show that substance of evidence was apparent from context within which questions were asked.

f. TRE 103(c) Hearing of Jury.

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, such as making statements or offers of proof or asking questions in the hearing of the jury.

Foster v. Bailey, 691 S.W.2d 801, 803 (Tex. App. – Houston [1st Dist.] 1985, no writ). Tort action against beauty salon for burns to scalp.

Right to cross-examine sole adverse party on ultimate disputed issue should not depend upon showing that cross-examination will be successful.

2. Mode of Interrogation of Witnesses.

a. TRE 611(a) Control by Court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Prezelski v. Christiansen, 775 S.W.2d 764 (Tex. App. - San Antonio 1989) *rev'd on other grounds,* 782 S.W.2d 842 (Tex. 1990). Medical malpractice suit for oral surgery.

(1) Rule of civil evidence permitting trial court to exercise "reasonable" control over order of witnesses did not give trial court unbridled discretion to impose unreasonable control when result prevented a plaintiff from exercising her right to present her case fairly.

(2) Trial court must be very cautious before permitting experts, whose testimony is dependent on testimony of party, to testify out of order prior to completing testimony of party upon whose testimony experts' testimonies depend.

b. TRE 611(b) Scope of Cross-Examination.

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

Perez v. BakerPackers, 694 S.W.2d 138 (Tex. App. – Houston [14th Dist.] 1985, writ ref'd n.r.e.). Premises liability case.

(1) Doctor's testimony that certain circumstances surrounding healing process of a wound to an injured deliveryman's knee caused him to suspect that wound was factitious, that is, self-inflicted, could have had direct bearing on amount of damages, which was major issue in personal injury lawsuit and was therefore clearly within scope of cross-examination for relevancy purposes.

(2) Evidence Rule 403 requires the trial judge to use a balancing test, weighing the probative value of evidence against its prejudicial nature.

c. TRE 611(c) Leading Questions.

Leading questions should not be used on the direct examination of a witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Kiel v. TEIA, 679 S.W.2d 656, 660 (Tex. App. – Houston [1st Dist.] 1984, no writ). Workers' compensation death case.

In workers' compensation proceeding, plaintiff's counsel was entitled to interrogate employer's witness by use of leading questions, since witness was both obviously hostile and associated with an adverse witness.

3. Bases of Opinion Testimony.

TRE 703. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or make known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Welder v. Welder, 794 S.W.2d 420 (Tex. App. - Corpus Christi 1990, no writ). Divorce case with issues regarding characterization of property.

Former husband's accountant could testify to separate or community nature of various assets based on a schedule which traced community interests, separate interests, and expenditures through joint account, even if the summaries on records were inadmissible hearsay, the testimony was still admissible under rule which provides that facts or data upon which expert relies in particular case need not be admissible in evidence if they are of a type reasonably relied upon by experts in the field.

4. Remainder of Related Writings or Recorded Statements.

TRE 106. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other party or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. "Writing or recorded statement" includes depositions.

Azur Nut Co. v. Caille, 720 S.W.2d *685* (Tex. App. - El Paso 1986).

Admission into evidence of letter by attorney for employee claiming retaliatory discharge addressed to former employer rejecting former employer's offer of employment with affiliate company at same salary was admissible under rule of optional completeness where employee's attorney objected to admission of employer's letter and advised court that if employer's letter was admitted, he would attempt to offer into evidence reply to that letter.

5. "Piggyback" Objections. [TRAP 52(a)].

Celotex Corp. v. Tate, 797 S.W.2d 197 (Tex. App. – Corpus Christi 1990, no writ).

To preserve the right to complain on appeal about the admission of evidence at trial, the party must have objected at time evidence was offered, the objection must have been specific enough to enable trial court to understand precise nature of error alleged, and the party must have obtained ruling on objection.

Even when an objection to evidence is properly made, prior or subsequent presentation of essentially the same evidence, without objection, waives any complaint regarding admission of evidence.

In trials involving multiple defendants, defendant must make its own objection to evidence if it wishes to preserve error for appeal.

6. Settlement Negotiations.

Haney v. Purcell Co., Inc., 796 S.W.2d 782 (Tex. App. – Houston [1st Dist.] 1990, no writ).

Where the issue of settlement negotiations was broached by plaintiffs before a series of questions by defense counsel, and where plaintiffs did not object when one of them was asked about settlement offer, they did not preserve any error with respect to the introduction of evidence of settlement offer.

Plaintiffs who had introduced subject of settlement negotiations early in the trial could not complain on appeal of additional evidence of settlement conference offered by defendant.

7. Criminal Prosecutions.

Crider v. Appelt, 696 S.W.2d 55 (Tex. App. – Austin 1985, no writ).

Alleged error of admission of testimony that defendant was never criminally prosecuted for driving while intoxicated was not preserved for appeal in negligence action arising out of automobile accident, even though defendant objected to admission of such testimony at trial, where record failed to disclose grounds for objection.

Evidence of criminal convictions and penalties is admissible in punitive damages cases to mitigate, but not to bar, award of punitive damages.

C. Rules for Preservation of Error on Trial Objections.

Even though some judges may believe otherwise, every litigant has a right to object to the introduction of improper evidence, and the attorney has a duty to the client to assure that only competent evidence is introduced against his client.

1. You Must Object.

The litigant has a right to object to the introduction of improper evidence, and the attorney has a duty to the client to see that only competent evidence is introduced against the client. *TEIA v. Drayton,* 173 S.W.2d 782 (Tex. Civ. App. - Amarillo 1943, writ ref'd).

2. You Must Object at the First Instance.

a. The admission of improper evidence is waived when testimony to the same effect has been permitted without objection.

   (1) *Rowe v. Liles*, 226 S.W.2d 253 (Tex. Civ. App. - Waco 1950, writ ref'd);

   (2) *Badger v. Symon,* 661 S.W.2d 163 (Tex. App. – Houston [1st Dist.] 1983, writ ref d n.r.e.);

   (3) *Hundere v. Tracy & Cook*, 494 S.W.2d 257 (Tex. Civ. App. - San Antonio 1973, writ ref d n.r.e.);

   (4) *Winkel v. Hankins*, 585 S.W.2d 889 (Tex. Civ. App. - Eastland 1979, writ dism'd).

b. Waiver does not occur when the witness disclaims any knowledge about the prior improperly admitted testimony.

   Glen Falls Ins. Co. v. Yarbrough, 396 S.W.2d 200 (Tex. Civ. App.– Waco 1965, writ dism'd).

3. Your Objection Must Be Timely.

The party who opposes the admission of evidence must object to the evidence at the time it is offered, and not after it has been received, in order to lay a predicate for review of action by the trial court. Cases in support of this rule are:

(1) *Nelson v. Jenkins,* 214 S.W.2d 140 (Tex. Civ. App. - El Paso 1948, writ ref'd);

(2) *J.A. Robinson Sons, Inc. v. Wigart,* 420 S.W.2d 474 (Tex. Civ. App. - Amarillo 1967), *rev'd,* 431 S.W.2d 327 (1968);

(3) *Moore v. Grantham,* 580 S.W.2d 142 (Tex. Civ. App. – Tyler 1979), *rev'd on other grounds, 599* S.W.2d 287 (1980).

(4) *Wilfin, Inc. v. Williams,* 615 S.W.2d 242 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e);

(5) *Montes v. Lazzara Shipyard,* 657 S.W.2d 886 (Tex. App. – Corpus Christi 1983, no writ);

(6) *Zamora v. Romero,* 581 S.W.2d 742 (Tex. Civ. App. - Corpus Christi 1979, writ ref d n.r.e.).

To preserve a complaint for review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if they are not apparent from the context of the request, objection, or motion. *See* TEX.R.APP. P. 33.1(a); *see also* TEX. R. CIV. EVID. 103(a)(1). If a party fails to do so, error is not preserved, and the complaint is waived. *See, Bushell v. Dean,* 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). The party opposing the admission of evidence must object at the time the evidence is offered and not after it has been received. *Fort Worth Hotel Ltd. P'ship v. Ensearch Corp.,* 977 S.W.2d 746, 756 (Tex. App. - Fort Worth 1998, no writ). An objection must be made immediately after the statement is made or the error is waived. *See, Miller v. Bock Laundry Mach. Co.,* 568 S.W.2d 648, 653 (Tex.1977); *Williams v. Lavender,* 797 S.W.2d 410, 413-14 (Tex. App.-Fort Worth 1990, writ denied).

4. Mode of Making Objections.

a. Written Objections.

(1) Before Trial.

A motion in limine to exclude anticipated evidence may be presented to the court, and when the court has ruled affirmatively thereon the evidence should not again be offered in presence of the jury. *Burdick v. York Oil Co.,* 364 S.W.2d 766 (Tex. Civ. App. - San Antonio 1963, writ ref d n.r.e.).

Caveat: If a motion is overruled, an objection must still be made when the evidence is offered or the point is waived. *Hartford Accident and Indem. v. McCardall,* 369 S.W.2d 331 (Tex. 1963).

(2) During Trial.

Written briefs on important points presented during trial in anticipation of objectionable evidence are very effective and persuasive.

b. Oral Objections.

Oral objections during trial are the most common mode of making objections.

5. "Running" Objections are Dangerous and Risky.

Under the proper circumstances a "running" objection will preserve error. The appellate court may consider the proximity of the objection to the subsequent testimony, the nature and similarity of the subsequent testimony as compared to the prior testimony and objection, whether the subsequent testimony was elicited from the same witness, whether a running objection was requested and granted, and any other circumstance which might suggest why the objection should not have been urged. A running objection can satisfy the TEX. R. APP. P. 33.1(a) requirement of a timely objection. *See, Atkinson Gas Co. v. Albrecht,* 878 S.W.2d 236, 242-43 (Tex. App. - Corpus Christi 1994, writ denied). The party requesting the running objection runs the risk of waiving error, if cross examination goes deep into the objectionable information. *Leaird's, Inc., d/b/a Leaird's White Elephant and White Elephant Store v. Wrangler, Inc.,* 31 S.W.3d 688, 690-69 1 (Tex. Civ. App. - Waco 2000, no pet.).

It is permissible for trial courts to admit testimony before its relevancy is established upon assurance from counsel that other evidence establishing

relevancy of that prematurely tendered will be offered subsequently, or when the pleadings of the parties indicate the tendered evidence will probably become admissible as the case is developed. *Thomas v. Atlanta Lumber Co.,* 360 S.W.2d 445, 447-48 (Tex. Civ. App. -Texarkana 1962, no writ). This process is sometimes referred to loosely as "connecting it up."

There has been a split of authority on whether "running" objections are allowed in Texas.

a. Texas Rules of Evidence.

Since Rule 611(a) allows the court to control the mode of interrogating witnesses in order to avoid the needless consumption of time, a strong argument can be made that under this rule "running" objections are allowable.

b. Pre-Texas Rules of Evidence Cases.

(1) Repetitive Objections by Counsel Required.

i. *City of Houston v. Riggins,* 568 S.W.2d 188 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e.). If trial court erred in admitting assertedly irrelevant testimony, objection was waived where the proponent of the testimony thereafter introduced without objection testimony from other witnesses to the same effect and the opponent of the testimony cross-examined all witnesses.

ii. *Kelso v. Wheeler,* 310 S.W.2d 148 (Tex. Civ. App. – Houston 1958, no writ). Objections should be repeated when a witness testifies to facts which were objected to in a document offered in evidence and admitted over objection, or when another witness is called upon for the same kind of evidence after objection has been made and overruled.

iii. *F. W. Woolworth Co. v. Ellison,* 232 S.W.2d 857 (Tex. Civ. App.– Eastland 1950, no writ). Where subsequent testimony renders inadmissible previously given testimony, party who objected to admission of prior testimony must renew objection or move to strike out prior testimony, and failure to do so waives the matter.

(2) Repetitive Objections by Counsel Not Required

i. *Burnett/Smallwood & Co. v. Helton Oil Co.,* 577 S.W. 2d291 (Tex. Civ. App. - Amarillo 1978, no writ). Where the party made a proper objection to the introduction of testimony and was overruled, it was entitled to assume that the judge would make the same ruling as to other offers of similar testimony, and it was not required to thereafter repeat the objection.

ii. *Crispi v. Emmot,* 337 S.W.2d 314 (Tex. Civ. App. - Houston 1960, no writ). A party who makes a proper objection to the introduction of the witness' testimony and is overruled is entitled to assume that the trial judge will make the same ruling as to other offers of similar evidence and is not required to repeat the objection.

(3) Practice Pointer.

If a "running" objection is made it may be made in the following manner:

"Your honor, pursuant to Rule 611 of the Texas Rules of Civil Evidence, may my client have a running objection to this same line of testimony if it is subsequently offered?"

6. Your Objection Must be Specific and not General.

To properly preserve error, the objection must be specific enough to enable the trial court to understand the precise question and to make an intelligent ruling affording the offering party the opportunity to remedy the defect if possible. *Dallworth Trucking v. Bulen,* 924 S.W.2d 728, 737 (Tex. Civ. App. - Texarkana 1996, no writ).To preserve an issue for appellate review, a party must make a timely, specific objection and obtain a

ruling on that objection. Tex. R. App. p. 33.1(a); *In re M.D.S.*, 1 S.W.3d 190, 202 (Tex. App.- Amarillo 1999, no pet.).

a. General or Specific.

(1) General objections will not suffice.

i. *Seymour v. Gillespie*, 608 S.W.2d 897 (Tex. 1980). A general objection to an insufficient predicate will not suffice; specific objection must be made or the objection to an improper predicate is waived.

ii. *Plyler v. City of Pearland*, 489 S.W.2d 459 (Tex. Civ. App.– Houston [1st Dist.] 1972, writ ref'd n.r.e.). Computer records. An objection that no proper predicate had been laid was so broad and indefinite that it was considered a general objection, and the court properly failed to sustain the objection.

(2) Specific objections are required. *Matter of Bates*, 555 S.W.2d 420 (Tex. 1977). Waiver accrued due to the lack of specific objections to the proper predicate for the admission of tape recordings of conversations.

(3) Specific objections are required whether the evidence is oral or documentary. *Brown & Root v. Haddad*, 180 S.W.2d 339 (Tex. 1944). A general objection to evidence as a whole, whether it be oral or documentary, which does not point out specifically the portion objected to, is properly overruled if any part of evidence is admissible.

(4) Objections should be clear and specific so that they may be understood by the court and obviated by the opposing party, if they are capable of being removed by production of other evidence. *Campbell v. Pasehall*, 132 Tex. 226, 121 S.W.2d 593 (Tex. Comm. App. 1938, opinion adopted).

(5) A "specific objection" is one which enables the trial court to understand the precise question and to make an intelligent ruling, affording the offering party the opportunity to remedy the defect, if possible. *De Los Angeles Garay v. TEIA*, 700 S.W.2d 657 (Tex. App. – Corpus Christi 1985*); Tex. Mun. Power Agency v. Berger*, 600 S.W.2d *850* (Tex. Civ. App. - Houston [1st Dist.] 1980, no writ); *Univ. of Tex. Sys. v. Haywood*, 546 S.W.2d 147 (Tex. Civ. App. - Austin 1977, no writ).

(6) It is incumbent upon the party objecting to the portion of the evidence to make a specific objection to the inadmissible portion, and then request a limiting instruction. *Ramirez v. Wood*, 577 S.W.2d 278 (Tex. Civ. App. - Corpus Christi 1978, no writ); *Brazos Graphics, Inc. v. Arvin Indus., Inc.*, 574 S.W.2d 240 (Tex. Civ. App. - Waco 1978), *writ ref'd n.r.e.*, 586 S.W.2d 841; *Eubanks v. Winn*, 469 S.W.2d 292 (Tex. Civ. App. - Houston [14th Dist.] 1971, writ ref d n.r.e.).

(7) The trial court has some discretion in deciding which party should specifically point out to the court that part of the record that is objectionable and that part which is not objectionable and thus admissible. *Hurtado v. TEIA*, 563 S.W.2d 360 (Tex. Civ. App. - San Antonio 1978), *rev'd on other grounds*, 574 S.W.2d 536 (1978) [medical records].

(8) The addition of the word "prejudicial" to the objection to the admission of evidence did not take it out of the general rule requiring objections to be specific. *Horn v. Atchison, T. & S. F. Ry. Co.*, 519 S.W.2d 894 (Tex. Civ. App. - Beaumont 1975, no writ).

(9) An objection that the evidence was "immaterial" was not specific and should be overruled. *Hunt v. Jones*, 451 S.W.2d 943 (Tex. Civ. App. - Waco 1970, writ ref d n.r.e.).

(10) An objection that the evidence was "prejudicial, irrelevant and immaterial," was a general objection rather than a specific objection. *Bales v. Delhi-Taylor Oil Corp.*, 362 S.W.2d 388 (Tex. Civ. App. - San Antonio 1962, writ ref d n.r.e.).

(11) An objection using an expression which may mean one or more of several specific complaints is usually too general to call the trial court's attention to the point the objector may have in mind. *Hooten v. Dunbar*, 347 S.W.2d 775 (Tex. Civ. App. - Beaumont 1961, writ ref'd n.r.e.).

(12) An objection which asserted that the evidence

was not admissible for any purpose, and which failed to point out any particular, is too general. *State v. Bernhardt,* 334 S.W.2d 203 (Tex. Civ. App. - Texarkana 1960, no writ).

(13) Specific examples of other objections held to be too general are:

i. Objection, immaterial, "she's not complaining about her arm." *Hunt v. Jones, supra.*

ii. Objection "to any transaction that happened down there, which does not have any bearing whatsoever on the transaction occurring up here." *Evans v. Henry,* 230 S.W.2d 620 (Tex Civ. App. – San Antonio 1950, no writ).

iii. Objection "because it would in no wise bind the plaintiff in this case." *Steptore v. San Antonio Transit Co.,* 198 S.W.2d 273 (Tex. Civ. App. – San Antonio 1974, no writ).

iv. Objection "to any other statement and ask that it all be stricken." *Jones v. Parker,* 193 S.W.2d 863 (Tex. Civ. App. - Texarkana 1946, writ ref d n.r.e.).

b. Statement of Grounds.

(1) A valid objection to the offer of evidence is one that names a particular rule of evidence which will be violated by the admission of the evidence. *Burleson v. Finley,* 581 S.W.2d 304 (Tex. Civ. App. – Austin 1979, writ ref'd n.r.e.).

(2) Objection that a "question calls for a present declaration of a past state of mind" was an insufficient statement of grounds. *F.B. Melntire Equip. Co. v. Henderson,* 472 S.W.2d 566 (Tex. Civ. App. – Fort Worth 1971, writ ref d n.r.e.).

(3) Objection to x-ray "that it was not sufficiently identified or proved up" stated insufficient grounds. *Parr v. Herndon,* 294 S.W.2d 162 (Tex. Civ. App. - Fort Worth 1956, writ ref'd n.r.e.).

(4) Objections to x-rays on grounds "that photographs were irrelevant and without proper predicate being laid to admit them and that there are no pleadings to support photographs and that they had not been sufficiently identified," were insufficient. *S. Underwriters v. Weldon,* 142 S.W.2d 574 (Tex. Civ. App. – Galveston 1940, no writ).

c. Bad Objections - Generality.

The following objections were held to be insufficient and amount to no objections at all:

(1) Objection that a "question calls for a present declaration of a past state of mind" was an insufficient statement of grounds. *F.B. Melntire Equip. Co. v. Henderson,* 472 S.W.2d 566 (Tex. Civ. App. – Fort Worth 1971, writ ref d n.r.e.).

(2) Objection to x-ray "that it was not sufficiently identified or proved up" stated insufficient grounds. *Parr v. Herndon,* 294 S.W.2d 162 (Tex. Civ. App. – Fort Worth 1956, writ ref'd n.r.e.).

(3) Objections to x-rays on grounds "that photographs were irrelevant and without proper predicate being laid to admit them and that there are no pleadings to support photographs and that they had not been sufficiently identified," were insufficient. *S. Underwriters v. Weldon,* 142 S.W.2d 574 (Tex. Civ. App. – Galveston 1940, no writ).

d. "T.V." Objections - Incompetency, Irrelevancy, and Immateriality.

The following objections were held to be insufficient and amount to no objections at all:

(1) "Such evidence is irrelevant, immaterial and prejudicial." *Peerless Oil & Gas Co. v. Teas,* 158 S.W.2d 758 (Tex. 1942).

(2) "Immaterial and irrelevant." *Bridges v. City of Richardson,* 349 S.W.2d 644 (Tex. Civ. App.– Dallas 1961), *writ ref'd n.r.e.,* 354 S.W.2d 366 (1961).

(3) "Immaterial, irrelevant and would solve no issue in this case." *Traders & Gen. Ins. Co. v. Haney,* 312 S.W.2d 690 (Tex. Civ. App. - Fort Worth 1958 , writ ref d n.r.e.).

(4) "Incompetent, irrelevant or immaterial." *Easley v. Brookline Trust Co.,* 256 S.W.2d 983 (Tex. Civ. App. -Amarillo 1953, no writ).

(5) "Immaterial, irrelevant and could not form the basis for a valid judgment." *Enfield Really & Home Bldg. Co. v. Hunter,* 179 S.W.2d 810 (Tex. Civ. App. - Austin 1944, no writ).

(6) "Incompetent." *Elbins v. Foster,* 101 S.W.2d 294 (Tex. Civ. App. – Amarillo 1937, writ dism'd).

e. Repetition of Statement of Grounds.

Where a specific and valid objection is followed by "same objection to all that line of testimony," the objection was properly saved. *Tondre v. Hensley,* 223 S.W.2d 671 (Tex. Civ. App. – San Antonio 1949, no writ).

f. Ultimate Issues.

Objection that evidence offered "invades the province of the jury" is insufficient. *Carr v. Radkey,* 393 S.W.2d 806 (Tex. 1965). [In view of the jury's role to believe or disbelieve testimony, "(t)he witness could not invade that province if he wanted to."]

TEX. R. CIV. EVID. 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

g. Expert and Opinion Evidence.

(1) TEX. R. CIV. EVID. 701-705 allow expert and opinion evidence.

(2) *Birchfield v. Texarkana Mem'l Hosp.,* 747 S.W.2d 361 (Tex. 1987). Testimony of an expert witness in a medical malpractice action that hospital's conduct constituted "negligence," "gross negligence," and "heedless and reckless conduct," and that certain acts were "proximate causes" of the injury complained of, constituted opinions on mixed questions of law and fact and as such were admissible, since they were confined to the relevant issues and based on proper legal concepts.

(3) Objection to "any questions" which may be asked a witness calling for expression of opinion is ineffectual. *Hooten v. Dunbar,* 347 S.W.2d 775 (Tex. Civ. App. – Beaumont 1961, writ ref d n.r.e.).

(4) Hearsay contained in expert opinion or reports is admissible for the limited purpose of aiding or assisting the expert in forming an opinion and not for the truth of the matter stated in the hearsay.

h. Documentary Evidence.

(1) TEX. R. CIV. EVID. 901-903 govern the admissibility of documentary evidence.

(2) Objection to the introduction of an amended pleading in evidence on the ground that "the pleadings are of record in the court and it's not a matter to be marked as an instrument of evidence. The pleadings will speak for themselves as to what is on file. I think I would object to it on that basis as an instrument of evidence. It certainly is part of the Court's Records" is too general and vague. *Jenkins v. Truck Ins. Exch.,* 576 S.W.2d 167 (Tex. Civ. App. - Fort Worth 1979, no writ).

i. Secondary Evidence.

(1) Tex. R. Civ. Evid. 1003 controls the admissibility of secondary evidence. It provides: "A duplicate is admissible to the same extent as an original unless (1) a question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

(2) An objection to testimony as being secondary evidence of a writing can prevail where it appears from the evidence objected to, or is made to appear by the objector that the evidence related to the contents of a written document. *State v. Brown,* 257 S.W.2d 796 (Tex. Civ. App. – Austin 1953, no writ).

j. Evidence Admissible in Part.

(1) Error in the admission into evidence of a portion of a chart on damages which was filled in by plaintiff's attorney without any testimony supporting it is waived by the failure of the objector to object to a particular

portion of the chart, and a general objection to the admission of the chart as a whole into evidence did not preserve error. *Speier v. Webster College*, 616 S.W.2d 617 (Tex. 1981).

(2) Objection to admission of voluminous medical records on grounds of hearsay, opinion and conclusional matters did not require objector to examine each of the 280 pages and segregate the inadmissible items from the admissible items. *Hurtado v. TEIA, supra.*

(3) Where a party offers several items as a unit and the opponent merely objects to the whole offer, if parts of the offer are admissible there is no error in overruling general objection which does not specify specific part to which valid objection could be made. *Ideal Mut. Ins. Co. v. Sullivan*, 678 S.W.2d 98 (Tex. App. – El Paso 1984, writ dism'd).

(4) Where the question propounded calls for an answer which is partly admissible and partly inadmissible, the objecting party must point out and distinguish the admissible from the inadmissible and direct objections specifically to that point which is inadmissible. *Lade v. Keller*, 615 S.W.2d 916 (Tex. Civ. App. – Tyler 1981, no writ).

(5) The overruling of an objection to or motion to strike testimony as a whole is not error, where part of such testimony is admissible. *Dabney v. Keene*, 195 S.W.2d 682 (Tex. Civ. App. - El Paso 1946, writ ref'd n.r.e.).

k. Evidence Admissible for Special Purposes.

(1) Where the evidence is admissible for one purpose but inadmissible for another, it may be admitted for the purpose for which it is competent; the court must, upon motion of a party, limit the evidence to its proper purposes, but in the absence of such a motion, the right to complain of the improper purpose is waived. *Bristol- Myers Co. v. Gonzales*, 548 S.W.2d 416 (Tex. Civ. App. – Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (1976).

(2) It is the duty of the party objecting to the introduction of evidence, which is admissible for one purpose but not for another, to request the court to limit the purpose for which it might be considered; and, failing so to do, such party may not be heard to complain that jury may have considered evidence for other purposes. *Fisher Consrt. Co. v. Riggs*, 320 S.W. 2d 200 (Tex. Civ. App. – Houston 1959), *rev'd on other grounds*, 325 S.W.2d 126, *remand*, 326 S.W.2d 915.

l. Evidence Admissible for or Against Part of Several Co-Parties.

(1) The opponent must request a limiting instruction. *Griggs v. Curry*, 336 S.W.2d 248 (Tex. Civ. App. – Waco 1960, writ ref'd n.r.e.).

(2) In the absence of a request to so limit evidence to one of several defendants as to whom such evidence was admissible as a declaration against interest. *Amberson v. Wilkerson*, 285 S.W.2d 420 (Tex. Civ. App. – Austin 1956, no writ).

m. Motion to Strike Out Testimony.

In addition to proper objection, an additional step is required, especially in jury cases. When an objection is sustained as to testimony which has been heard by the jury, a motion to strike request for the court to instruct the jury to disregard the testimony should be made to preserve error. Merely urging an objection to testimony already elicited is insufficient to prevent the jury's consideration thereof or to prevent an appellate court's consideration of same in a sufficiency review. Therefore, any error posed by the testimony as to facts, not in evidence, is waived by a failure to request that erroneously admitted testimony be stricken. *Parallax Corp. v. City of El Paso*, 910 S.W.2d 86, 91 (Tex. App. – El Paso 1995), writ denied).

(1) **Court's Motion to Strike**. The court may strike out testimony on its own motion. *Aquamarine Assoc. v. Burton Shipyard, Inc.*, 645 S.W.2d 477 (Tex. App. – Beaumont [9th Dist.] 1982), *aff'd*, on other grounds 659 S.W.2d 820 (1983).

(2) **Necessity for Motion to Strike when Objection Sustained**. Where the objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless the jury is instructed to

disregard it. *Prudential Ins. Co. of Am. v. Uribe,* 595 S.W.2d 554 (Tex. Civ. App. – San Antonio 1979, no writ).

(3) **Effect of No Motion to Strike When Objection Sustained.** Where an objection is made and sustained but no motion is made to strike the answer or instruct the jury not to consider, the testimony is before the jury for whatever it is worth. *Sw. Title Inc. Co. v. Northland Bldg. Corp.,* 542 S.W.2d 436 (Tex. Civ. App. - Fort Worth 1976), *aff'd in part, rev'd in part, 552* S.W.2d *425* (1976).

(4) **Necessity for Motion to Strike on Expert Testimony.** Where an objection to expert testimony was made after testimony's admission, any error in admitting such testimony was waived when no motion was made to strike the answer from the record or to instruct the jury not to consider it. *City of Denton v. Mathes,* 528 S.W.2d *625* (Tex. Civ. App. - Fort Worth 1975, writ ref'd n.r.e).

(5) **Necessity of Motion to Strike Previous Testimony.** Where subsequent testimony renders inadmissible previously given testimony, the party who objected to the admission of prior testimony must renew the objection or move to strike out the prior testimony, and failure to do so waives the matter. *F. W. Woolworth Co. v. Ellison,* 232 S.W.2d 857 (Tex. Civ. App. - Eastland 1950, no writ).

(6) **When Must Motions to Strike Be Made.** Ordinarily, a motion to strike out objectionable testimony must be made at the time the testimony is given, if the objection to the testimony is then apparent. *Magnolia Petroleum Co. v. Johnson,* 176 S.W.2d 774 (Tex. Civ. App. - Fort Worth 1944, no writ).

(7) **Inexcusable Delay on Moving to Strike.** Inexcusable delay in moving to strike out the objectionable evidence is ground for denying the motion. *Magnolia Petroleum Co. v. Johnson,* supra.

(8) **Necessity of Previous Objection.** Absent a previous objection to the testimony, it is discretionary with the court to strike out testimony on motion by the opponent of the testimony.

(9) **No Gambling on the Answer.** The objecting party cannot gamble on the answer and then move to strike when the testimony turns out to be unfavorable. *Int'l Bhd of Boiler Makers v. Rodriguez,* 193 S.W.2d 835 (Tex. Civ. App. - El Paso *1945,* writ dism'd).

(10) **Discharge of Witness or Concluding Evidence.** The trial court may properly overrule the motion to strike testimony if it is not made until after witnesses have been discharged, or at the close of complaining party's case or at the conclusion of the evidence. *Collins v. Smith,* 175 S.W.2d 407 (Tex. 1943).

(11) **Motions to Strike "Under Advisement."** Where the trial court overrules the objection to testimony "for the present," the objecting party may move to exclude the objectionable evidence at any stage of the proceedings before the cause is submitted to the jury, and in order to protect his rights must do so. *Johnson v. Hodges.* 121 S.W.2d 371 (Tex. Civ. App. - Fort Worth 1938. writ dism'd).

(12) **Evidence Admissible in Part.** Motion to strike directed at entire testimony of witness, some of which was clearly admissible is insufficient. A limiting motion must be made. *City of Kennedale v. City of Arlington,* 532 S.W.2d 668 (Tex. Civ. App. - Fort Worth 1976, writ dism'd as moot); *Williams v. Gen. Motors Corp.,* 501 S.W.2d 930 (Tex. Civ. App. - Houston [1st Dist.] 1973, writ ref d n.r.e.).

(13) **Evidence Elicited by Party Moving to Strike.** A party is not permitted to ask questions on cross-examination and then, upon receiving answers unfavorable to his cause, have answers stricken from the record. *Cherry v. State,* 546 S.W.2d 922 (Tex. Civ. App. - Dallas 1977, writ ref'd).

(14) **Examples of when a motion to strike may become necessary**:

i. To exclude an answer of a witness made before an objection could be made. *Biard Oil Co. v. St. Louis Sw.. Ry.,* 522 S.W.2d 588 (Tex. Civ. App. – Tyler 1975, no writ).

ii. To exclude volunteer statements of the witness. *Walgreen-Texas Co. v. Shivers,* 169 S.W.2d 271 (Tex. Civ. App.– Beaumont 1943, writ ref'd w.o.m.).

iii. To exclude non-responsive answers. *Johnson v. Woods,* 315 S.W.2d 75 (Tex. Civ. App. - Dallas 1958, writ ref d n.r.e.); *Am. Nat'l Ins. Co. v. Nussbaum,* 230 S.W.2d 1102 (Tex. Civ. App. - 1921, writ dism'd).

iv. To exclude prior testimony admitted conditionally upon counsel's promise to connect up the testimony or lay a foundation. *Galveston H & S.A.R. Co. v. Janert,* 49 Tex. Civ. App. 17, 107 S.W. 963 (Tex. Civ. App. 1908, writ ref'd).

n. Ruling on Objections.

(1) The objecting party must secure a ruling on objections in order to complain on appeal, or else error is waived. *Cusak v. Cusak,* 491 S.W.2d 714, 718 (Tex. Civ. App.– Corpus Christi 1973, writ dism'd). The objecting party is also entitled to an immediate ruling admitting or excluding the evidence. *Thomas v. Atlanta Lumber Co.,* 360 S.W.2d at 447. There is no error in the exclusion of evidence which is not admissible when offered. *Id.* Even if a ruling is obtained, error cannot be predicated on a ruling admitting or excluding evidence unless a substantial right is affected and the substance of the excluded evidence is made known to the court. *Chance v. Chance,* 911 S.W.2d 40, 52 (Tex. App. - Beaumont 1995, writ denied).

(2) Ordinarily a party making an objection to the admission of evidence is entitled to an immediate ruling admitting or excluding the evidence. *Thomas v. Atlanta Lumber Co.,* 360 S.W.2d 445 (Tex. Civ. App. - Texarkana 1962, no writ).

(3) An objection to a special issue preserves nothing for review absent an indication in the record of a ruling or order on the objection by the trial court. *North Star Dodge Sales, Inc. v. Luna,* 653 S.W.2d 892 (Tex. App. – San Antonio 1983), *aff'd in part, rev'd in part,* 667 S.W.2d 115 (Tex. 1984), *on remand,* 672 S.W.2d 304, writ dism'd).

o. Exceptions to Rulings.

Taking exception to the Court's ruling is no longer required not recommended. TRAP 52(a).

p. Effect of Failure to Object or Except.

(1) **Variance with Pleadings.** A party relying on his opponent's pleadings as judicial admissions of fact must protect his record by objecting to the introduction of evidence contrary to that admission of fact and by objecting to submission of any issue bearing on fact admitted. *Houston First Am. Sav. v. Musick,* 650 S.W.2d 764 (Tex. 1983); *Watson v. Bettinger,* 658 .S.W.2d 756 (Tex. App. – Fort Worth 1983, writ ref'd n.r.e.).

(2) **Incompetent Evidence.** Incompetent evidence, even when submitted without objection, has no probative force and will not support a judgment. *Aetna Ins. Co. v. Klein,* 325 S.W.2d 376 (Tex. *1959).*

(3) **Failure to Object.** Any objection to evidence is waived by the failure to object. *Ryan Mtg. Investors v. Fleming-Wood,* 650 S.W.2d 928 (Tex. App. – Fort Worth 1983, writ ref d n.r.e.).

(4) **Parol Evidence Rule.** The "parol evidence rule" is a rule of substantive law, and renders inadmissible any testimony to vary the legal effect of a writing in the absence of any ambiguity, accident, mistake or fraud shown in connection with the contract; inadmissible testimony, whether objected to or not, is without probative force and will not support any finding. *Huddleston v. Ferguson,* 564 S.W.2d 448 (Tex. Civ. App. - Amarillo 1978, no writ).

(5) **"Opening the Door."** Failure to object to the other party's eliciting testimony on immaterial or extraneous matters does not "open the door" to examination by the party failing to object. *Tex. & N.O.R. Co. v. Barham,* 204 S.W.2d *205* (Tex. Civ. App. - Waco 1947, no writ).

(6) **Dead Man's Statute.** May be waived in the

absence of proper objection. *Tex. Bank & Trust Co. v. Moore,* 595 S.W.2d 502 (Tex. 1980).

(7) **Hearsay.** Unobjected-to hearsay is admissible and may be considered in arriving at ultimate conclusions. TEX. R. EVID. 802; *Aatco Transmission Co. v. Hollins,* 682 S.W.2d 682 (Tex. App. – Houston [1st Dist.] 1984, no writ); *Furr's Supermarket Inc. v. Williams,* 664 S.W.2d 154 (Tex. App. – Amarillo 1983, no writ).

(8) **Expert and Other Opinion Evidence.** A witness is presumed to be qualified to give his opinion when the opinion is admitted without objection. *Wilfin Inc. v. Williams,* 615 S.W.2d 242 (Tex. Civ. App. - Dallas 1981, writ ref'd n.r.e.).

(9) **Documentary Evidence.**

i. Unobjected – to documentary evidence establishing a claim for liquidated damages obviates the necessity for submitting the matter of liquidated damages to the jury. *Henshaw v. Kroenecke,* 656 S.W.2d 416 (Tex. 1983), *on remand,* 671 S.W.2d 117 (Tex. App. 1 Dist. 1984 writ ref'd n.r.e.).

ii. Pleadings, including sworn pleadings and exhibits attached thereto, do not constitute evidence even when introduced without objection. *Blackwell v. Chapman,* 492 S.W.2d 657 (Tex. Civ. App. - El Paso 1973, no writ); *Cline v. Sw. Wheel & Mfg. Co.*. 390 S.W.2d 297 (Tex. Civ. App. - Amarillo 1965, no writ).

q. Jury Argument.

If the argument is of "curable" nature, objection to it must be promptly made and an instruction requested or error is waived; but if the argument is "incurable," failure to object does not result in a waiver, and the reasoning is that the counsel making the argument is the offender, so the law will not require opposing counsel to take a chance on prejudicing his cause with the jury by making the objection. *Otis Elevator v. Wood,* 436 S.W.2d 324 (Tex. 1968).

Mundy v. Shippers, Inc., 783 S.W.2d 743 (Tex. App. - Houston [14th Dist.] 1990, no writ). Personal injury plaintiffs failed to preserve alleged error of improper jury argument where they neither registered a contemporaneous objection at trial nor did they designate improper jury argument as a point of error in their motion for new trial.

7. Estoppel or Waiver - Similar Evidence

Error created by the admission of improper evidence is waived when testimony to the same effect has been admitted without objection. *Mollinedo v. T.E.C.,* 662 S.W.2d 732, 739 (Tex. Civ. App. - Houston [1st Dist.] 1983, ref'd n.r.e.).

8. Offer of Proof.

If evidence is excluded, the proponent has the burden to make offer. Even if exclusion is erroneous, error is not preserved for appellate review unless the offer of proof is made. *Porter v. Nemir,* 900 S.W.2d 376, 383 (Tex. App. - Austin 1995, no writ). When the trial court excludes evidence, failure to make an offer of proof waives any complaint about the exclusion on appeal. *Id.* The offer of proof is sufficient it apprizes the court of the substance of the testimony and may be presented in the form of a concise statement. *Ludlow v. Deberry*, 959 S.W.2d 265, 270 (Tex. App. – Houston [l4th Dist.] 1997, reh'g overruled).

9. Limited and Conditional Admissibility.

When evidence is admissible for one purpose and inadmissible for another, it may be admitted for the proper purpose. The court must, upon motion of a party, limit the evidence to its proper purpose, and in the absence of such motion, the right to complain of the improper purpose is waived. *Rendleman v. Clark*, 909 S.W.2d 56, *58* (Tex. App. - Houston [14th Dist.] 1995, writ dismissed). Evidence may also be admitted, conditioned upon the representation of counsel that "it will be connected up at a later time". If it is not connected up at a later time, the opposing party must request the prior testimony be stricken and request an instruction from the court to disregard the 'unconnected' testimony. *Galveston H&SAR Co. v. Janert,* at 107.

10. Motions in Limine Do Not Preserve Error.

Regardless of a ruling on Motion in Limine, an objection should be made when evidence is offered or error will be deemed waived. *Hartford Accident and Indem. v. McCardell,* 369 S.W.2d 331, 335

(Tex. 1963).

D. Objectionable Objections.

Judge Joseph M. McLaughlin, in an excellent article in 4 *Litigation* 32, pointed out common objections which are objectionable in form or substance fall into three basic categories, i.e., (1) hearsay, (2) cross- examination, and (3) techniques of objection.

1. Hearsay.

Lawyers fuse two or three exceptions into one with a consequent loss of clarity.

a. Res Gestae.

(1) Properly used, "res gestae" refers to words that are uttered as part of a legal transaction and impart legal coloration to the transaction, to wit:

If a person rips up his will and says at the time, "1 hereby revoke my will," the words become part of the act.

(2) A witness may testify to what he *saw* and also to the contemporaneous words that he heard, as for example when a witness sees a father give his son the keys to a car and contemporaneously state, "Son, here are the keys to your graduation gift."

(3) Res gestae has been improperly used to describe a spontaneous declaration such as an excited utterance. TEX. R. EVID. 803(2); or statement of mental condition ("1 hate my wife."). TEX. R. EVID. 803(3).

b. Admissions and Declarations Against Interest.

(1) "Admissions against interest" do not exist. There are "Admissions by party opponent" and "declarations against interest."

(2) "Admissions by party opponent" are out-of-court statements by a party that are inconsistent with the position he later takes in court. For example, when a person files his income tax in April, he may believe it in his interest to understate his income. Nevertheless, if he later brings a personal injury suit and seeks to recover lost income, his tax return would be admissible against him if he asserts that he lost more income than he reported on his tax return. The party need not be available for court for this to be admissible.

(3) "Declarations against interest" are out of court statements made by a non-party, which statements were known by him to be against his interest when made. For example, an out of court statement by non-party witness Brown that he was at fault in the accident when Smith is being sued for the accident based on the accident being his fault. These statements may be admissible only if the non-party witness is available to be called as a witness.

c. Self-Serving.

Since the whole purpose of a lawsuit is to self-serve, there is no rule of evidence excluding self-serving statements.

(1) "Writings," when offered to prove the truth of the matter contained in them, are hearsay.

(2) If the writing *does not fall* within any exception to the hearsay rule, then the writing is admissible, not because it is self-serving, but because it is hearsay. On the other hand, if the writing *does fall* within an exception, then the writing is admissible even if it happens to be self-serving.

(3) Most business records are self-serving, yet they are admissible.

(4) Accident reports qualify as business records if kept in the regular course of business and otherwise qualify. Its self-serving nature does not affect admissibility. *See, e.g., Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (N.Y. App. Div. 1969).

d. Presence of Client.

(1) There is a commonly accepted assumption that if a statement is made in the presence of a party, that statement is admissible. NOT TRUE.

(2) The "presence-of-the-client" rule is probably the illegitimate offspring of the rule that the party's silence may, in certain circumstances, constitute an admission. Under well-defined,

narrow conditions, where an accusation is leveled at a party, and he has an opportunity to deny it, and every normal human instinct would suggest that he would deny it, then a court may construe the party's silence as acquiescence in the truth of the charge. It is rare that all of the conditions can be met to invoke this doctrine.

Examples:

(a) Drivers at an accident scene with the police officer making statements and one driver keeps his mouth shut and the other is accusatory and will not shut up.

(b) Two people in a domestic dispute with a third person mediating the argument.

2. Cross-Examination.

Several objections that are often heard on cross-examination from opposing counsel but not well founded are as follows:

a. "Calls for the Operation of the Witness' Mind."

This should properly be objected to as a conclusion, if objected to at all, e.g., "Was the car going fast or slowly?" This is a proper question. TEX. R. EVID. 701 permits a lay witness to express an opinion on the speed of a moving vehicle.

b. "Nonresponsive Answer."

(1) Nonresponsive is a problem between the questioner and the witness. It is none of the adversary's business. In other words, the only person who can move to strike a nonresponsive answer is the person who put the question.

(2) Why? If the nonresponsive answer is independently admissible (and the speed of a moving vehicle is), it would serve no purpose to strike it. The questioner would only have to ask the question directly. If the nonresponsive answer is inadmissible, then the adversary should move to strike on whatever ground makes it inadmissible.

(3) Example: Q: "As the defendant approached the intersection, what color was the traffic light'?" A: "The defendant was driving fast and..." The objection by your adversary is: "Your Honor, I move to strike the answer on the ground that it is nonresponsive. "The judge should deny the objection and permit the answer to stand.

c. "Asked and Answered."

(1) There is no rule of evidence that bars the asking of the same question twice.

(2) If the question is crucial, or if there is good reason to repeat it, a party should be permitted to re-ask the question.

(3) Technically, the objection is one under TEX. R. EVID. 403 to move the trial along because the questioner is propounding cumulative questions.

d. "Argumentative."

An argumentative question is one that seeks to frame as a question a matter that properly belongs in a summation. For example, the question, "How can you even remember the events of five years ago, when you cannot even remember what dress you wore yesterday'?" does not really seek an answer. Rather, it seeks to embarrass the witness and pick a fight with her. This should be left to summation.

e. "Calls for a Narrative."

(1) Example: Q: "Tell us what happened on June 3, 1985." The objection is, "1 object. The question calls for a narrative."

(2) There is no rule of evidence that forbids narratives. The rules only forbid inadmissible testimony. Accordingly, if there is substantial assurance that an uninterrupted narrative by a witness will not result in a flood of inadmissible statements, the court may permit such testimony.

(3) Practice Pointer: Allow the question, but when it gets out of hand, object as follows: "Objection, your Honor, the statement by the witness 'he said. . . is hearsay and we object on that basis. We further request an instruction from the court to counsel and the witness to proceed in specific question and answer form as opposed to general question and answer form."

3. Techniques of Objection.

a. Objections serve two purposes:

(1) To keep impermissible evidence from being heard by the jury; and,

(2) To preserve for appellate review whatever error was committed in the trial court.

b. These purposes are sometimes at cross-purposes, i.e.:

(1) The jury can conclude that an attorney who constantly (but properly) objects has something to hide; and,

(2) If error is allowed to be shown in the appellate record without objection it will escape appellate review.

(3) The art of the trial lawyer is to know at every moment which of the two purposes is more important.

(4) The most commonly overlooked objection is that of "variance," where the pleadings and testimony vary and new issues or theories are tried by consent.

(5) If general objections of the adversary are constantly sustained, rather than abandon the line of questioning, extend an olive branch to the bench with "your Honor, may I have some guidance'?"

(6) Remember, judges were once humble lawyers. *See U.S. v. Dwyer*, 539 F.2d 924 (2d Cir. 1976).

E. Practical Considerations on Objections.

John J. Curtin, Jr., in his article "Objections" in 3 *Litigation* 37 (1982), touches on some practical considerations on making and meeting objections. Some of those considerations are repeated here.

1. When Should You Object?

Mr. Curtin draws analogy to answer the question:

> "I think of myself like a baseball player. When a question is asked in the courtroom, I think of it like a pitch. I may not want to swing even though it is a strike the same way that a batter need not swing at every pitch. Often there are good reasons for not swinging, yet the batter does not have much time to make up his mind. He should be up there looking to hit if he can, and not take the pitch because a key hit gives his team momentum or disrupts the pitcher's momentum. But you have to swing to get a hit."

2. Objecting is an Art, Not a Science.

a. Areas for Consideration.

Mr. Curtin discusses eight (8) areas for consideration in support of his statement that "objecting is an art and not a science," to wit:

(1) Know the basic law and lore.

(2) Know how to preserve your rights on appeal.

(3) Know your judge.

(4) Be aware of the jury.

(5) Know your opponent.

(6) Know your witness.

(7) Know your case.

(8) Know what you intend to do in advance.

b. Know the Basic Law and Lore.

(1) Categories of Objections. There are two general categories of objections:

i. Objections to the substance of evidence offered; and,

ii. Objections to the form of the question.

(2) Objections to Substance.

i. Objections going to the substance of the evidence involve the entire law of evidence. In Texas they are the Texas Rules of Evidence.

ii. Read the rules, statutes, and the relevant case law from the perspective of basing an objection on them.

iii. The form in which you object arises from the common lore, and you will learn it only through experience.

iv. State rules, statutes, and court decisions will be of limited help in supplying appropriate guides to the proper form of objections.

(3) Objections to Form.

i. Common objections to form such as leading, compound, ambiguous, argumentative, cumulative, overly broad, general, repetitive and the like are unlikely to be analyzed in the cases.

ii. If you sit in the courtroom, you will hear most of the objections as to form.

iii. Cases are not reversed on appeal because of the overruling of proper and specific objections as to form.

iv. TEX. R. EVID. 611(a) gives the judge the power to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence as to [1] make the interrogation and presentation effective for the ascertainment of the truth, [2] avoid needless consumption of time, and [3] protect witnesses from harassment or undue embarrassment."

v. Objections to the form of the question must be made at depositions. TEX. R. CIV. P. 204 (1984).

(4) Know How to Preserve Your Right on Appeal. The areas of applicable Texas statutory and case law are discussed in this article below.

c. Know Your Judge.

(1) Does He Have the Final Say? If the trial judge has the final say on objections to the form of questions and most objections to the substance, you should concentrate in the short run on the trial judge and the jury, not the appeals court.

(2) What is His Attitude Toward Procedure and Substance?

i. Politeness is always a good starting point.

ii. Allow the question to be completed before objecting unless completing the question will itself be prejudicial.

iii. Never address your opponent directly. Object to the judge.

iv. If the judge is irritated by argument, limit your objecting to a succinct statement of your ground in understandable language.

v. Know whether he permits "running" objections.

vi. Know his receptiveness to motions in limine. Many judges appreciate early warning even on less crucial matters and can be persuaded to listen to brief argument at the start of trial.

vii. The judge has such broad discretion that you may encounter directly contrary rulings from different judges on many objections, particularly those as to form. This should not be unexpected. Umpires have varying ideas about strike zones. You only ask that each judge be consistent.

d. Be Aware of the Jury.

(1) In a jury case, your audience expands. The judge remains the key to whether you win or lose any single objection, but your overriding objective is to persuade the jury.

(2) Objection strategy and techniques become part of the impression that you

make on the jury concerning the credibility of your case.

(3) The jury's reaction to your objection must be weighed and considered as part of the tactical decision to object.

(4) The skillful objection educates the jury to the reasonableness of excluding the other side's evidence.

(5) The aim is to explain briefly the objection so that the jury will believe that your opponent is being unfair, without irritating the judge.

(6) Do not object for objection's sake.

(7) Never object because you do not like the evidence.

(8) If an objection is likely to result in only temporary delay of the evidence, do not object.

(9) Carefully consider the offset on your credibility of series of unsuccessful objections.

(10) You may, within wisdom, choose not to object even though it will be sustained.

(11) If the witness is doing well under cross-examination and the jury seems impressed, do not intrude. Only object if the unfairness of the question will be obvious to the jury.

e. Know Your Opponent.

(1) It is unethical to object solely to upset your opponent or to prevent him from eliciting testimony in a smooth fashion.

(2) You should consider the resourcefulness of the opposing lawyer. Can he frame a proper question if pressed. Rephrasing may result in more persuasive testimony.

(3) Objection as a "best evidence" basis may be counterproductive. The document may better his case.

(4) If your opponent is easily rattled, you may choose to make more objections as to form in the hopes of prematurely excluding the evidence.

(5) If your opponent is resourceful, you may wish to make a valid objection to slow his momentum on direct.

f. Know Your Witness.

(1) Valid objections to the testimony of your witness can be used to warn the witness of danger areas and keep him from being confused.

(2) Objections can also be used to settle the witness.

(3) Most judges feel that your witness is fair game for cross-examination and will react negatively to unwarranted intrusions on the examination by unimportant objections to form after the first one or two objections.

g. Know Your Case.

(1) Object for the right reason.

(2) There should be a strategic and a tactical advantage.

(3) The objection should be consistent with your overall theory of the case.

(4) Be consistent with your objections.

(5) Sometimes silence is a better weapon.

(6) TEX. R. EVID. 403 expressly authorizes an objection to otherwise relevant evidence where, on balance, the benefit to the proponent of the evidence is outweighed by the unfair prejudice to your client. Psychology dictates that if you are constantly objecting to every question, you may not avail yourself of this rule.

h. Know What You Intend to Do in Advance.

(1) The time to object is short. Objections are likely to be better if you anticipate them.

(2) Analyze your opponent's case. Think about the witnesses through whom objectionable evidence may be offered. Anticipation gives you an edge in objecting.

(3) Be alert in the courtroom. One of the techniques of a good direct examiner is to move so quickly through certain parts of his examination that this momentum deters objections. To counter this technique you will have to be prepared.

F. Ethical Considerations.

Texas Disciplinary Rules of Professional Conduct - Rule 3.04(c)(5) [Fairness In Adjudicating Proceedings] provides that "[a] lawyer shall not engage in conduct intended to disrupt the proceedings."

Practice Pointer:

(1) It won't take long for you to build a reputation as one who plays fast and loose with the rules of ethics. It does take years to change that reputation.

(2) No attorney accepts the "I have a client to represent" excuse for sharp practices in trial. Unfortunately, these attorneys do not seem happy unless they are stepping on or over the line.

G. Basic Rules for Making Objections.

Prof. James W. McIlhaney in his *Trial Notebook* (ABA Press) lists eight (8) basic rules for making objections:

(1) Rise whenever you object.

(2) Make objections specific.

(3) Object to improper information even if you do not think the witness is credible, otherwise you will "open the door."

(4) Make "running objections."

(5) Never make an objection without a good reason for it.

(6) Unless it is necessary to preserve the record, it is usually unwise to object unless you think you will be sustained.

(7) Make objections in advance whenever possible through motions-in-limine.

(8) Use supporting memoranda whenever possible.

H. 22 Questions to Consider in Making and Meeting Objections to Evidence.

The late Dean Page Keeton in his classic text "Trial Tactics and Methods" poses 22 basic questions to consider in making and meeting objections. They are repeated here for your use and consideration as they have stood the test of time. They are:

(1) What purposes are served by objections?

(2) Should you object?

(3) Should you object to your adversary's questions to his own witness in leading or otherwise improper form?

(4) Should you object to your adversary's manner of cross-examination of your witness?

(5) Should you object to your adversary's methods of using or presenting contents of a document?

(6) Should you object to want of proof of foundation for admission of evidence offered?

(7) When and how should you offer evidence in support of your objection?

(8) Should you object because of insufficiency of the evidence?

(9) Should you object on the ground of want of pleadings to support the evidence?

(10) Should you object to the generality of a question?

(11) Should you move that the court hear testimony "in chambers" to determine its admissibility?

(12) Should you make your objection out of the hearing of the jury?

(13) What should you do when you know that an objection would be overruled by the court?

(14) What should you do to preserve error when the court rules adversely on an evidence point?

(15) What should you do when the court fails to rule on your objection?

(16) Should you use an objection as an argument to the jury?

(17) Should you move for an instruction to the jury to disregard an improper question or answer?

(18) Should you present an advance motion for exclusion of evidence which you anticipate your adversary will offer?

(19) Should you reply to your adversary's objections?

(20) Should you move for an instruction that evidence not be considered except for a limited purpose?

(21) Should you interrupt a question or answer to make your objection?

(22) How should your objection be phrased?

1. What Purposes Are Served by Objections?

a. The primary reason is for the exclusion of improper evidence.

b. The prevention of an improper manner of questioning.

c. The preservation of an improper manner of questioning.

d. Forcing your adversary to offer evidence favorable to you.

e. The ethically questionable purpose of making a "jury argument."

f. Coaching the witness during cross-examination.

2. Should You Object?

a. Generally, this will depend on both the form and content of the question and anticipated answer.

b. You should not object if you are reasonably certain that the answer will not be unfavorable to you, unless you anticipate that it is preliminary to the offering of materially harmful matter which you can exclude if you object in time.

c. Anticipate the probable ruling of the trial judge upon your objection and give that factor consideration in determining whether to object.

d. Jurors have seen and heard enough about trials, whether it be accurate or not, that they expect some objections on the part of lawyers.

e. Permitting the objectionable evidence to come in may be the key to admissibility of other evidence which you desire to offer.

f. You may be able to impeach the witness effectively as to his answer to the objectionable question.

3. Should You Object to Your Adversary's Question to His Own Witness in Leading or Otherwise Improper Form?

a. So long as you choose only the improper questions as time for objection, your objecting each time will result in repeated rulings by the court in your favor.

b. If there is any jury reaction to the continued questions to leading questions, it probably will be more unfavorable to the questioner than to you.

c. The reasons for objecting are not so much related to exclusion of the anticipated answer as to restraining the further use of leading questions and calling to the jury's attention the use already made and its bearing on the credibility of the evidence.

d. After persistent leading questions, you may request an instruction by the court to your adversary not to lead the witness.

e. An instruction from the court aids you in impressing the jury that the witness is not

being given the opportunity to tell his own story.

4. Should You Object to Your Adversary's Manner of Cross-Examination of Your Witness?

a. Objections as to the manner of cross-examination, e.g., being unfair with the witness, repetitious, confusing, oppressive, misleading and the like, are addressed to the discretion of the court, and are properly used only when there is reasonable hope of having the objection sustained by him.

b. It is better not to object if the witness is able to take care of himself.

c. If your adversary is mistreating the witness, the jury probably will be sympathizing with the witness.

d. If you consider that your witness is becoming angry, emotionally upset, or confused, you should object promptly for the purpose of stopping the practice before your witness harms your case.

5. Should You Object to Your Adversary's Methods of Using or Presenting Contents of a Document?

a. An advantage of forcing introduction of the document is that it avoids uncertainty in the record for appeal as to what was before the jury.

b. A disadvantage in forcing production is that document may contain more details than those displayed to the jury, and may actually supply some otherwise fatal omission, or it may give the jury a chance to study it during their deliberations, which would not have been possible had it not been introduced.

c. If documents are merely consulted by the witness though not expressly referred to in his testimony, an objection usually should be made.

d. If your adversary calls upon his witness to explain or interpret the document, it will most likely include his own understanding and interpretation, and you should object.

6. Should You Object Because of Want of Proof of Foundation for Admission of Evidence Offered?

a. If it is obvious that the facts constituting the foundation for admission of the evidence exist and can readily be proven, your objection, though sustained, probably will serve no useful purpose.

b. Objecting to the want of proof of medical qualifications when those qualifications actually exist emphasizes both the opinions, which you originally exclude but which are finally received, and also the standing of the expert whose qualifications are fully proven in meeting your objection.

7. When and How Should You Offer Evidence in Support of Your Objection?

a. Since the judge's decision on admissibility is final, you must offer your evidence promptly, before he rules.

b. It is to your advantage to produce all of the evidence available in support of your objection.

c. You should not request permission for voir dire if you are reasonably certain that the witness will testify to acts constituting the foundation for admission of the questioned evidence.

8. Should You Object Because of Insufficiency of the Evidence?

a. There is generally no reason for withholding objection to any harmful evidence when the circumstances of the case disclosed no danger of your adversary's curing the insufficiency by other evidence after objection is made.

b. As against a careless adversary, waiting until the last opportunity to raise the contention of insufficiency has the advantage of giving your adversary less opportunity to cure his omission.

c. If the evidence against you is received conditionally, by an offer to "connect it up," you should take care to renew your objection

and ask that the evidence be stricken if it is not "connected up."

9. Should You Object on the Ground of Want of Pleadings to Support the Evidence?

a. You should make the objection of want of pleadings only if the nature of the particular evidence offered, the circumstances of the offer, the rules of procedure under which the case is being tried, and the anticipated attitude of the trial judge are such as to indicate that you have reasonable hope of excluding the evidence entirely or obtaining a continuance or postponement of the trial to give you an ample opportunity for further preparation.

b. The proper objection is either "no pleadings" or "variance" between the pleadings and the proof.

10. Should You Object to the Generality of a Question?

a. Usually the questions asked by your adversary will indicate to you whether objectionable evidence is called for in the answer.

b. A sound objection to such a general question is that it does not afford you the opportunity of objection to improper matters before they are stated in the presence of the jury.

11. Should You Move that the Court Hear Testimony "In Chambers" to Determine its Admissibility?

a. Once the jury has heard the answer it is impossible to erase that from the jury's mind.

b. Objection should be made only if you expect the answer to be damaging to your case. Otherwise, the jury will soon become irritated with moving in and out of the jury box.

c. If your request is refused, you might next request an instruction to the witness that he not repeat any expression of opinion or conclusion in his answer.

12. Should You Make Your Objection Out of the Hearing of the Jury?

a. When you are invoking an exclusionary rule of evidence, it would be your preference that the purpose of objection be accomplished without taking the risk of unfavorable jury reaction to the practice of objection as such and the risk of harmful inferences concerning excluded matter.

b. Disadvantages of making such a request are that the curiosity and speculation of the jurors will naturally be aroused, that there is danger of their being influenced by an unfavorable inference of what the facts probably are, and that this emphatic indication of the wish to keep something from them is more likely than a mere objection in their presence to give rise to reaction against the method you are using.

13. What Should You Do When You Know That an Objection Would Be Overruled by the Court?

a. You must decide whether an error in admitting evidence warrants reversal rather than being "harmless error."

b. Review of the harmless error rule reveals that many sins are forgiven by appellate courts when they do not go to the very heart of the case.

14. What Should You Do to Preserve Error When the Court Rules Adversely on an Evidence Point?

a. Never say, "Note my exception, please."

b. The risk of waiver can be reduced by your pointing out to the court before such cross examination rebuttal that it is being offered subject to and without waiver of your primary contention that your objection should have been sustained.

c. If the court denies your request either with or without the intervention of opposing counsel, the jury will understand the reason for your persistence in repeating objections.

d. If you use either a "running objection" or an adoption by reference, it is important that you make your full statement of the objection in such form that the same expression would be entirely apt as an objection to the new questions.

e. Since reversals of trial court judgments because of erroneous rulings in relation to evidence points are now comparatively rare, you should direct your efforts primarily toward development of the evidence so as to secure a favorable verdict rather than to preserve what you perceived to be reversible error.

15. What Should You Do When the Court Fails to Rule on Your Objection?

a. The burden is upon you to secure a ruling by the judge upon your objection and silence will not be interpreted as an equivalent to overruling the objection.

b. You should obtain an expression which indicates his ruling.

c. If you are confronted with a situation in which the witness is proceeding with an answer to the question after the judge has failed to respond to your objection, it is proper for you to interrupt the witness with a request that the witness be instructed to withhold his answer until the judge has ruled upon your objection.

16. Should You Use an Objection as an Argument to the Jury?

a. The expression of serious objections in a manner calculated to appeal to the jury as well as the court is considered by many lawyers to be a proper practice.

b. Explaining your ground of objection serves both to make the legal point clear and also to convince the judge and the jury that the objection is sound and fairly urged.

c. Most of your objections made for the purpose of exclusion of subject matter which you think would prejudice the jury against your case afford no opportunity for such argumentative comments.

d. Your purpose is to get the point of the objection before the court while attracting the least possible attention of the jury.

17. Should You Move for an Instruction of the Jury to Disregard any Improper Question or Answer?

a. It is preferable to request a specific instruction to disregard, since the jury may not be as much impressed by a statement that the evidence is "stricken from the record" as a statement to them that they will not consider it for any purpose.

b. If the question alone serves to disclose to the jury the evidence which you are trying to exclude, you should generally request the instruction; the value of a specific statement by the court to the jurors that they shall not consider it outweighs any disadvantage of emphasis.

c. If you are unable to anticipate an objectionable answer to an apparently proper question, either because it was non-responsive or for other reasons, which may exist in spite of careful preparation of your case, you should use a motion for an instruction to disregard the answer rather than merely an objection to the answer.

d. A motion for mistrial based upon an inadmissible answer is not often sustained, however, unless it appeared that clearly inadmissible evidence was deliberately offered through the device of an apparently innocuous question.

18. Should You Present an Advance Motion for Exclusion of the Evidence Which You Anticipate Your Adversary Will Offer?

a. Use of motions in limine is a popular practice in Texas. Remember, the ruling on the motion in limine will not preserve objection, that is, objection must be made at the time the evidence is offered.

b. Both your chances of dissuading your adversary from asking an improper question and your chances of obtaining a mistrial if he uses it are improved by such an advance motion or advance notice.

19. Should You Reply to Your Adversary's Objections?

a. If the judge looks over at you after your adversary has made his objection, he is indicating to you that he would like to hear

your side of the point.

b. Since your aim is to win the case, and not merely to vindicate yourself by upholding every question you have asked, you should not urge, either expressly or implicitly, that the judge overrule objections when you consider that he may be committing reversible error by doing so.

c. It never hurts to say "1 withdraw the question." Simply back up and start over again.

d. If the court appears inclined to exchange views with your adversary on the merit of the objection, it is best for you to remain quiet and let the court do the arguing for you.

20. Should You Move for an Instruction That Evidence Not Be Considered Except for a Limited Purpose?

a. Yes, if you feel that your adversary will use the evidence for general purposes and not limited purposes in a jury argument.

b. Since a request for a limiting instruction generally comes after your objection has been overruled to evidence admitted for a general purpose, a request for a limiting instruction by the court to the jury that this evidence is not to be considered by the jury for any purpose other than the limited one of giving it whatever weight, if any, they think it deserves can be construed by the jury as a comment by the court on the weight of the evidence.

21. Should You Interrupt a Question or an Answer to Make Your Objection?

a. Where your adversary is stating matters in the presence of the jury which you are seeking to exclude as improper, an interruption is advisable.

b. Requesting an instruction from the court to your adversary or the witness to stop talking whenever you rise to your feet can be very effective especially after the court gives it two or three times.

c. Each lawyer is entitled to the courtesy of an opportunity to state his question to a witness or his argument to the court without interruption, unless he is abusing that privilege.

22. How Should Your Objection Be Phrased?

a. An objection is divided into three parts: [1] the introduction, [2] identification of the rule of evidence invoked, and [3] an explanatory comment.

b. Judges prefer the addition of one of the customary phrases in the address to the court, as a matter of courtroom etiquette, such as "Your Honor, we object on the following grounds..."

c. When you have several grounds, it is desirable that they be separated in your statement for reasons of clarity.

23. Checklist on Objections.

Professor Matt Dawson of the Baylor Law School has supplied a checklist for possible objections to evidence in Judge Jordan's *Texas Trial Handbook, 2d* at Section 239. The late Dean Page Keeton in *Trial Tactics and Methods 2d* at pages 210-215 has stated objections that may be made to various types of evidence offered.

I. Substantive and Impeachment Evidence.

Substantive evidence is that evidence which is probative and supports the judgment of the court. *In Re A.S.M,* 172 S.W.3d 710, 713 (Tex. App.—Fort Worth 2005, no pet.) Impeachment evidence is aimed at attacking the credibility of the witness, and testimony admitted solely for impeachment purposes is without probative value and is not substantive evidence to prove a material fact in the case. Cochran, C., *Texas Rules of Evidence Handbook* (6th Ed.) 2005, p. 580. TEX. R. CIV. EVID. 607 permits the impeachment of any witness, including the party calling him. *Truco Prop., Inc. v. Chariton,* 749 S.W.2d 893, 896 (Tex. App. - Texarkana 1988, no writ). While this may seem a rather straight forward and simple task, many trial attorney have yet to master this very important tool. Listed below are some basic rules dealing with impeachment of not only an adverse witness, but also one's own hostile witness.

1. Prior Inconsistent Statement.

The most common use of impeachment testimony

is by way of prior inconsistent statement. If approached properly, the results can be devastating. If the rules are not followed, the results are embarrassment and frustration. The witness must be told the contents of the statement, time, place and person to whom statement was made, and must be afforded the opportunity to explain or deny the statement. *Ramsey v. Lucky Stores*, 853 S.W.2d 623, 637 (Tex. App. - Houston [1st Dist.] 1993, writ denied).

PRACTICE NOTE: When impeaching the witness with deposition testimony or other written evidence, it is very effective to read the question to be used, and request the witness read their response.

2. Writing Used to Refresh Memory.

Although a bit different than impeachment in the true sense of the word, this form can be just as effective as prior inconsistent statements. A writing used to refresh memory should not be confused with Recorded Recollection [803 (5)]. These two rules are often used interchangeably they are very different. With a writing used to refresh memory the witness does not have total memory failure as to the event, but relies on a writing to refresh his recollection of the event. If the witness uses the writing to refresh his memory, the opposing party is entitled to use it to cross examine and introduce the portions relating to the witness's testimony. The court reserves the right to conduct an *in camera* inspection of the writing and excise any irrelevant portions.

3. Prior Consistent Statements.

Recent fabrication of events or a statement are commonplace in family law cases. The proponent can cure any such accusations if prepared to show that his witness did, in fact, previously testified the same as in trial.

J. Who Has What Burden?

There are many facets to successful trial preparation. One of the most important aspects is the determination of what burdens are applicable to the instant case. What does each side have to prove to win their case? What burdens must be met to succeed on the point of law in issue? It is mandatory that the trial lawyer understand the various shades of burdens required to convince the fact finder that their side of the case has merit upon which a valid judgment can be rendered. Below is a discussion of those burdens.

1. Burden of Proof.

The common meaning of this term among litigators is the amount of evidence required to establish the facts pled, as well as a sufficient amount of evidence necessary to convince the trier of fact to find in the offering party's favor. While simplistic in usage, an academic examination reveals that there are two separate and distinct burdens which are dependent upon the other for a valid judgment.

a. Burden of Producing Evidence - The burden of producing evidence on a particular issue is based on the premise that the proponent must produce satisfactory evidence to the judge of the fact to be proved. 1 Roy R. Ray, Texas Practice, Law of Evidence §336 (1972). Absent a presumption of the facts to be proved, if the party with that responsibility does not produce the requisite evidence, the results will be an adverse ruling (i.e. a directed verdict). This burden of producing evidence rests initially on the party who pleads the existence of a particular fact. When the initial burden to produce evidence has been met, the burden to disprove the fact shifts to the opposing party.

b. Burden of Persuasion - The burden of persuasion comes only after the proponent has met his or her burden of producing evidence sufficient to prove the contested issue. Simply stated, it is the task of convincing the trier of fact, after producing satisfactory evidence, that the alleged facts are true. If the advocate is successful in meeting the burden of producing evidence and, in persuading the fact finder, the ultimate outcome is a favorable verdict. Unlike the burden of producing evidence, the burden of persuasion seldom shifts from one party to the other. It remains with the party who seeks any affirmative relief.

2. Standard of Proof (The Burden of Persuasion).

Though referred to as the burden of proof in practice, a more accurate term would be the standard of proof required in persuading the judge or jury. The standard of proof represents the persuasive boundaries set by the court. Injury cases,

the boundaries are affixed in the court's charge.

a. Persuading by a Preponderance of the Evidence - With few exceptions, this is the most common standard of proof utilized in family law cases. The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced and admitted in this case. The oft used "football" analogy is relatively accurate in illustrating the permissible parameters of this standard of proof. By analogy, once the party bearing the burden moves the ball past the fifty yard line, the "preponderance" burden has been met.

b. Persuading by Clear and Convincing Evidence - The exception to the usual preponderance standard in most family law cases is the burden to persuade by clear and convincing evidence. Less than beyond a reasonable doubt and more than a preponderance, this burden is the measure or degree of proof that will produce in the minds of the trier of fact a firm belief or conviction as to the allegations sought to be established. TEX. FAM. CODE ANN. §101.007.

PRACTICE NOTE: The above represent the only applicable standards in family law litigation. The unwritten standard of "Clear and Compelling" is virtually non-existent in family law. Although previously utilized by some courts in "sibling-splitting" cases, this author is unable to find where this standard was ever defined. *Fizzitola v. Fizzitola*, 748 S.W.2d 568, 569-70 (Tex. App.-Houston [1st Dist.] 1988, no writ). *See, In re D.R.L.M*, 84 S.W.3d 281, 303 (Tex. App. Fort Worth 2002, review denied). Upon reading some of the opinions which imposed this standard of proof, it appears that the burden fell somewhere between a preponderance of the evidence and clear and convincing. *Fizzitola*, and *In the Interest of G.M*, 596 S.W.2d 846 (Tex. 1980).

K. Common Oversights

Although this section of the paper does not directly deal with predicates and objections, the author is of the opinion that the following oversights will adversely impact on the effectiveness of one's case. Complying with the suggestions referenced below will result in a smooth and concise presentation which, in turn, will enhance the chance of success.

1. The Proponent - Common Oversights.

The party offering evidence has the burden to lay the proper predicate, usually through testimony of the witness, that is relevant and probative. Most of the time these two elements are inferred from the nature of the offer itself. Assuming this hurdle is cleared the evidence must be offered and a ruling obtained on its admissibility or exclusion. TEX. R. CIV. EVID. 103(b)

a. Failure to Mark Exhibits - To alleviate this potential mistake, always pre-mark the exhibits prior to trial. Prepare an exhibit list. Pre-marking exhibits with an accompanying list will place the Advocate in esteem with the court reporter and trial judge, and provide the attorney with a relatively clear road map of where they are going.

b. Failure to Refer to the Exhibit Number When Questioning Witness - Often the attorney generically refers to the "exhibit" when questioning the witness as opposed to the specific exhibit by number. One cannot appreciate the severity of this mistake until they read the statement of facts in the appeal and discover that the record is unclear as to what exhibit was being referenced.

c. Failure to Offer the Evidence - All trial attorneys have at one time or another been guilty of this faux pas. It occurs after counsel has done a masterful job in laying the predicate and identifying the document. After all the hard work is done then he or she lays the item on the bench never to find its way into the appellate record. This is yet another reason to have an exhibit list with an "offered and admitted" box to check.

d. Failure to Have the Necessary Predicate(s) Available and Ready - Should a particular piece of evidence have a predicate that counsel does not have committed to memory, he or she should always have it written out or the necessary authority handy to present to the court.

e. Failure to Have Enough Copies - Very few moments in a trial are more frustrating than proponent's counsel, opposing counsel, the judge, parties, and court reporter all trying to

look at the only copy of the exhibit. Always have a copy of the exhibit available for all involved.

f. Failure to Obtain a Stipulation on Ruling Prior to Starting Trial - If at all possible counsel should attempt to secure a stipulation from opposing counsel or obtain a pretrial ruling from the judge prior to the heat of battle. The proponent's case flows smoothly and the patience of all involved is greatly extended.

g. Failure to Make Offers of Proof - If a crucial piece of evidence has been excluded by the Judge, the proponent's job is not over. An offer of the excluded evidence must be made to preserve error. TEX. R. CIV. EVID. 103(a)(2). The offer can be made at the time the ruling is obtained or at anytime prior to time the jury is charged or the trial court renders. Offer of proof may be in the form of a concise statement so long as it adequately apprizes the court of the substance of the testimony and adequately preserves complaint. *Chance v. Chance*,911 S.W.2d. *supra* at 51.

h. Failure to Utilize Summaries - The failure of attorneys to use summaries, when appropriate, is one of advocacy's great mysteries. Fact finders would always (especially judges) will always pay more attention to a one or two page summary of voluminous records than the records themselves. Unless there is a good reason to introduce the actual records, summaries should always be used.

2. The Opponent - Common Oversights.

Just as the law of physics demonstrates that for every action there is an equal reaction, counsel for the party opposing the admission of evidence can be guilty of similar human error.

a. Premature Objections - It is both disruptive and annoying to the fact-finder to listen to a multitude of objections during the course of questioning by the opposing side. Unless the preliminary questioning is really harmful to the case, wait until the offer is actually made prior to stating the objection.

b. Permitting the Witness to Testify From the Exhibit Prior to its Admission - Until the subject exhibit is admitted into evidence by the court, it is *not* evidence. One should never permit the tendering witness to testify from the exhibit until it has been admitted. The witness' primary function prior to admission is to identify the exhibit prior to offer.

c. Failure to Request the Witness on Voir Dire - If it becomes apparent from the preliminary questioning that the witness does not have adequate personal knowledge to qualify the exhibit, counsel should request to take the witness on voir dire. Ask concise questions, relevant only to the issues relating to the exhibit. This is not cross-examination.

d. Failure to Timely and Properly Object - Depending on the subject of the offer, the opponent of the evidence must be prepared to timely and properly object or error will be waived. The objection must be material and specific or waiver will occur. If objecting as to relevancy, state in the objection as to why the offer is irrelevant.

X. MOTION FOR DIRECTED OR INSTRUCTED VERDICT.

This part of the article is taken from "Texas Objections," by Hon. Harvey Brown and Hon. Ken Curry, Chapter 24, Revision 5, August 2008. The author recommends this treatise on Texas objections for an in-depth review on this topical area.

A. In General.

1. Overview.

a. **What Is It?** A directed verdict is a procedural device seeking judgment from the court as a matter of law as opposed to submitting fact issues to the finder of fact. It is proper only when the evidence (a) conclusively establishes the right of the movant or (b) negates the right of the opponent to a judgment, or when a material fact issue is not raised by the evidence. *Kitchen v. Frusher*, 181 S.W.3d 467, 476 (Tex. App. – Fort Worth 2005, no pet.). If the latter, consideration is limited to the evidence in favor of the losing party and if the probative evidence raises a material fact issue, then the directed verdict is incorrect and must be reversed. If the former, all of the trial evidence is reviewed in the losing party's

favor. *Kitchen v. Frusher*, 181 S.W.3d 467, 476 (Fort Worth 2005, no pet.).

b. **Court Error**. The court errs if reasonable minds could reach different conclusions as to the controlling facts. *Byrd v. Delasancha*, 195 S.W.3d 834, 837 (Tex. App. – Dallas 2006, no pet.) (trial court committed error when it granted directed verdict on the grounds that no expert medical opinion on causation was offered as to injuries arising from a car accident, even though lay opinion evidence clearly established causation).

2. Definitions; Terminology.

a. **Procedural Mechanism**. A motion for directed verdict is the procedural mechanism for a party to ask the court for judgment as a matter of law without submitting the case to the jury at the close of the opposition's presentation of evidence. *Homme v. Varing*, 852 S.W.2d 74, 77 (Tex. App. – Beaumont 1993, no writ). A directed verdict is also called an "instructed verdict."

b. **Directed and Instructed Verdict Used Interchangeably**. "Directed verdict" and "instructed verdict" are used interchangeably to describe a court's mid-trial determination that a party is entitled to a judgment as a matter of law. *Tex. Steel Co. v. Douglas*, 533 S.W.2d 111, 114 (Tex. App. – Fort Worth 1976, writ ref'd n.r.e.). There is no material difference between a court instructing a verdict and rendering judgment on the verdict, and a court dismissing the jury and then rendering judgment. *Shield v. First Coleman Nat'l Bank*, 160 S.W.2d 277 (Austin), *aff'd*, 166 S.W.2d 688 (Tex. 1942); *Hutchinson v. Tex. Aluminum Co.*, 330 S.W.2d 895, 897 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.).

c. **Use in Non-Jury Trials**. In a non-jury trial, a defendant who moves for a directed verdict at the close of the plaintiff's case is making a motion for judgment. *Carrasco v. Tex. Transp. Inst.*, 908 S.W.2d 575, 577 (Tex. App. – Waco 1995, no writ). The motion is not equivalent to a motion for directed verdict at the conclusion of plaintiff's case in a jury trial. *Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302 (Tex. 1988). A motion for judgment when the plaintiff rests in a non-jury trial permits the trial court to deny the plaintiff relief if the trial court is not persuaded as a fact finder the defendant's liability has been established. *Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988). In a non-jury trial, the appellate court presumes the trial court ruled on the sufficiency of the evidence and will affirm the trial court's factual rulings unless there is legally or factually insufficient evidence to support them. *Carrasco v. Tex. Transp. Inst.*, 908 S.W.2d 575, 577 (Waco 1995, no writ).

d. **No Restrictions on Consideration of Evidence**. The trial court is not restricted to only considering the evidence presented before the plaintiff rested when the defendant renews his motion for a directed verdict at the close of the its case. The trial court is entitled to look at all of the evidence, including the evidence offered by the defendant when determining whether a material issue of fact exists requiring submission to the jury. *Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400 (Tex. App. – Amarillo 2003, pet. den.).

3. Motion Must State Specific Grounds.

a. **Specificity Required**. A motion for directed verdict must state the specific grounds for the motion. TEX. R. CIV. P. 268. Any attack on the evidence for material insufficiency should be raised when the court might permit an offer of additional evidence under TRCP 270. *Red River Valley Pub. Co. v. Bridges*, 254 S.W.2d 854 (Tex. App. – Dallas 1953, writ ref'd n.r.e.), *overruled on other grounds*, *Flanigan v. Carswell*, 324 S.W.2d 835 (Tex. 1959).

b. **Failure of Specificity**. Failure to state specific grounds is not necessarily fatal if the party is entitled to judgment as a matter of law. If no material fact issues are raised by the evidence, the court may instruct a verdict regardless of the sufficiency of the motion. *T.E.I.A. v. Page*, 553 S.W.2d 98, 102 (Tex. 1977); *Newman v. Link*, 866 S.W.2d 721, 725-26 (Tex. App. – Houston [14th Dist.] 1993, writ den.); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712 (Tex. App. – Corpus Christi 1967, writ ref'd n.r.e.).

c. **Grounds**. For the permissible grounds for the motion, *see* §24:130 et seq. of Brown &

Curry, Texas Objections, 2008.

4. Who Can Make Motion, and When.

a. **Either Party May Move**. Either the plaintiff or defendant may move for a directed verdict:

(1) The defendant generally makes the motion after the plaintiff rests. *Wedgeworth v. Kirskey*, 985 S.W.2d 115, 116 (Tex. App. – San Antonio 1998, no pet.).

(2) The plaintiff generally moves after the defendant rests. *Cecil Pond Constr. Co. v. Ed Bell Invs., Inc*., 864 S.W.2d 211, 214 (Tex. App. – Tyler 1993, no writ). When the plaintiff makes out a prima facie case and the defendant fails or refuses to introduce evidence, the court must instruct a verdict for the plaintiff. *Lesikar v. Lesikar*, 251 S.W.2d 555 (Tex. Civ. App. – Galveston 1952, writ ref'd n.r.e.).

(3) Either side may move for a directed verdict after all the parties rest. *Homme v. Varing*, 852 S.W.2d 74, 77 (Tex. App. – Beaumont 1993, no writ).

b. **After Jury Discharge.** The motion may be made after the jury has been discharged because of inability to reach a verdict. *Nelson v. Data Terminal Sys., Inc*., 762 S.W.2d 744, 748-49 (Tex. App. – San Antonio 1988, writ den.); *Chasco v. Providence Mem'l Hosp.*, 476 S.W.2d 385 (Tex. App. – El Paso 1972, no writ).

5. Necessity of Motion.

a. **At Close of Petitioner's Case-At Close of All Evidence**. It is not necessary in state court to file a motion for directed verdict. A no evidence point of error can be preserved without filing a motion for directed verdict in Texas state courts. If a defendant makes a motion for directed verdict at the close of the plaintiff's case and the court denies the motion, the defendant must re-urge the motion at the close of the evidence to preserve error. *Horton v. Horton*, 965 S.W.2d 78, 86 (Fort Worth 1998, no pet.).

b. **Denial of Specific Motion Preserves Error**. The denial of a motion for directed verdict preserves error for challenging evidence on appeal by points of error that there was no evidence of a certain fact or that a fact was established "as a matter of law." *Koepke v. Martinez*, 84 S.W.3d 393 (Tex. App. – Corpus Christi 2002, pet. den.); *see Holt v. Purviance*, 347 S.W.2d 321, 324 (Tex. Civ. App. – Dallas 1961, writ ref'd n.r.e.); *Myers v. Minnick*, 187 S.W.2d 941, 943 (Tex. App. – San Antonio 1945, no writ) (contention that there was no evidence to support finding of jury may be raised for first time on appeal).

6. Motion on Court's Own Initiative.

a. **The Judge's Prerogative**. When there are no disputed issues of fact, the trial court can, of its own volition, instruct a verdict for one of the parties. *In re Price's Estate*, 375 S.W.2d 900, 904 (Tex. 1964); *Guerra v. Datapoint Corp*., 956 S.W.2d 653, 657 (Tex. App. – San Antonio 1997, no writ); *Valero Eastex Pipeline Co. v. Jarvis*, 926 S.W.2d 789, 792 (Tex. App. – Tyler 1996, writ den.); *Castillo v. Euresti*, 579 S.W.2d 581, 582 (Tex. App. – Corpus Christi 1979, no writ).

b. **The Judge's Duty**. Regardless of the tender of a motion by one of the parties, the court has the duty to withdraw the case and dispose of it as a matter of law when no evidence warrants submission to the jury. *Marlin Assocs. v. Trinity Universal Ins. Co.*, 226 S.W.2d 190 (Tex. App. – Dallas 1950, no writ). The trial court may not, however, grant a directed verdict on its own motion until all the evidence has been presented. *Wedgeworth v. Kirskey*, 985 S.W.2d 115, 116 (Tex. App. – San Antonio 1998, no pet.). While ordinarily a trial court cannot enter a directed verdict until a party has had full opportunity to present its evidence, it may do so where either the cause of action is not legally viable or the damages sought are legally unrecoverable. *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 82 (Tex. 2003) (trial court correctly stopped plaintiff's presentation of evidence and entered a directed verdict against plaintiff because the damages sought by the plaintiff were legally unrecoverable).

7. Partial Directed Verdict.

A partial directed verdict that grants a party a judgment on one of the opposing party's causes of action but still submits some issues to the jury is permissible. *Johnson v. Swain*, 787 S.W.2d 36, 36 n.1 (Tex. 1989).

8. Formal Writing Not Required.

Although the better practice is to file a written motion, a formal writing is not required. *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Corpus Christi 1982, writ ref'd n.r.e.); *Castillo v. Euresti*, 579 S.W.2d 581, 582 (Tex. App. – Corpus Christi 1979, no writ). However, the record on appeal must show that the motion for judgment or for directed verdict was presented to and ruled on by the court. *State v. Dikes*, 625 S.W.2d 18, 20 (Tex. App. – San Antonio, 1981, no writ).

9. Time for Ruling by Court.

a. **Before Verdict Reached by Jury**. A court may grant a motion for directed verdict at any time before the jury reaches its verdict and is discharged. For example, the court may grant a motion for reconsideration and sustain a motion even after the jury reports it cannot agree. *Hutchinson v. Tex. Aluminum Co.*, 330 S.W.2d 895, 897 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.).

b. **Before Jury Discharged**. If the jury has returned a verdict but has not been discharged, the court may instruct it to render a verdict for the party entitled to it. *Keton v. Silbert*, 250 S.W. 316 (Tex. App. – Austin 1923, no writ).

10. Failure to Re-Urge Motion.

A party, usually the defendant, by electing not to stand on a motion for directed verdict made after the opposing party has rested, and by proceeding with the introduction of its own evidence, waives the motion for instructed verdict unless the motion is re-urged after both sides have rested. *Ratsavong v. Menevilay*, 176 S.W.3d 661, 667 (Tex. App. – El Paso 2005, pet. denied) (litigant moved for directed verdict on the grounds of statute of fraud, but waived the motion when after its denial the litigant presented evidence and did not re-urge the motion after closing its case); *1986 Dodge 150 Pickup v. State*, 129 S.W.3d 180, 183 (Tex. App. – Texarkana 2004, no pet.) (defendant moved for a directed verdict after completion of the state's testimony, and when denied, waived any error from the failure to grant the motion by calling a witness on behalf of the defendant). This is true in both jury and non-jury trials. *Bryan v. Dockery*, 788 S.W.2d 447, 449 (Tex. App. – Houston 1990, no writ) (jury trial); *Wenk v. City Bank*, 613 S.W.2d 345, 348 (Tex. App. – Houston [1st Dist.] 1990, no writ) (non-jury trial). A party preserves its right to complain of the denial of a directed verdict if it elects not to introduce evidence and test the ruling on appeal.

11. Response.

A party has no obligation to respond to a motion for directed verdict. *Gore v. Gore*, 233 S.W.3d 911, 912 (Tex. App. – Beaumont 2007, no pet.) (defendant who did not object when trial court granted directed verdict for liability, but did object to the charge when court submitted damages alone, preserved error to complain on appeal as to the directed verdict). A failure to respond to a motion for directed verdict is not an abandonment of a cause of action. *Sibai v. Wal-Mart Stores, Inc.*, 986 S.W.2d 702, 708 (Tex. App. – Dallas 1999, no pet.).

12. Appeal.

a. **Focus on Probative Evidence**. Upon appeal, the focus of the appellate court is whether there is any probative evidence sufficient to raise an issue of fact on the material question at issue. The evidence is examined in the light most favorable to the party adversely affected by the court's ruling. *Perez v. Embree Constr. Group, Inc.*, 228 S.W.3d 875, 881 (Tex. App. – Austin 2007, pet. den.) (trial court's grant of a directed verdict that the defendant did not retain sufficient control over a subcontractor's worker to be held responsible for the worker's injuries upheld where the evidence in the light most favorable to the worker did not create a fact issue as to the defendant's control over the worker).

b. **File Complete Reporter's Record**. The complete reporter's record must be filed to preserve error in the grant or denial of a motion for directed verdict. *McDonald v. State*, 936 S.W.2d 734, 737 (Tex. App. – Waco 1997, no writ). The record on appeal must show that the motion was presented to and ruled on by the court; otherwise there is no basis for a point of error. *State v. Dikes*,

625 S.W.2d 18 (San Antonio, 1981, no writ).

c. **Signed Order not Required to Preserve Compliant**. Some Courts of Appeals require the order overruling the motion for directed verdict to be in writing to preserve error for appeal. *Steed v. Bost*, 602 S.W.2d 385, 387 (Tex. App. – Austin 1980, no writ); *Soto v. S. Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App. – Corpus Christi 1989, no writ); *but see* TEX. R.APP. P. 33.1(c) (signed order not required to preserve complaint for appeal).

d. **On Issues of Law**. On issues of law, a motion for instructed verdict may preserve an issue for appeal even though no jury issue is submitted on it. *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982).

e. **Upholding Directed Verdict on Other Grounds**. If the trial court granted a directed verdict on grounds in the motion that on appeal are found invalid, the appellate court will uphold the directed verdict if the record supports any other ground, including a ground that was not embodied in the original motion. *Gonzales v. Willis*, 995 S.W.2d 729, 740 (Tex. App. – San Antonio 1999, no writ); *see Villareal v. Art Inst. of Houston, Inc.*, 20 S.W.3d 792, 796 (Tex. App. – Corpus Christi 2000, no pet.) (reviewing court may affirm directed verdict even if trial court's rationale for granting directed verdict is erroneous, if it can be supported on another basis); *but see Am. Petrofina Co. v. Panhandle Pet. Prod., Inc.*, 646 S.W.2d 590, 593 (Tex. App. – Amarillo 1983, no writ) (in reviewing trial court's denial of motion, appellate court is limited to specific grounds stated in motion).

f. **Appellate Review Standard**. An appellate review of a directed verdict examines the verdict in the light most favorable to the party against whom the verdict was rendered, disregarding all contrary evidence and inferences. *Gomez v. Valley Baptist Med. Ctr.*, No. 13-03-082, 2005 WL 1244600 (Corpus Christi May 26, 2005, pet. denied) (memorandum opinion); *Argus Sec. Sys., Inc. v. Owen*, No. 13-02-00219-CV, 2005 WL 729657 (Tex. App. – Corpus Christi - Mar. 31, 2005, no pet.) (memorandum opinion). The challenge to a denial of a directed verdict motion is a challenge to the legal sufficiency of the evidence. *Rice v. State*, 195 S.W.3d 876, 879 (Tex. App.— Dallas 2006, pet. den.).

g. **A Review of All Facts**. In reviewing a trial court's decision to grant of a motion for judgment in a non-jury trial at the close of the plaintiff's case because the court finds the evidence unpersuasive, the appellate court does not just rule on whether there was no evidence or a proposition was established as a matter of law. The appellate court instead examines the record as if the trial court had determined the case based on all the facts. *Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303-304 (Tex. 1988).

B. Grounds.

1. Claim or Defense Established as Matter of Law.

a. **As a Matter of Law**. A directed verdict is proper when a party is entitled to judgment as a matter of law. *CDB Software, Inc., v. Kroll*, 992 S.W.2d 31 (Tex. App. – Houston [1st Dist.] 1998, no pet.); *Franklin Nat'l Bank v. Boser*, 972 S.W.2d 98 (Tex. App. – Texarkana 1998, pet. den.). It is proper when a party conclusively proves facts that establish its right or negate the other party's right to judgment. *Mills v. Angel*, 995 S.W.2d 262, 266 (Tex. App. – Texarkana 1999, no pet.); *Sibai v. Wal-Mart Stores, Inc.*, 986 S.W.2d 702, 705 (Tex. App. – Dallas 1999, no pet.). If the evidence raises a material issue, a conflict of probative value as to a theory of recovery, or if reasonable minds could differ as to the controlling facts, then a directed verdict is improper. *Byrd v. Delasancha*, 195 S.W.3d 834, 837 (Tex.App.— Dallas 2006, no pet.).

b. **When the Evidence is Conclusive**. A party is entitled to a directed verdict when the evidence on a claim or defense is conclusive. *Orozco v. Orozco*, 917 S.W.2d 70, 73 (Tex. App. – San Antonio 1996, writ den.). A directed verdict is proper when reasonable jurors could only make one finding from the evidence. *Vance v. My Apt. Steak House, Inc.*, 677 S.W.2d 480, 483 (Tex. 1984).

c. **Interested Party or Witness Testimony as a Basis**. A directed verdict may be based solely on evidence from an interested party or

witness only if the evidence is clear, direct and positive, and devoid of inconsistencies and contradictions, reasonably capable of exact statement, uncontroverted by other witnesses or the circumstances, and all the evidence points to the truthfulness of the witness. *Collora v. Navarro*, 574 S.W.2d 65, 68-70 (Tex. 1978).

2. Defect in Pleadings.

a. **Point Out Defects in Writing**. TEX. R.CIV. P. 90 suggests that defects in pleadings must be pointed out by exception in writing and not by motion for instructed verdict. However, a motion for directed verdict is proper if a party presents a claim or defense not recognized by Texas law. *Arguelles v. UT Family Med. Ctr.*, 941 S.W.2d 255, 258 (Tex. App. – Corpus Christi 1996, no writ) (court directed verdict because Texas does not recognize "lost chance doctrine" in medical malpractice actions); *Anderson v. Vinson Expl., Inc.*, 832 S.W.2d 657, 665 (Tex. App. – El Paso 1992, no writ) (court directed verdict because under DTPA investor is not "consumer"); *Dillard v. Broyles*, 633 S.W.2d 636, 644 (Corpus Christi 1982, writ ref'd n.r.e.) (court directed verdict on statute of limitations to breach of warranty claim).

b. **Defective Pleadings as Insufficient to Support a Verdict**. A directed verdict is also proper if a defect makes the pleadings insufficient to support a judgment. *Crown Cent. Petroleum Corp. v. Coastal Transp. Co., Inc*., 38 S.W.3d 180, 184 (Tex. App. – Houston [14th Dist.] 2001, pet. granted in part); *Conex Int'l Corp v. Cox*, 18 S.W.3d 323, 327 (Tex. App. – Beaumont 2000, pet. den.); *Mills v. Angel*, 995 S.W.2d 262, 266 (Texarkana 1999, no pet.); *CDB Software, Inc., v. Kroll*, 992 S.W.2d 31 (Tex. App. – Houston [1st Dist.] 1998, no pet.); *Sibai v. Wal-Mart Stores, Inc*., 986 S.W.2d 702, 705 (Tex. App. – Dallas 1999, no pet.).

3. Scintilla of Evidence.

a. **Must Have More Than A Scintilla**. The trial court has a duty to enter a directed verdict if the evidence is so weak as to amount to a scintilla, surmise or a suspicion of evidence. *Urquidi v. Phelps Dodge Ref. Corp*., 973 S.W.2d 400, 403 (Tex. App. – El Paso 1998, no pet.); *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d 435, 440 (Tex. App. – Texarkana 1998, no pet.); *Hunter v. Carter*, 476 S.W.2d 41 (Tex. App. – Houston [14th Dist.] 1972, writ ref'd n.r.e.). Mere possibilities are insufficient to avoid a directed verdict. *Arlington Mem'l Hosp. Found., Inc. v. Baird*, 991 S.W.2d 918 (Tex. App. – Fort Worth 1999, pet. den.). The court should direct a verdict when reasonable minds can draw only one conclusion from the evidence. *Vance v. My Apt. Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 483 (Tex. 1984).

b. **Legally Insufficiency and No Evidence**. A directed verdict is proper when the evidence is legally insufficient or no evidence raises a fact issue that must be established before the adverse party is entitled to judgment. *Crown Cent. Petroleum Corp. v. Coastal Transp. Co., Inc*. 38 S.W.3d 180, 184 (Houston [14th Dist.] 2001, pet. granted in part); *Miga v. Jensen*, 25 S.W.3d 370, 375 (Tex. App. – Fort Worth 2000, pet. granted); *Conex Int'l. Corp v. Cox*, 18 S.W.3d 323, 327 (Beaumont 2000, pet. den.); *Wyler Indus. Works, Inc., v. Garcia*, 999 S.W.2d 494 (Tex. App. – El Paso 1999, no pet.). The evidence must be lacking as to any fact proposition that must be established for the opponent to be entitled to judgment. *Mills v. Angel*, 995 S.W.2d 262, 266 (Tex. App. – Texarkana 1999, no pet.); *Sibai v. Wal-Mart Stores, Inc*., 986 S.W.2d 702, 705 (Tex. App. – Dallas 1999, no pet.).

c. **Evidence Must Have Probative Value**. The proponent must present evidence of a probative value on the issues in question to avoid a directed verdict. *Szczepanik v. First S. Trust Co*., 883 S.W.2d 648, 649 (Tex. 1994) (per curiam). If the record contains any probative and conflicting evidence on a material issue, the appellate court must reverse, since the issue should have been resolved by the jury. *Porterfield v. Brinegar*, 719 S.W.2d 558, 559 (Tex. 1986); *White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983).

d. **Consideration of Evidence in Light Most Favorable to Adverse Party**. The court considers the evidence in the light most favorable to the adverse party, disregarding all

evidence and inferences to the contrary and giving the adverse party the benefit of all reasonable inferences created by the evidence. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex. 1996); *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 275-76 (Tex. 1995); *Crown Cent. Petroleum Corp. v. Coastal Transp. Co., Inc.* 38 S.W.3d 180, 184 (Houston [14th Dist.] 2001, pet. gr. in pt.). If there is any conflicting, probative evidence, the trial court must submit the issue to the jury. *Szczepanik v. First S. Trust Co*., 883 S.W.2d 648, 649 (Tex. 1994) (per curiam); *Air Conditioning, Inc. v. Harrison-Wilson-Pearson*, 151 Tex. 635, 253 S.W.2d 422, 425 (Tex. 1952); *Facciolla v. Linbeck Constr. Corp.*, 968 S.W.2d 435, 440 (Texarkana 1998, no pet.).

e. **Circumstantial Evidence Is Sufficient.** A necessary fact is not to be discounted merely because it is proved by circumstantial evidence. Circumstantial evidence and its inferences can be a sufficient basis for finding an ultimate fact. Under the equal inference rule, meager circumstantial evidence from which equally plausible but opposite inferences may be drawn is speculative and legally insufficient. *$165,524.78 in U.S. Currency v. State*, 47 S.W.3d 632, 635 (Houston [14th Dist.] 2001), *cert. denied* 123 S. Ct. 435. Thus, if the circumstances are consistent with either of two sets of facts, and nothing shows that one set of facts is more probable than the other, neither fact can be inferred. *Wal-Mart Stores v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998); *City of Beaumont v. Spivey*, 1 S.W.3d 385, 395 (Tex. App. – Beaumont 1999, pet. denied); *see Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 278 (Tex. 1995) (meager circumstantial evidence insufficient if inferences equally likely and merely establish suspicion); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993) (some suspicion linked to other suspicion produces only more suspicion, which is not same as some evidence). Thus, circumstances equally consistent with the existence and non-existence of the ultimate fact are insufficient to establish the existence of the ultimate fact. *S. Tex. Water Co. v. Bieri*, 247 S.W.2d 268, 273 (Tex. App. – Galveston 1952, writ ref'd n.r.e.). The equal inference rule is merely a species of the no-evidence rule that when the evidence does not support an inference it is no evidence. *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001).

f. **Burden of Proof and Sufficiency of the Evidence**. A party having the burden of proof makes its case by presenting evidence sufficient to justify, even though not strong enough to compel, a finding favorable to the party. *Robb v. Gilmore*, 302 S.W.2d 739 (Tex. App. – Fort Worth 1957, writ ref'd n.r.e). A verdict should not be set aside merely because a jury could have drawn different inferences or conclusions. *Benoit v. Wilson*, 239 S.W.2d 792, 797 (Tex. 1951). If there is any conflicting evidence on an issue, it should be resolved by the jury. *White v. Sw. Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Brookshire Bros., Inc. v. Wagnon*, 979 S.W.2d 343 (Tex. App. – Tyler 1998, no pet).

g. Cases:

(1) *Sherman v. Elkowitz*, 130 S.W.3d 316, 320 (Tex. App. – Houston [14th Dist.] 2004, no pet.). Trial court properly granted directed verdict against plaintiffs, as there was no evidence real estate brokers made any misrepresentations or failed to disclose any defects in the property.

(2) *Coronado v. Schoenmann Produce Co.*, 99 S.W.3d 741, 757 (Tex. App. – Houston [14th Dist.] 2003, no pet.). Trial court properly granted directed verdict, as there was no evidence to raise a fact issue.

(3) *Alejandro v. Robstown Ind. Sch. Dist.*, 131 S.W.3d 663, 668 (Tex. App. – Corpus Christi 2004, no pet.). Trial court granted directed verdict against school employee on grounds that firing was not retaliatory. In reviewing the evidence most favorable to the school employee, appellate court could not conclude that the trial court erred.

(4) *Vaughn v. Ford Motor Co.*, 91 S.W.3d 387, 396 (Tex. App. – Eastland 2002, pet. den.). No evidence presented to support cause of action and therefore summary judgment as to that cause of action appropriate.

XI. PREPARATION OF THE JURY CHARGE.

A. Overview.

This part of the article covers the "nuts and bolts" of jury charge practice including a judicial survey of common mistakes, helpful library references, recommended uses of the jury charge before and during trial, the evolutionary cycle of broad-form submissions, current hot topic questions related to the jury charge, and a checklist for preservation of error in the court's charge.

The next part of this article covers pre-trial orders, pleadings, fair notice in pleadings, trying issues by consent, and the charge conference.

The last part of this article covers specific areas of objections and appellate review.

B. Judicial Survey of Common Mistakes, Library References and Recommended Uses of the Charge Before and During Trial.

1. Judicial Survey of Common Mistakes.

The author expresses appreciation and attribution to federal and state district judges for their past survey responses, and comments on common mistakes, and recommendations, on the court's charge which follow:

(1) No collaborative effort by Plaintiff and Defendant

(2) Requesting irrelevant generic charges

(3) Requesting argumentative instructions

(4) Making misstatements of law or law related facts

(5) Placing improper burdens of proof

(6) Making unwarranted burden shifts

(7) Submitting shades and phases of the same issue

(8) Asking for too long a charge

(9) Failing to object and submit because of *Payne* confusion

(10) Confusion between informal and formal charge conference after *Alaniz*

(11) Confusion between present rules and supreme court opinions

(12) Proposing evidentiary vs. broad form questions

(13) Proposing "nudging" instructions that comment on the weight of evidence

(14) Putting cites directly on the issue so it can not be used

(15) Not thinking through on how to properly condition issues

(16) Going to trial in a complex case without a concise charge

(17) Too many proposed issues

(18) Not giving the charge much thought before or during trial

(19) Following the PJC blindly without thought given to legislative changes

(20) Not knowing how to object to / or submit proposed charges

(21) Ignoring local rule requirements for an attorney conference to possibly reach an "agreed charge"

(22) Failure to bring good, clean proposed charges to trial

(23) Writing charges that only an appellate court can understand

(24) Writing "proposed" on charge so it cannot be photocopied

(25) Waiting until the charge conference to begin talking about the charge

(26) Making charge conferences a start from scratch, rather than short and snappy proceedings

(27) Requesting charges that are too complicated

(28) Submitting too many charges

(29) Submitting specific vs. global issues in commercial cases

(30) Requesting incorrect types of damages in commercial and DTPA cases

(31) Making general vs. specific objections

(32) Making global objections

(33) Failing to submit requested charges

(34) Waiting until the last minute to complain about an error that is easy to correct

(35) Failing to use the same "form" as is used in the charge

(36) Failing to bring a "clean ready-to-insert-in-the-charge" copy of each issue

(37) "Junking" up the charge with extraneous matter ("refusal", "accepted", case cites, PJC references)

(38) Failing to use a format that is "user-friendly"

(39) Formatting charges on the top half of the page

(40) Failing to submit separate questions on different pages

(41) Failing to put instructions related to questions on the same page

(42) Making objections that are good after trial, such as "factual sufficiency."

(43) Submitting purely legal questions without adequate instructions, i.e., "was the contract valid."

(44) Converting the latest case law into an instruction

(45) Failing to prepare a proposed jury charge before trial

(46) Failing to revise the proposed charge as the trial develops

(47) Failing to follow the PJC if it applies to your case

(48) Failing to provide case or statutory or PJC support for charge on an attached page

(49) Failing to have staff available to revise charge if necessary

(50) Failing to have proposed charges ready to submit if the court refuses to submit the charge you want

(51) Failing to have objection to the charge prepared in advance, if possible

(52) Remembering that it is the court's charge

(53) Preserving error if necessary

(54) Following the charge in your argument

(55) Waiting too late to consider the preparation of the charge

(56) Varying the PJC for an advantage that can result in "nudging" instructions

(57) Asking the judge for more than you can support on appeal

2. Library References.

The following outstanding library and West's digest references with recent case citations are recommended:

(1) Michel O'Connor, *O'Conner's Texas Rules*, Ch. 8 - I, p.p. 611-626 (2008).

(2) McDonald & Carlson, *Texas Civil Practice*, §22:50 (1st ed.) (August 2005).

(3) Hon. Adele Hedges and Daniel K. Hedges, West's Texas Practice Guide - Civil Trial, Chapter 15 [Jury Charge] §§15:1-:293 (2007).

(4) West's "Appeal and Error" Key Nos. 836, 930(3), 989, 1175(1), 1177(6), 1177(7) and 1183(6). *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995*); Calhoun v. Chase Manhattan Bank (U.S.A.), N.A.*, 911 S.W.2d 403, 409-10 (Tex. App. – Houston [1st Dist.] 1995, no writ); *Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farms Dev., Inc.*, 915 S.W.2d 61, 70, 72 (Tex. App. – Corpus Christi 1996, writ denied);

Taub v. City of Deer Park, 912 S.W.2d 395, 397-98 (Tex. App. – Houston [14th Dist.] 1995, no writ); *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274-76 (Tex. 1995); *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995).

(5) Other West's Digests:

a. TEX. R. CIV. P. 271, [CHARGE TO THE JURY] - "Trial" Key Nos.: 182, 203(1), 214 and 223. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790-91 (Tex. 1995).

b. TEX. R. CIV. P. 272 [REQUISITES] - "Trial" Key Nos.: 186, 223, 225, 228(1) and 277. *Plainsman Trading Co. v. Crews*, 898 S.W.2d at 790-91.

c. TEX. R. CIV. P. 273 [JURY SUBMISSIONS] - "Trial" Key Nos.: 258(1) and 269.

d. TEX. R. CIV. P. 274 [OBJECTIONS AND REQUESTS] - "Trial" Key No. 278.

e. TEX. R. CIV. P. 275 [CHARGE READ BEFORE ARGUMENT] - "Trial" Key No. 220.

3. Recommended Uses of the Jury Charge Before and During Trial.

The West's Texas Practice Guide, Civil Trial, Chapter 15, §§ 15.25-.34 (2007), authored by the Hon. Adele Hedges and Daniel K. Hedges makes the following recommendations regarding the courts charge:

a. Prepare a Draft of the Charge at the Outset of the Case - Although the jury will not be charged until after the close of evidence, preparation of the charge, including defensive questions, instructions, and definitions, is recommended before conducting the discovery process. While the charge will change and be refined as the issues in the case become narrower and better defined, preparing the charging document at the outset of the case will lend focus to the pretrial proceedings and prepare counsel for a thorough charge submission at the close of evidence.

b. Use the Charge as a Roadmap for the Case and Evidence Developments - Preparation of a draft charge before beginning discovery is invaluable in focusing the process of evidence gathering and keeping the issues clear. After having gone through the process of fleshing out a draft charge, discovery will be more efficient and focused. Charge questions, instructions, and definitions become useful in conducting depositions, drafting discovery motions, and document requests.

c. Keep Track of the Changing Issues - By using a draft jury charge throughout the proceeding, issues, defenses, and grounds of recovery can be added or deleted as the case continues through the pretrial process. When the evidence is completed and the charging process commenced, the attorney will be more aware of the issues that must be included in the final charge. By taking the time to update the charge as the case progresses, the lawyer allows himself or herself time to consider issues for inclusion from all strategic aspects.

d. Use a Draft of the Charge at the Pre-Trial Conference - A draft charge document is useful at the stage of the pretrial conference because it gives a clear form to the objectives of the parties and the content and strength of the evidence. The party with the forethought to have prepared a draft charge is in a stronger position to set the scheduling and tone of the case. *See* TEX. R. CIV. P. 166. It may also help in achieving a settlement by forcing each side to better assess the efficacy of its own positions and focus the lawyers' attention on the ultimate issues of the case.

e. Use the Charge Throughout the Trial - The charge can be utilized several times throughout a trial.

f. Use the Charge in Voir Dire - The object of voir dire is to examine potential jurors and to determine whether or not they are competent or desirable to sit as jurors in a particular case. The examination process allows counsel to exercise their challenges (both peremptory and for cause) against specific jurors. Because a proposed jury charge is nothing more than a collection of questions, instructions and definitions, it has obvious applications in juror examination. The prepared charge provides a

basic stating point for examining jurors and helps to insure a favorable jury.

g. Use the Charge in the Opening Statement - The objective of the opening statement is to set the tone, pace, and objective for the trial from the standpoint of the party with the burden of proof. It provides the path for each party's rendition of the facts the jury will hear. Using a proposed charge serves to frame the issues and allows the party who has taken the time to prepare it, to make a more focused presentation to the jury. This process simplifies complicated issues and gives a party a strategic advantage from the beginning by familiarizing the jury with the terms and hot buttons of your case.

h. Use the Charge as a Checklist - The proposed charge's assortment of instructions, definitions and questions can be used as a checklist that the counsel who opens the case can use to cover all the significant issues, anticipate and provide evidence to establish answers, and generally guide the case along a chosen course.

i. Use the Charge in Closing Argument - Using the proposed charge at all stages of case preparation gives clarity to the proceeding. As the parties' last opportunity to address the jury directly, closing argument is particularly important. Using the proposed charge, the closing argument will have greater strength, because counsel can review the questions and issues that the jury will consider, based on the evidence, and suggest the answers to the questions.

C. Evolution of the Rules Governing Jury Submissions.

1. Background History.

In 1973 the Texas Supreme Court began moving toward modern broad-form practice when TEX. R. CIV. P. 277 ("Rule 277") was amended to abolish the requirement that issues be submitted "separately and distinctly." The amendment of Rule 277 granted to the trial courts the discretion to submit issues broadly because, for example, the "separate and distinct" requirement in an ordinary "fender-bender" auto accident generally resulted in a charge containing three questions for *each* liability theory, i.e., 1) did the act occur?; if so, 2) was such act negligence?; and, if so, 3) was such negligence a proximate cause of the occurrence in question? These same three inquiries being submitted for each alleged violation, such as speed, lookout, turning, horn, improperly changing lanes, failure to maintain assured clear distance, and so on, was granulation in its purest form. Understandably in some cases, reading the Court's Charge took as long as it did to try the case.

Responding to the Texas Supreme Court's mandate to submit issues broadly, the State Bar of Texas established pattern jury charge committees for various areas of practice, including family law, in 1987. In 1988, the Texas Supreme Court amended Rule 277, again, to provide for mandatory broad-form submission of jury questions, "whenever feasible."

2. Proposed Rule Changes.

In 1996, the Supreme Court Jury Charge Task Force Report prepared, at the request of the Texas Supreme Court, detailed proposed revisions to Texas Rules of Civil Procedure 271 through 279. These rules govern the preparation and submission of the Charge of the Court to the jury, as well as the requirements for preserving error in the Charge for appeal.

The Task Force's proposed changes organize, simplify and clarify several confusing aspects of the existing rules. The Supreme Court's decision in *State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) set the stage for this trend, and the proposed substantive changes to the rules are consistent with *Payne*.

Several significant changes in the rules have been proposed, including the following:

(1) Eliminating all doubt and requiring an objection to preserve error in all cases. In addition, a party will be required to tender charge elements "which the party was required to plead." This recommendation should "clear-up much of the confusion created by the shift to broad-form submission." P. Michael Jung, *The Court's Charge*, in State Bar of Texas Prof. Dev. Program, 17 Advanced Civil Trial Course S, S-14 (1994).

(2) Replacing the "substantially correct" test which, in reality, has become a "totally correct"

test. *Id.*

(3) Replacing the mandatory endorsement and signature of "refused" or "modified" requests. An optional endorsement and signature is provided for under the new proposed rule, which will create the presumption of a timely tender. *Id.*

(4) Eliminating the "two phase" requirement that requests be made separate and apart from written or oral objections. "The Task Force viewed a systematically interleaved proffer of objections and requests as a permissible (indeed usually superior) method of presenting complaints." *Id.*

The Texas Supreme Court has not acted on its Task Force's recommendations since their submission to the Court in 1996. The Task Force was created, in part, as a result of the Court's pronouncement in *Payne* in 1992 that the applicable rules of procedure (Rules 271-279) had "lost their philosophical meanings." 838 S.W.2d at 241. Exasperation by one court of appeals over the lack of action by the Texas Supreme Court was articulated in *Borden, Inc. v. Rios*, 850 S.W.2d 821, 827, n. 3 (Tex. App. – Corpus Christi 1993), *writ granted without reference to the merits*, 859 S.W.2d 70 (Tex. 1993):

> On the one hand, the Texas Supreme Court tells us that *Payne* does not change any rules; yet, on the other hand, *Payne* reverses and renders any charge error which was not raised by objection. But see TEX. R. CIV. P. 274, *supra*.

We are thus faced with a difficult choice. We can interpret the meaning of *Payne* in light of its result and thus ignore Rule 274, in which case appellant need not object to preserve error. Or, we can ignore the result in *Payne* (or consider it to be an anomaly without application to the principles announced therein) and apply Rule 274. The latter option is seductive, indeed, for Rule 274 gives us a bright-line test for determining whether error is preserved: whether appellant objected. The former option is more problematic as it requires us to determine whether "the party made the trial court aware of the complaint, timely, and plainly, and obtained a ruling," and we are not told how to measure awareness or plainness of complaints.

As much as we would like to be able to reduce the questions of preservation to simply whether appellant objected, we feel that this would be inappropriate in light of *Payne*. However, since we are not certain what effect *Payne* has on the Rules or whether its test has actual vitality rather than mere desirability, we should not ignore the requirements of Rule 274. Therefore, we shall attempt to examine the question of preservation in light of both Rule 274 and the "test" announced in *Payne*.

PRACTICE NOTE: The Texas Supreme Court has written in a concurring opinion that the holding in *Payne* rejects the formalistic view of Rule 274. *First Valley Bank of Lost Fresnos v. Martin*, 144 S.W.3d 466, 476 (Tex. 2004) (Wainwright, J. concurring). The Court rejects the theory of form over substance and embraces the purpose of Rule 274, which is "to make the trial court aware of objectionable matter." *Id*. In *Martin*, Justice Wainwright stated, in a concurring opinion, that there was a valid objection to the jury submission and that the court overruled the charge submission even though the proper procedure was not followed. The objection was made through the submission of an alternate jury charge, and the court overruled the charge by refusing to use it. *Id*. There is still a question on this issue, though, because *Martin* fails to overrule previous cases that rule to the contrary. *See Hernandez v. Montgomery Ward and Co.*, 652 S.W.2d 923, 925 (Tex. 1984).

D. Hot Topic Questions.

Hot topic questions concern the feasibility of broad form submissions in certain situations, the use of instructions and what facts require a remand versus a rendition.

1. When is Broad Form Submission Not Feasible Under *Casteel*?

In 2000, the Texas Supreme Court decided *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), which affirmed in part and reversed in part *Casteel v. Crown Life Ins. Co.*, 3 S.W.2d 582 (Tex. App.—Austin 1997). In *Casteel* policy-holders brought an action against a life insurer and an agent to recover for misrepresentations that a premium obligation would vanish. The agent filed a cross-claim for acts or practices in the business of insurance and DTPA violations. The insurer settled with the policy-holders after a verdict against it. The trial court entered judgment in favor of the insurer on the cross-claim and entered judgment on the jury verdict against the agent. The question and answer

for determination relevant to this article were:

Question: Whether the inclusion of invalid theories of **liability** submitted to the jury in a single broad-form question constitutes harmful error?

Answer: Yes. The court held that submitting four invalid theories of liability in a single broad-form jury question (which submitted thirteen theories of liability) is harmful where it cannot be determined whether the jury based its verdict on one or more of the invalid theories.

In *Casteel*, the question requested a single answer on Crown's liability which the jury answered affirmatively.

PRACTICE NOTE: When submitting alternative theories of recovery in one broad-form question in family law cases, place answer blanks beside each theory of liability or recovery and against each party.

The court further noted that Rule 277 is not absolute; rather, it mandates broad-form submission whenever feasible. In *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992) the Court noted that submitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible. Similarly, 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. Furthermore, Rule 277 mandates that the court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. It is implicit in this mandate that the jury be able to base its verdict on legally valid questions and instructions. Thus, it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability.

The extent of *Casteel's* application became confused when the First Court of Appeals, in *Harris County v. Smith*, 66 S.W.3d 326, 336 (Tex. App.—Houston [1st Dist.] 2001), *rev'd*, 96 S.W.3d 230 (Tex. 2002) held that *Casteel* did not apply to errors in a broad-form **damages** charge:

> . . . the policy concerns that may have prompted *Casteel* do not weigh as strongly here in favor of abandoning settled harm analysis for erroneously submitted elements of damages that the jury may have possibly, but not necessarily, relied on in awarding damages for Harris County's unchallenged negligence. . . . *Casteel* addresses only erroneously submitted **liability** questions; nothing in *Casteel* suggests it applies to erroneously submitted elements of **damages**. The mere possibility of error has never sufficed for analogous challenges to the sufficiency of the evidence to support an element of damages awarded. Moreover, we agree with Professor Dorsaneo, that traditional harm analysis is the better reasoned approach for assessing error in submitting elements of damages.

See also Exxon Pipeline Co. v. Zwahr, 35 S.W.3d 705, 713 (Tex. App.–Houston [1st Dist.] 2001), *rev'd on other grounds*, 88 S.W.3d 623 (Tex. 2002) (court should have submitted broad-form damages question in easement condemnation action).

The Fourteenth Court of Appeals disagreed with *Smith*, in *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 154 (Tex. App. – Houston [14th Dist.] 2001, pet. denied), and applied *Casteel's* holding to a damages charge. Similarly, in *Iron Mt. Bison Ranch v. Easley Trailer Manufacturing*, 42 S.W.3d 149, 157-58 (Tex. App. B Amarillo 2000, no pet. h.), the court held:

> The Texas Supreme Court has held that when, in the face of a timely and specific objection, a trial court submits a single broad-form liability question incorporating multiple theories of liability, some valid and some invalid, the submission is harmful error when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). It is improper to allow a defendant to be held liable without a judicial determination that a fact-finder actually found that the defendant should be held liable on proper, legal grounds. *Id.* It is no less improper to allow assessment of damages against a defendant without a judicial

> determination that a fact-finder actually found an amount assessed as damages on proper, legal grounds. We thus hold that in the face of a timely and specific objection, submission of a single broad-form damage question incorporating multiple measures of damages, some valid and some invalid, is harmful error when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. *See id.* Appellants' objection was sufficient to comply with TRCP 274 and to preserve error.

See also El Paso Ref., Inc. v. Scurlock Permian Corp., 77 S.W.3d 374, 388 (Tex. App. – El Paso 2002, pet. denied)(questioning whether *Casteel* should be extended to defensive instructions).

In December, 2002, the Texas Supreme Court resolved this dispute by holding, in a 5-4 decision, that *Casteel* also applies to damages issues. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002):

> In *Casteel*, we reaffirmed our reasoning in *Lancaster v. Fitch*, 112 Tex. 293, 246 S.W. 1015 (Tex.1923), where this Court recognized the inherent harm to the administration of justice caused by mixing valid and invalid liability theories in a single broad-form liability question. *Casteel*, 22 S.W.3d at 389. The same year we decided *Lancaster*, we applied its reasoning to a similar situation involving a broad-form damages question. See *E. Tex. Elec. Co. v. Baker*, 254 S.W. 933, 934-35 (Tex.1923). . .
>
> Just as in 1923, a litigant today has a right to a fair trial before a jury properly instructed on the issues "authorized and supported by the law governing the case." *Casteel*, 22 S.W.3d at 389 (quoting *Lancaster v. Fitch*, 246 S.W. at 1016). We conclude that the trial court erred in overruling Harris County's timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining "whether the jury based its verdict on an improperly submitted invalid" element of damage. *Casteel*, 22 S.W.3d at 388; see also Tex. R. App. P. 61.1(b). *Id*. at 3-4.

The Supreme Court, however, reaffirmed the usefulness of broad-form submission:

> . . . the dissent decries our decision today as the end of broad-form submission, suggesting that parties will inevitably misapply our reasoning to charge objections that complain about "potential" errors, such as the factual insufficiency of the evidence. Here, of course, we have actual error in the charge, not an imagined or potential one. More importantly, our decision is not a change in recommended broad-form practice. . . . Today's decision will change the practice only of those lawyers and judges who have heretofore disregarded the PJC's advice on this question.
>
> Neither our decision today nor *Casteel* is a retrenchment from our fundamental commitment to broad-form submission. *Id*. at 4-5.

Justice Schneider did not participate, and Justices Harkinson and Enoch joined in a dissent authored by Justice Harkinson. They argued for a distinction between a technical legal deficiency which is beyond the jurors' competence to recognize or correct, such as existed in *Casteel*, and an evidentiary deficiency, as in this case, which is uniquely in the jurors' province. Thus, they believed the jury was capable of following the trial court's instruction to award damages only for those particular types of injuries that the plaintiffs suffered. (There was ample evidence to support the damages award under the properly submitted elements.)

2. What is the Latest Word on Instructions?

The "latest word" on jury instructions came in 2003 and 2005, in: *Golden Eagle Archery, Inc. v. Ronald Jackson*, 116 S.W.3d 757 (Tex. 2003), *Diamond Offshore Mgmt. Co. v. Guidry*, 171 S.W.3d 840 (Tex. 2005), *Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230 (Tex. App. – Texarkana 2005, no pet.), and *Taylor v. Tex. Dept. of Protective and Regulatory Serv.*, 160 S.W.3d 641 (Tex. App.—Austin 2005, pet. denied).

a. In *Golden*, Plaintiff was injured by Defendant's product. Defendant contended that the trial court erred in submitting both "physical impairment of loss of vision" and "physical impairment other than loss of vision" as separate items of damages. Defendant argued that submitting these elements violated Rule 277 ("in all cases the court shall, whenever feasible, submit the cause upon broad-form questions").

Question: Whether there was reversible error in submitting separate items of damages for both "physical impairment of loss of vision" and "physical impairment other than loss of vision"?

Answer: The Texas Supreme Court concluded that there was no reversible error in this granulated submission. Also, it should be noted that the trial court's instruction to the jury not to award overlapping damages was different than the State Bar of Texas Pattern Jury Charge 8.2 (General Negligence). The Texas Supreme Court observed in this case that the trial court's instruction was clearer than the PJC instruction. Whether or not the trial court decided that PJC 8.2 was outdated is not known. However, it is an example of a trial court staying "in tune" with the developing case law on Rule 277.

b. In *Diamond*, the claimant filed a wrongful death action under the Jones Act regarding a seaman who was killed ashore in a one-car accident. The employer argued there was no conclusive evidence the seaman was in the course of his employment when the accident occurred. Since the evidence was not conclusive, he argued the jury should have been asked to find whether the seaman were in the course of their employment. At issue was:

Question: Whether the defendant is entitled to an "improper inferential rebuttal question" which presents a contrary theory from the one relied upon by the claimant for recovery?

Answer: Yes. The Supreme Court said "[t]he basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery . . . The questions [the employer] requested did not present a theory inconsistent with the plaintiff's claim; they asked about elements of the plaintiff's claim." *Diamond*, 171 S.W.3d at 844. The Court further said that the defendant was not obligated to request the question, but the defendant only had to object to the absence of the inquiry. *Diamond*, 171 S.W.3d at 844.

PRACTICE NOTE: For an instruction to be proper, it must (1) assist the jury; (2) accurately state the law; and (3) find support in the pleadings and the evidence. TEX. R. CIV. P. 278. *See, e.g.*, *In re K.M.B.*, 91 S.W.3d 18, (Tex. App. – Fort Worth 2002, no pet.) (constructive abandonment instruction in this family law case assisted the jury in reaching its verdict and accurately tracked the statute's language).

c. In *Sunbridge*, the estate of the deceased brought an action to recover damages when the resident was killed as a result of a wheelchair accident which occurred when the resident was left unattended. *Sunbridge*, 160 S.W.3d 236. Defendants argued on appeal that the court failed to limit the charge to only those theories supported by legally sufficient evidence. *Sunbridge*, 160 S.W.3d at 253. They argued prior falls of the resident should not be commingled with the fall which killed her since the question referred to disfigurement and physical impairment and there was no evidence of either in reference to the prior falls. *Id*.

Question: Whether specific acts at issue constitute separate theories of liability which if put in a broad form jury submission would produce a mixture of valid and invalid elements?

Answer: No. The events which took place before the final fall did not constitute a theory of liability separate from the final fall. *Sunbridge*, 160 S.W.3d at 254. Since the Plaintiff based her claim on the theory that the prior falls created a pattern of neglect, the court ruled the acts before the fall would not constitute a separate theory of liability rendering the submission erroneous. *Sunbridge*, 160 S.W.3d at 254.

d. In *Taylor*, a father appealed a termination of parental rights trial stating error had occurred in the trial court's use of a broad form submission. *Taylor*, 160 S.W.3d at 648. He claimed the submission of alternative statutory termination grounds could have enabled the jury to find in favor of termination without the required ten jurors finding one particular termination ground to be established. *Taylor*, 160 S.W.3d at 648.

Question: Whether there is error in a broad form submission when there is sufficient evidence to support each of the statutory termination grounds asserted in the case?

Answer: No. The court held "Casteel was not implicated where there was sufficient evidence to support each of the statutory termination grounds asserted in the case." *Taylor*, 160 S.W.3d at 649. Since each of the alternative statutory termination grounds offered were supported by sufficient evidence, giving a broad form submission did not provide harmful error.

3. How Do You Preserve Error and What Requires a Remand Versus a Rendering on Charge Errors Under *Payne*?

The best way to answer these questions is to consider the language in *Payne* which may touch on this point and then consider if *Payne* altered the existing case law relating to reversal and remand. The *Payne* test for preserving charge errors is:

> "...whether 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 test for remand versus rendition upon reversal follows. If the court of appeals finds harmful (as opposed to harmless) error in the charge, the next important question is whether the court should reverse and remand or reverse and render. The answer to this question depends on whether the complaining party raised and properly preserved "no evidence" and/or "insufficient evidence" points of error. If so, the following rules will apply. The court of appeals must first consider the "no evidence" point, which is subject to review by the Supreme Court on application for writ of error. If the court of appeals sustains the "no evidence" point, it will reverse and render. If it denies the "no evidence" point but sustains the factual insufficiency point, it will remand. The court of appeals has no jurisdiction to render based on a factual insufficiency point.

Accordingly, the prayer for relief in your appellate brief is very important. In the court of appeals, ask for a reversal and rendition on your "no evidence" point of error, if you are the complaining party. In the Supreme Court, ask for reversal and remand to the court of appeals (if the Supreme Court overrules the no evidence point) to consider and decide the "factual insufficiency" point. In the court of appeals, ask for a reversal and remand for a new trial if the court sustains your "factual insufficiency" point of error. The Supreme Court has no jurisdiction to review the sufficiency of the evidence. *See Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820-22 (Tex. 2002) (plaintiff failed to present legally sufficient evidence that defendant's negligence proximately caused his injuries); *Glover v. Tex. Gen. Indem. Co.*, 619 S.W.2d 400, 402 (Tex. 1981); *Wright Way Spraying Serv. V. Butler*, 690 S.W.2d 897, 898 (Tex. 1985); *In Re King's Estate*, 244 S.W.2d 660, 661-62 (Tex. 1951); Tex. Const., Art. 4, §6.

PRACTICE NOTE: When a defendant appeals a broad-form, multi-element damage award (e.g., for physical pain and mental anguish), claiming factual and legal insufficiency, he must appeal each damage element and establish that the evidence is insufficient to support the entire award. Otherwise, he may waive the challenge. *Wal-Mart Stores, Inc. v. Garcia*, 30 S.W.3d 19, 24 (Tex. App. – San Antonio 2000, no pet.), *disap'd on other grounds*, 81 S.W.3d 812, 816 (Tex. 2002).

4. What is the Family Law Application of the 'Whenever Feasible' Requirement?

a. **Hypothetical:** Suppose H alleges in his divorce petition that his marriage with W is insupportable, and W is guilty of cruel treatment. W counters with allegations of adultery, cruel treatment and abandonment, by H. *Both parties request the court to make a disproportionate division of property in their respective favor based upon fault in the breakup of the marriage.* The court instructs the jury on insupportability, adultery, cruel treatment and abandonment and then submits PJC 201.D ["Do grounds exist for divorce between H and W?"], to which the jury answers "yes." In the Charge Conference H's attorney properly preserves error on the submission of the broad-form question (PJC 201.D) stating that there is, and was, no evidence of adultery and abandonment.

The trial court divides the property 70 - 30 favoring W based on H's fault in the break-up of the marriage because, as the trial court states, in listening to the evidence in the trial, the judge believed W and not H. Post-trial interviews with

jurors, by counsel for H, discloses that the jury totally believed H and not W, that is, that the marriage was insupportable, and W was guilty of cruel treatment toward H.

Question: Under the hypothetical facts stated above, was it feasible to submit the question broad-form, without granulation, on the theories of recovery alleged by H and W?

Answer: No. It was not feasible because the court, in making its division, had no findings of fault upon which to make an unequal division of property favoring W. Tex. R. App. P. 61(b); *Houston County v. Smith*, supra. In *Phillips v. Phillips*, 75 S.W.3d 564 (Tex. App.- Beaumont, 2002, no pet.), the Court of Appeals observed that when a party does not obtain fault findings as a ground for divorce, the trial court can not consider fault in the break up of the marriage, even though that party has pleadings requesting the court to consider "fault in the break up of the marriage" in making its division of the marital estate of the parties.

b. **What is a proper submission under the hypothetical above?** Under *Crown Life Ins. Co. v. Casteel*, *supra*, it can be argued that the following submission properly submits the hypothetical case:

Do grounds exist for divorce between Party A and Party B as to:

1. insupportability of the marriage between Party A and Party B?
   _____
2. cruel treatment by Party A toward Party B, if any? _____
3. cruel treatment by Party B toward Party A, if any?
   _____
4. Party A's adultery, if any?
   _____
5. Party B's adultery, if any?
   _____
6. Party A's abandonment of Party B, if any?
   _____
7. Party B's abandonment of Party A, if any?
   _____
8. Party A and Party B living apart, if any?
   _____

Statutory and case law support for the definitions are: "Insupportability" – TEX. FAM. CODE §6.001, "Cruel treatment" – TEX. FAM. CODE §6.002 and *Henry v. Henry*, 48 S.W.3d 468, 473-474 (Tex. App.–Houston [14th Dist.] 2001, no pet.); "Adultery" – TEX. FAM. CODE §6.003, *Bell v. Bell*, 540 S.W.2d 432, 435 (Tex. Civ. App. – Houston [1st Dist.] 1976, no writ); "Abandonment" – TEX. FAM. CODE §6.005. **Practice Note:** Without a "granulation there is no way for the court to determine whether the jury decided the "grounds" based upon fault or no fault.

E. Checklist for Preservation of Error in the Court's Charge.

This outline is intended as an overview of the court's charge. The following is a synopsis of the court's charge, charge conference and appellate review.

1. Court's Charge Functions as the Verdict.

The court's charge is the "verdict" and functions as one of three components of a judgment in a jury trial: (1) pleadings + (2) evidence + (3) verdict = judgment. TEX. R. CIV. P. 310.

2. Three Kinds of Charges: Questions, Definitions, and Instructions.

Jury charges come in three forms: (1) questions, (2) definitions, and (3) instructions ("Q, D, I"). TEX. R. CIV. P. 278.

3. Three Kinds of Problem Charges: Omitted, Defective and Unnecessary Charges.

"Problem" charges come in three forms: (1) omitted charges, (2) defective (flawed) charges, and (3) immaterial, unnecessary or superfluous charges. TEX. R. CIV. P. 274, 279.

4. "The Test" for Preservation of Error in the Charge Conference.

"There should be but 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. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle." *Payne*, 838 S.W.2d at 241. For example, in *Se.. Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172-73 (Tex. 1999), the Texas Supreme Court held that an oil and gas lessee adequately objected to questions in a lessor's action for breach of duty to protect against substantial drainage, for purposes of preserving the issue for appeal, when it made the trial court aware of its complaint and obtained a ruling. The lessee 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 and pooling and drainage. During the hearing and the rehearing of its motion, the lessee 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. The lessee reurged its prior objections during the charge conference. *Id.*

PRACTICE NOTE: The *Payne* test set out above was not referred to by the majority in the later decided case of *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992, writ ref'd n.r.e.). In *Keetch*, Justice Mauzy emphasized in his dissent that the plaintiff both correctly objected to the granulations of questions and correctly requested the broad-form negligence question for a slip-and-fall case as suggested by the State Bar of Texas Pattern Jury Charge. However, the Supreme Court appears to be relaxing the standards for preserving charge error and has re-emphasized its support of the *Payne* waiver analysis. *See Lester v. Logan*, 907 S.W.2d 452, 453 (Tex. 1995) (jury issues and instructions submitted on a single page). In the *Lester's* Court's per curiam denial of the application for writ of error, a majority of the Court disapproved the analysis of the court of appeals concerning the waiver of complaint regarding the requested jury instructions. *Id*. However, because Lester had failed to request and tender a substantially correct instruction, the Court nevertheless held that error had been waived. *Id*. The Supreme Court also has recently stated " . . . *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, [however,] 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. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450 (Tex. 1995). *In re Stevenson*, 27 S.W.3d 195, 201 (Tex. App.—San Antonio 2000, pet. denied, 52 S.W.3d 735 (Tex. 2001)).

5. Rules for Preserving Error.

The more specific requirements of the rules for preserving error in the charge are set out below. These rules and procedures traditionally have been complex and confusing. However the Texas Supreme Court has issued opinions supporting the trend towards relaxing the requirements for preservation of error in the charge. *See, e.g., Payne*, 838 S.W.2d at 241; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Alaniz*, 907 S.W.2d at 450 (Tex. 1995). Until the new rules are enacted, however, a party should follow the established rules for preserving error in the charge.

Under the existing rules, to preserve error in the charge a party must make objections (oral or written) or submit in writing requests for additional questions, instructions, or definitions. TEX. R. CIV. P. 272, 274, 279. Whether a party should object, make a written request, or do both in light of *Payne*, generally depends on the answers to the following questions:

(1) Are you complaining of a question, instruction or definition?

(2) Who has the burden of proof?

(3) Did the court *omit* a question, instruction or definition? or

(4) Did the court *submit* a defective or erroneous question, instruction or definition?

Note, however, that when the trial court submits a question, instruction or definition which is erroneous, it does not matter which party has the burden of proof on the particular question being submitted. TEX. R. CIV. P. 274; *Religious of Sacred Heart v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992). The complaining party must object or any complaint is waived. *See Johnson v. State Farm Mut. Auto, Ins.*, 762 S.W.2d 267, 270 (Tex. App. – San Antonio 1988, writ denied).

6. Step-By-Step Analysis.

The following step-by-step analysis has been helpful to the author:

(1) Omitted Questions [Yours].

Step 1:

Request and tender the question in writing in substantially correct wording, including any appropriate instructions or definitions (or waiver occurs). TEX. R. CIV. P. 278.

AND

Step 2:

Have the rejected charge marked "refused," signed by the court, and filed with the clerk, failing which try to make a record, verbal or otherwise, of the court's ruling on the rejected charge. TEX. R. CIV. P. 276; *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382 (Tex. 1997).

AND

Step 3:

If it is an omitted question upon which you rely for affirmative relief, object specifically and distinctly.

Example: "Party A objects to the omission of (Q # ___) on the grounds that: (1) . . . , (2) . . . and (3) . . ."

(2) Omitted Questions (Theirs).

Step 1:
You need not request and tender or specifically and distinctly object, if the GROUND of recovery is omitted, because the opposing party has waived the omitted ground for relief if the opposing party has not followed Steps 1 and 2 above. When no question is submitted on a cause of action or a ground of recovery, the cause of action or ground of recovery is waived. TEX. R. CIV. P. 274.

Example: Common law negligence, strict products liability, D.T.P.A., and breach of contract.

AND

Step 2:

You must specifically and distinctly object, or at your option, request and tender, if an ELEMENT of the ground of recovery is omitted. Otherwise, your failure to object could result in a deemed finding against you to support the judgment. *See City of Houston v. Black*, 571 S.W.2d 496, 496-97 (Tex. 1978).

Example: In *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989), the plaintiff failed to submit proximate cause as an element in a medical malpractice case. After the defendant properly objected, the plaintiff did not tender a question with proximate cause as an element. The Supreme Court reversed and rendered on preservation of error grounds. The Court held that the defendant could have at his/her option requested and tendered the proximate cause element in the form of an instruction and preserved error. *Id.* (citing, *Morris v. Holt*, 714 S.W.2d 311 (Tex. 1986)).

Caveat: You must distinguish grounds of recovery from elements of grounds of recovery, for the reasons shown in Steps 1 and 2 immediately above.

(3) Omitted Definitions and Instructions (Yours or Theirs).

For omitted definitions and instructions, you must follow Steps 1, 2 and 3 (described in the subsection addressing preservation of error when the omitted question is your issue). Because definitions and instructions do not "belong" to either side, you must timely object specifically and distinctly, request and tender in writing the omitted definition or instruction in substantially correct wording and obtain a ruling from the court. TEX. R. CIV. P. 278.

(4) Defective and Immaterial Questions, Definitions and Instructions (Yours or Theirs).

Object specifically and distinctly to the defect or immateriality. TEX. R. CIV. P. 274. Example: "Party A objects to [Q, D, I] as being defective [immaterial] on the grounds that: 1) . . ., 2) . . ., and 3) . . ."

The Texas Supreme Court has held that a defendant does not preserve error regarding a defective "right to control" question if the

defendant fails to object to a similar submitted question:

a. Objected to Question: Did Lee Lewis Construction, Inc. retain the right to control the safety of the construction project where Jimmy Harrison suffered his fatal fall? Lee Lewis argued that the question should have specifically asked whether it controlled the relevant work equipment.

b. Unobjected to Question: Did the negligence, if any, of the persons named below proximately cause the occurrence in question? "Negligence," when used with respect to a general contractor, means the failure to use ordinary care with regard to its retained right of control, if any, to reduce or eliminate an unreasonable risk of harm created by an activity or condition on the premises which the general contractor either knows about or in the exercise of ordinary care should know about. "Ordinary care," when used with respect to a general contractor, means that degree of care which would be used by a general contractor of ordinary prudence under the same or similar circumstances. *Lee Lewis Constr. Co v. Harrison*, 70 S.W.3d 778, 786 (Tex. 2001).

PRACTICE NOTE: Know the difference between a defect and an omission. For a discussion of this distinction refer to the opinion, on motion for rehearing, in *Winfield v. Renfro*, 821 S.W.2d 640, 657 (Tex. App. – Houston [1st Dist.] 1991, writ denied). In *Winfield*, Justice O'Connor distinguished between a defect in an essential element of a cause of action for common law marriage and an omission of the entire element.

PRACTICE NOTE: Refer also to *Carey v. Am. Gen. Fire & Cas. Co.*, 827 S.W.2d 631, 632-33 (Tex. App. – Beaumont 1992, writ denied), where the court of appeals stated that the immateriality of a jury question may be raised by the trial court on its own motion. In *Carey*, the evidence conclusively established that a prior injury was noncompensable. Thus, certain jury questions were immaterial and the trial court erred in failing to disregard the jury's answers to them. *Id.*

PRACTICE NOTE: In *LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 702 (Tex. App. – Dallas 1992, writ denied), the court of appeals held that, where the trial court submits a definition that a party is not satisfied with, all that a complaining party must do to preserve error is to file an objection to the court's definition that is in error. "It is not necessary for an objecting party to tender a substantially correct definition unless the trial court omits such definition altogether." *Id.*

(5) Limiting or Exclusionary Instructions.

If there is a WIDE variance between pleadings and proof, tender a limiting or exclusionary instruction when (a) one or more pleaded acts, omissions or elements of damages are unsupported by the evidence and (b) the record contains evidence of other possible acts, omissions or elements of damages which are not pleaded. *Scott v. Atchison, Topeka and Santa Fe Ry. Co.*, 572 S.W.2d 273, 277-78 (Tex. 1978).

Caveat: Rule 277's mandate of broad-form submission arguably applies to damage questions where there are instructions on elements of damages and one damage answer. TEX. R. CIV. P. 277. *See* Section III.A., *supra.*

Examples:

Acts or omissions:

"In answering Q.____, consider the following conduct listed below and none other:"

Damages:

"In answering Q.____, consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages, if any, you find."

PRACTICE NOTE: Subsequent interpretations of *Scott* emphasize that in order to be entitled to limiting or exclusionary instructions, the variance between pleading and proof must be *wide*. *See Harville v. Siebenlast*, 582 S.W.2d 621, 624 (Tex. Civ. App. – Amarillo 1979), *rev'd*, 596 S.W.2d 112 (Tex. 1980); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 937-38 (Tex.), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 575 (1980). However, limiting instructions on damages appear to be an exception to the wide variance rule. In this situation, the complaining party must object and tender the

omitted limiting instruction on the proper legal measure of damages in substantially correct wording in order to preserve error. *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 902-03 (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); *Nat'l Fire Ins. Co. v. Valero Energy Corp.*, 777 S.W.2d 501, 508 (Tex. App.– Corpus Christi 1989, writ denied); *Tex. Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 335 (Tex. App. – Texarkana 1982, writ ref'd n.r.e.).

F. Pre-trial Orders - Tex. R. Civ. P. 166.

Under Rule 166, the trial court has the discretion to conduct a pre-trial conference to consider certain matters including, but not limited to, the proposed jury charge questions, instructions, and definitions. TEX. R. CIV. P. 166. When appropriate, Rule 166 authorizes the following suggested court's charge order:

"All parties are ordered to exchange and file with this court on or before the _____ day of , 200—, all proposed jury charges [questions, definitions and instructions]. This order shall control the subsequent course of action in this matter and will only be modified at trial to prevent manifest injustice."

Caveat: Refer to your local county rules to determine whether the local rules *require* you to be prepared to submit a proposed charge before trial. For example, in Tarrant County, you must have your charge requests ready at the time you announce ready for trial. Tarrant (Tex.) Civ. Dist. Ct. Loc. R. 3.03(c). As a practical matter, however, courts generally allow a party to tender its charge at the charge conference because some issues can be tried by consent and other issues can be waived at the charge conference.

G. Pleadings - a Blueprint for the Charge - TEX. R. CIV. P. 47, 278.

Pleadings furnish the blueprint for the charge. *Scott*, 572 S.W.2d at 277. Rule 278 provides, in part:

> "The Court shall submit the questions, instructions and definitions in the [broad] form provided by Rule 277, which are raised by the *written* pleadings and the evidence..."
>
> TEX. R. CIV. P. 278 (emphasis added); *See Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663-64 (Tex. 1999); *see also, Laughlin v. Fed. Deposit Ins. Co.*, 657 S.W.2d 477, 480-81 (Tex. App. – Tyler 1983, no writ).

H. Fair Notice Required in Pleadings - TEX. R. CIV. P. 47.

Rule 47 requires that the pleadings give "fair notice" of the claim involved. A pleading will be liberally construed in favor of the pleader and is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his/her claim. If there is a pleading defect, it is properly attacked by special exceptions. *Troutman v. Traeco Bldg. Sys. Inc.*, 724 S.W.2d 385, 387 (Tex. 1987).

1. Test of Fair Notice.

The test of fair notice is whether an opposing attorney of reasonable competence, with the pleadings before him/her, can ascertain the nature and the basic issues of the controversy and the probable relevant testimony. *State Fidelity Mortgage Co. v. Varner*, 740 S.W.2d 477, 479 (Tex. App. – Houston [1st Dist.] 1987, writ denied).

2. Cannot be Surprised, Prejudiced or Misled by Evidence.

The "fair notice requirement" of Texas pleading practice relieves the pleader of the burden of pleading evidentiary matters with meticulous particularity. Familiar discovery procedures provide the parties with the opportunity to determine the nature of the claim or defense, as long as the parties are not surprised, prejudiced or misled by the evidence offered pursuant to the pleadings. *State Fidelity Mortgage Co.*, 740 S.W.2d at 480.

3. Test for Fatal Variance.

The test for "fatal variance" between pleading and proof is a showing that the variance is so substantial as to be misleading, surprising and prejudicial. *Brown v. Am. Transfer and Storage Co.*, 601 S.W.2d 931, 937 (Tex.), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 575 (1980). For example, an entire unpleaded theory of recovery or defense cannot be submitted over proper objection. *Harkey v. Tex.*

Employers Ins. Ass'n., 208 S.W.2d 919, 922-23 (Tex. 1948).

I. Trial by Consent - TEX. R. CIV. P. 67.

1. Exceptional Cases Only.

Rule 67 covers only exceptional cases where it appears from the record as a whole that the parties tried the unpleaded issue. TEX. R. CIV. P. 67.

2. Evidentiary Stage.

During the evidentiary stage, an objection of "no pleadings" by the opponent upon the mention of the new theory precludes trial by consent. *Bobby Smith Brokerage, Inc. v. Bones*, 741 S.W.2d 621, 622-23 (Tex. App. – Fort Worth 1987, no writ).

3. Charge Conference.

When objected to at the charge conference on the basis of "no pleadings," written pleadings are then necessary for the submission of jury charges on the unpleaded matters. TEX. R. CIV. P. 278. *McFadden v. Hale*, 615 S.W.2d 345, 348 (Tex. Civ. App. – Waco 1981, no writ).

4. Trial Amendment.

A "no pleadings" objection at the charge conference, when no written trial amendment has been filed before submission, prevents trial by consent. *Harkey*, 208 S.W.2d at 922.

5. Appellate Review.

Because the evidence of the issue may apply to other issues in the case, appellate review examines the record for *trial* of the issue, rather than *evidence* of the issue. *Walker v. Whitman*, 759 S.W.2d 781, 782-83 (Tex. App. – Fort Worth 1988, no writ).

J. The Charge Conference.

Under the present rules of procedure, the charge conference is split into two very different and distinct stages: (1) the "request and tender stage" and (2) the "objection stage."

1. The Request and Tender Stage - Rules for Requesting Charges.

To preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefore, and obtain a ruling. TEX. R. APP. P. 33.1(a)(5). To prevent waiver and to preserve error, the following "rules" for the request and tender stage are recommended.

a. Should Be in Writing.

Requested charges should be in writing. TEX. R. CIV. P. 273, 279; *Shafer Plumbing and Heating, Inc. v. Controlled Air, Inc.*, 742 S.W.2d 717, 720 (Tex. App. – San Antonio 1987, no writ).

b. Should Separate Requests From Other Requests.

Except for placing the request for a correct question accompanied by correct and related instructions and definitions on a single page as seen in *Lester*, 907 S.W.2d at 453, each requested jury charge should be separated from other requested jury charges. *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 181 (Tex. App. – Waco 1987, writ denied); *Jon-T Farms Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 751 (Tex. Civ. App. – Amarillo 1977, writ ref'd n.r.e.).

PRACTICE NOTE: The trial court can refuse a requested question if it is accompanied by a defective definition. *Sherwin-Williams Paint Co. v. Card*, 449 S.W.2d 317, 322-23 (Tex. Civ. App. – San Antonio 1970, no writ). *See also Lester*, 907 S.W.2d at 453.

c. Should Separate Requests From Objections.

Requested jury charges should be separated from objections to jury charges. TEX. R. CIV. P. 273; *see, e.g., Alaniz*, 907 S.W.2d at 450 (Tex. 1995). Requests which are commingled with objections are waived. *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379 (Tex. 1985); *Templeton v. Unigard Sec. Ins. Co.*, 550 S.W.2d 267, 269 (Tex. 1976); *Tex. Employers Ins. Assoc. v. Eskue*, 574 S.W.2d 814, 818 (Tex. Civ. App. – El Paso 1978, no writ).

d. Requests Should Be Marked, Refused, Signed, and Filed.

To complain that a jury charge was wrongfully refused, it should be endorsed "refused," signed by

the court, and filed with the clerk. TEX. R. CIV. P.. 276; *Greenstein, Logan & Co.*, 744 S.W.2d at 181; *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex. App. – El Paso 1989, no writ). An instruction that is endorsed "refused" by the trial court serves as a bill of exceptions. *G.A.B. Business Servs., Inc. v. Moore*, 829 S.W.2d 345, 349 (Tex. App. – Texarkana 1992, no writ) (when the record did not show a sheet marked or endorsed with "refused," and there was no formal bill of exceptions, the appellant failed to preserve error). If the court modifies the requested instruction, question or definition, the court must endorse it "modified" and state the nature of the modification. TEX. R. CIV. P. 276. A request which is not endorsed and signed by the trial court may not preserve any error for appeal. While Rule 276 requires the trial to endorse refused requests for instructions as "Refused," the endorsement is not the exclusive means for preservation of error and the trial court's failure to comply with Rule 276 does not waive the requesting party's complaint. *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W. 2d 382, 386-87 (Tex. 1997). To make an endorsement by the trial court the exclusive means of preserving error for refusing a charge request, when the court's refusal is otherwise clear from the record, would promote form over substance and be ill advised. A lawyer has no practical way of ensuring that a trial court will actually endorse charge requests as promised. *Id* at 387.

PRACTICE NOTE: If the trial judge expressly refused to endorse and sign your requests, you should object on the record regarding the trial judge's failure to do so. Consider also presenting a formal bill of exceptions under TEX. R. APP. P. 52(c); *see also Greenstein, Logan & Co.*, 744 S.W.2d at 181.

e. Must Present Before Submission.

A party must present and file properly worded jury charges before submission of the case to the jury. *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989); *M.L.C. Loan Corp. v. P.K. Foods, Inc.*, 541 S.W.2d 902, 905 (Tex. Civ. App. – Beaumont 1976, no writ); *Williams v. S. Pac. Transp. Co.*, 804 S.W.2d 132, 140 (Tex. App. – Houston [1st Dist.] 1990, writ denied).

f. Must Be Raised by Pleadings and Evidence.

Only questions, definitions, and instructions raised by the pleadings and evidence, not conclusively established and not tried by consent, shall be submitted. TEX. R. CIV. P. 278; *Tribble & Stephens Co. v. Conso. Serv., Inc.*, 744 S.W.2d 945, 951 (Tex. App. -- San Antonio 1987, writ denied); *Otis Elevator Co. v. Shows*, 822 S.W.2d 59, 62 (Tex. App.– Houston [1st Dist.] 1991, writ denied).

g. Must Be Broad Form "Whenever Feasible."

Under the rules, broad form questions shall be submitted whenever feasible. TEX. R. CIV. P. 277. "Whenever feasible" means " in any or every instance in which it is capable of being accomplished." *Tex. Dept. of Human Serv. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). Thus, unless extraordinary circumstances exist, the charge should be submitted to the jury in broad-form. *Id.* The Supreme Court has restated its "commitment to" and "general preference for" broad-form submission and explained that Rule 277 mandates broad-form whenever feasible. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *see also Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995); *Hyundai Motor Co. v. Rodriguez*, 995 S.W2d 661, 664 (Tex. 1999).

An example of infeasibility may be found in the case of *Rosell v. Cent. West Motors Stages, Inc*., 89 S.W.3d 643, 655-56 (Tex. App. – Dallas 2002, pet. denied) where the appeals court upheld a trial's court's decision to **separately submit** related claims against a single defendant:

> [The plaintiffs] requested a liability question that proposed several theories under which [the defendant] was liable. The first was based on entrusting a vehicle to a reckless driver. The second was based on employing an incompetent or unfit employee. The last was based on failing to adequately train, hire, or supervise an employee. While these theories are similar, they have different requirements. . .
>
> The feasibility of including all of the theories of [defendant's] liability along with the negligence of the other parties [which were a predicate to some of the claims against the defendant] may have led the trial court to submit separate questions on the negligent entrustment,

> hiring, supervision, and retention issues. The trial court's submission of liability to the jury was logical, simple, and clear. The submission fairly, correctly, and completely addressed the valid theories of recovery raised by the pleadings and evidence. Thus, there was no harm in the submission. Accordingly, the trial court did not abuse its discretion in submitting the separate liability issue.

PRACTICE NOTE: 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. It is essential that the theories submitted be authorized and supported by the law governing the case. If they are not, the appellate court must, at a minimum, be able to determine whether properly submitted theories constituted the basis of the jury's verdict. *See* Section III.A., *supra.*

PRACTICE NOTE: When a single broad-form liability question erroneously commingles valid and invalid liability theories and the complaining party'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. The Texas Supreme Court has disapproved those courts of appeals' decisions holding that this error is harmless if any evidence supports a properly submitted liability theory. *See* Section III.A., *supra.*

PRACTICE NOTE: When a single broad-form damages question erroneously mixes valid and invalid elements of damages and the complaining party properly objects, the error is harmful when it cannot be determined whether the jury based its verdict on the improperly submitted damage element. *See* Section II.B., *supra.*

Although Rule 277 gives the court discretion to submit issues broadly, this discretion is not boundless. For example, damages must be measured by a legal standard that serves to guide the fact-finder in determining the amount of compensation required under the evidence. The proper measure of damages is a question of law for the court, but the charge should limit the jury's consideration to the facts that are properly a part of the damages allowable. The charge to the jury must be sufficient to enable the jury to make an assessment of damages on proper grounds and proper legal principles. *Geo Viking, Inc. v. Tex-Lee Operating Co.*, 817 S.W.2d 357, 363-64 (Tex. App. – Texarkana 1991), *writ denied with per curiam opinion*, 839 S.W.2d 797 (Tex. 1992)(deceptive trade practice action where requested and tendered limiting instruction on damages was refused); *see also, Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Recently, the Supreme Court noted that broad-form submission may not be feasible "when governing law is unsettled." *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992).

h. May Submit Multiple Grounds Within Question.

A broad-form question may contain independent grounds of recovery that are mutually exclusive or otherwise conflicting. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255-56 (Tex. 1974); *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663-64 (Tex. 1999); *Tex. Dept. of Human Serv.*, 802 S.W.2d at 649. A trial court does not abuse its discretion by combining a defendant's affirmative (but not inferential rebuttal) defenses into one jury question. *Fuentes v. McFadden*, 825 S.W.2d 772, 777 (Tex. App. – El Paso 1992, no writ); *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App. – Texarkana 1992, no writ).

Caveat: A different rule applies when a plaintiff is seeking recovery of damages in different capacities. *Wingate v. Hajdik*, 795 S.W.2d 717, 719-20 (Tex. 1990). Additionally, the failure to segregate attorney's fees, in a case containing multiple causes of action, when only some causes permit the recovery of fees, can result in the recovery of no fees. *Stewart Title Guarantee Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Hoxie Implement Co., Inc. v. Baker*, 65 S.W.3d 140, 151 (Tex. App. – Amarillo 2001, pet. denied).

Relatedly, a court should not confuse the jury by submitting differently worded questions that call for the same factual findings. *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 865-66 (Tex. App. – Fort Worth 2001, pet. denied) (submission of broad-form issue regarding breach of agreement subsumed affirmative defense of excuse and counterclaim for breach of contract).

i. Must Submit Ultimate/Controlling

Questions Only.

Broad-form questions embrace only ultimate or controlling [and not evidentiary] questions, which are those factual determinations that are necessary to form the basis of a judgment. "Ultimate question" does not refer to a cause of action or a claim. *Tartar v. Metro. Sav. & Loan Assoc.*, 744 S.W.2d 926, 928 (Tex. 1988); *Tex. Dept. of Human Serv.*, 802 S.W.2d at 649; *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex. 1985). Where recovery (attorneys' fees) is controlled by a statute as a matter of law, the submission of a question regarding the recovery (amount of reasonable attorneys' fees) may be attacked for the first time on a motion for judgment not withstanding the verdict. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999). Such a challenge is analogous to a legal sufficiency challenge. *Id. See also Wal-Mart Stores Inc. v. McKinzie*, 997 S.W.2d 278, 279-80 (Tex. 1999). The jury's charge must include all "controlling issues." TEX. R. CIV. P. 278; *Tex. Dept. of Transp. v. Ramming*, 861 S.W.2d 460, 463 (Tex. App. – Houston [14th Dist.] 1993, writ denied). The issues deemed as "controlling" by case law are those which, if answered in the affirmative, will form the basis of a judgment for the proponent of the issue. *Bernal v. Garrison*, 818 S.W.2d 79, 83 (Tex. App. – Corpus Christi 1991, writ denied). An "evidentiary" question is one that the jury could properly consider in deciding the controlling issue, but it need not be submitted in the charge. *2v. S. Life & Health Ins. Co.*, 776 S.W.2d 753, 754 (Tex. App. – Corpus Christi 1989, no writ). The trial court may properly refuse to submit a "controlling" issue to the jury where the evidence is legally insufficient to justify its submission. *See Elboar v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *see also Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986). The refusal to submit a "controlling" issue, if error is properly preserved and there is some evidence to support it, is ground for reversal on appeal. *Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996); *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992).

j. Omitted Claims or Defenses Are Waived.

An omitted *ground* of recovery or affirmative defense, not conclusively established and unobjected to by its proponent, is waived. *Harkey v. Tex. Employers, Ins. Ass'n.*, 208 S.W.2d 919, 923 (Tex. 1948); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990), *cert. denied*, 498 U.S. 1048, 111 S.Ct. 755 (1991); *Strauss v. LaMark*, 366 S.W.2d 555, 557 (Tex. 1963).

k. Omitted Elements of Claims or Defenses Are Deemed Found.

An omitted *element* of a ground of recovery or defense, unobjected to by the opponent that is supported by the evidence, may be deemed found by the court in such manner as to support the judgment. TEX. R. CIV. P. 279; *Am. Nat'l Petroleum Co. v. Transcon. Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); *Ramos v. Frito Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990); *City of Houston v. Black*, 571 S.W.2d 496, 496-97 (Tex. 1978). In *McKinley v. Stripling*, 763 S.W.2d 407 (Tex. 1989), the supreme court held that the failure of the plaintiff in a medical malpractice case to submit a proximate causation issue waived the plaintiff's right to recover on the claim. Because the defendant "properly objected to the omission of a proximate cause issue, (the plaintiff) having failed to submit such an issue after objection, has waived the issue." *Id.* at 408, 410.

l. Definitions and Instructions Act Only as Aids to Jury.

Submit only proper definitions and instructions necessary to enable the jury to answer the questions asked. TEX. R. CIV. P. 277; *In Re K.M.B.*, 91 S.W.3d 18, (Tex. App. – Ft. Worth 2002, no pet.) (parents appealed from judgment entered upon jury verdict terminating their parental rights to daughter); *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 822 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dism'd*, 485 U.S. 994, 108 S.Ct. 1305 (1988). The jury need not and should not be burdened with surplus instructions. *See generally Buls v. Fuselier*, 55 S.W.3d 204, 212 (Tex. App. – Texarkana 2001, no pet.) (negligent rendition of health services); *Exxon Pipeline Co. v. Zwahr*, 35 S.W.3d 705, 714-15 (Tex. App. – Houston [1st Dist.] 2001), *rev'd on other grounds*, 88 S.W.3d 623 (Tex. 2002) (trial court properly did not submit instruction on project enhancement in easement condemnation action). *But see Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 169-71 (Tex. 2002) (failure to give railroad's proposed foreseeability instruction in Federal Employers' Liability Act (FELA) action constituted reversible error; facts surrounding foreseeability were disputed and proposed instruction would have

enabled jury to determine whether the railroad owed a duty to its former employee to use reasonable care at the derailment site, which jury probably did not consider after trial court admonished it that foreseeability was not an element of a FELA claim).

An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and the evidence. *See* TEX.R.CIV. P. 278; *Union Pacific R.R.*, 85 S.W.3d at 306; *Tex. Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 911-12 (Tex. 2000).

m. Wide Discretion Given on Definitions and Instructions.

Wide discretion is given to the court to determine the sufficiency of definitions and instructions. *Mandlbauer*, 34 S.W.3d at 911-12; *H. E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998); *Steak & Ale of Tex., Inc. v. Borneman*, 62 S.W.3d 898, 904 (Tex. App.— Fort Worth 2001, no pet.); *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 636 (Tex. App. – Houston [1st Dist.] 1984), *writ ref'd n.r.e.*, 686 S.W.2d 593 (Tex. 1985). The trial court's discretion is not limitless. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995); *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 579 (Tex. App.— Houston [1st Dist.] 1992, no writ). The requirements of Rule 278 act as a limit on the breadth with which the trial court can submit the question to the jury by delineating broad parameters for the appropriate content of the charge.

PRACTICE NOTE: "A definition is essential only when the term is a legal expression having a meaning unknown to laymen or is used in [a] . . . peculiar legal sense or under circumstances which might confuse or mislead unless explained." *City of San Antonio v. Dunn*, 796 S.W.2d 258, 263 (Tex. App. – San Antonio 1990, writ denied). It is not an abuse of discretion to refuse to define a term not used in the charge. *Mandlbauer*, 34 S.W.3d at 912.

PRACTICE NOTE: Where contracting parties specify definitions for their agreement, the trial court may be required to use those definitions in a lawsuit on the agreement. *USRP v. Motel Enter., Inc.*, 25 S.W.3d 293, 295 (Tex. App.— Beaumont 2000, pet. denied) (lease agreement).

n. Test for Abuse of Discretion on Definitions and Instructions.

The standard of review is whether the trial court's submission or refusal to submit an instruction or definition constitutes an abuse of discretion. An abuse of discretion occurs only when the trial court acts without reference to any guiding principle. *Tex. Dept. of Human Serv.*, 802 S.W.2d at 649. A trial court has considerable discretion in submitting explanatory instructions and definitions. *Wisenbarger v. Gonzales Warm Springs Rehab. Hosp., Inc.*, 789 S.W.2d 688, 692 (Tex. App. – Corpus Christi 1990, writ denied); *Johnson v. Whitehurst*, 652 S.W.2d 441, 447 (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.). When an instruction was given, the question on appeal is whether it was proper. *M.N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 631 (Tex. App. – Houston [14th Dist.] 1992, writ denied). It is not an abuse of discretion to refuse to define a term not used in the charge. *Mandlbauer*, 34 S.W.3d at 912.

o. Presumption of Average Intelligence on the Jury.

The court is not required to convert the charge into a dictionary, and the jurors are presumed to have average intelligence. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d at 814 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.).

p. Must Only Define Words of Art.

The court is required to define or explain only those words or phrases given a distinct meaning by the law. Words which have no special or technical meaning apart from their ordinary usage need not be defined. *Green Tree Acceptance Inc. v. Combs*, 745 S.W.2d 87, 89-90 (Tex. App. – San Antonio 1988, writ denied). In a breach of good faith and fair dealing case, because various requested instructions, concerning matters which were encompassed within the pertinent jury questions, involved matters of common knowledge or were unnecessary to the jury's determination, they were properly refused. *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 705-708 (Tex. App. – Houston [14th Dist.] 1991, writ denied).

q. Must Submit Charge in Substantially Correct Form.

Jury charges must be tendered in substantially correct form. TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int'l*, 724 S.W.2d 20, 21-22 (Tex. 1987). "Substantially correct" means the jury

charge is in such form that the court could properly submit the charge as requested. *Yellow Cab Co. v. Smith*, 381 S.W.2d 197, 198 (Tex. Civ. App. – Waco 1964, writ ref'd n.r.e.). For example, and as a general rule, when a statutory cause of action is submitted the charge should "[t]rack the language of the provisions as closely as possible." *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 413 (Tex. 2000). Substantially correct does not mean that the charge must be absolutely correct, nor does it mean a charge that is merely sufficient to call the matter to the attention of the court. It means a charge that is in substance and in the main correct and is not affirmatively incorrect. *Placencio v. Allied Indus. Int'l*, 724 S.W.2d at 21.

When the trial court submits a defective issue to the jury, the appellate court is not required to review sufficiency of the evidence against a question and instruction which the court should have submitted, when the defect was never brought to the court's attention and the question or instruction was never requested. Rather the appellate court must rule on the question and instruction actually submitted to the jury. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000), *cert. denied*, 530 U.S. 1234; 120 S.Ct. 2690 (2000). All definitions and instructions required to be included must be included. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 479-80 (Tex. 1978); *Marling v. Maillard*, 826 S.W.2d 735, 738-39 (Tex. App. – Houston [14th Dist.] 1992, no writ) (trial court properly refused to submit patient's tendered jury question on informed consent because the issue was not raised by pleadings and evidence).

PRACTICE NOTE: A request is not substantially correct if it is conditioned on the wrong question or event. *U.S. Fidelity & Guar. Co. v. Hernandez*, 410 S.W.2d 224, 228 (Tex. Civ. App. – Eastland 1966, writ ref'd n.r.e.). Other examples, of requests which are not substantially correct include:

(1) a requested charge element which omits one or more essential elements of a cause of action or defense. *Stewart & Stevenson Serv. Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 110-11 (Tex. App. – Houston [14th Dist.] 1994, writ denied).

(2) a requested question that does not properly place the burden of proof. *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d at 182.

(3) a requested charge element that constitutes a comment on the weight of the evidence. *Placencio v. Allied Indus., Int'l, Inc.*, 724 S.W.2d at 21-22.

r. "En Masse" Requests Must Not Be Confusing and Must Be Totally Correct.

If any single question, definition, or instruction of an "en masse" request is defective, the entire request may be properly rejected by the trial court. *Edwards v. Gifford*, 155 S.W.2d 786, 788 (Tex. 1941); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170, 182 (Tex. App. – Waco 1987, writ denied) (the court may refuse an en masse request of issues if they are so intermingled as to be confusing or if one or more of them is improper); *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 666-67 (Tex. App. – Dallas 1986, writ ref'd n.r.e.) (20 questions in a single request); *Hoover v. Barker*, 507 S.W.2d 299, 305 (Tex. Civ. App. – Austin 1974, writ ref'd n.r.e.) (54 questions in a single request). However, if the grouping does not mislead or confuse the court, the request preserves error. *Aetna Cas. & Sur. Co. v. Moore*, 361 S.W.2d 183, 187 (Tex. 1962) (nine questions in a single request).

PRACTICE NOTE: It is suggested that a complete charge be handed to the court at the beginning of the trial, in addition to the individual requests, so the court can see the "whole picture" raised by both parties' pleadings.

s. Must Predicate All Conditional Questions.

Conditional questions shall be predicated, otherwise, they assume the truth of facts and constitute a comment on the weight of the evidence. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d at 21.

t. Try to Keep It Simple.

A workable jury system demands a strict adherence to simplicity in jury charges. *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). Simplicity in the jury charge is preferred. The questions, instructions, or definitions included in the charge must cover the issues raised by the pleadings and evidence in the case. TEX. R. CIV. P. 278; *Tex. Dept. of Transp. v. Ramming*, 861 S.W.2d 460, 463 (Tex. App. C

Houston [14th Dist.] 1993, writ denied).

2. The Objection Stage – Rules for objecting to charges.

The purpose of an objection is two-fold: (1) to notify the trial judge and the other party of the complaint and (2) to preserve the complaint for appellate review. To prevent waiver and to preserve error, the following "rules" for the objection stage are recommended:

PRACTICE NOTE: A complaint about a defect in an instruction is waived unless specifically included in the objections. *Moody v. EMC Ser., Inc.*, 828 S.W.2d 237, 245-47 (Tex. App. – Houston [14th Dist.] 1992, writ denied) ("[I]f a party objects to the submission of an issue on attorney's fees on the grounds of lack of segregation, this party has sufficiently preserved error despite a lack of objection to the admission of the evidence of unsegregated fees.").

PRACTICE NOTE: You must make the same objections to the charge on appeal as you made in the trial court. *Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993), *cert. dism'd*, 510 U.S. 985, 114 S.Ct. 490, 126 L.Ed.2d 440 (1993); *Haley v. GPM Gas Corp.*, 80 S.W.3d 114, 119-20 (Tex. App.— Amarillo 2002, no pet.). In *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 835 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert denied*, 485 U.S. 994, 108 S.Ct. 1305 (1988), even though an instruction was an incorrect statement of law, it was nonetheless upheld because that was not the basis of the error asserted by appellant.

a. Must Object Before Submission.

Failure to raise all *proper* objections, orally or in writing, before submission waives any error. TEX. R. CIV. P. 272; *Mo. Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973); *Morgan v. Letellier*, 677 S.W.2d 165, 167 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Sudderth v. Howard*, 560 S.W.2d 511, 516 (Tex. Civ. App. – Amarillo 1977, writ ref'd n.r.e.). Although the trial court and the parties may have agreed, in the interest of time, to debate special instructions and objections after submitting the charge to the jury, such an agreement cannot be recognized by the court. *Williams v. S. Pac. Transp. Co.*, 804 S.W.2d at 140.

Caveat: Upon objection, the charge may not be modified by the court during argument, but the court on its own motion can modify the charge to correct an error after the jury has retired for deliberation. *Methodist Hosp. of Dallas v. Corp. Communicators, Inc.*, 806 S.W.2d 879, 885 (Tex. App.– Dallas 1991, writ denied).

b. Must Make Objections Before the Court.

Objections dictated in the court's absence are not preserved. *Brantley v. Sprague*, 636 S.W.2d 224, 225 (Tex. App.– Texarkana 1982, writ ref'd n.r.e.).

c. Ruling Should Be Apparent.

If after properly objecting there is no change in the charge, it is presumed that the court overruled the objection. *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984). A common sense reading of the objection and the court's ruling must show that the court necessarily overruled the objection. *Betty Leavell Realty Co. v. Raggio*, 669 S.W.2d 102, 104 (Tex. 1984).

d. Purpose of Objecting Before Submission.

The purpose of objecting before submission is so the court can have the benefit of counsel's objection to enable a proper charge to be submitted to the jury, to make an informed ruling and remedy any defect, and to give the court a fair opportunity to correct any error or deficiency. *See McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989); *Sudderth v. Howard*, 560 S.W.2d 511, 515-16 (Tex. Civ. App.– Amarillo 1978, writ ref'd n.r.e.); and *Osteen v. Crumpton*, 519 S.W.2d 263, 264 (Tex. App. – Dallas 1975, writ ref'd).

e. Objections Must Be Distinct and Specific.

Objections must be distinct and specific. TEX. R. CIV. P. 274. Rule 274 requires objections to point out distinctly the objectionable matter and the grounds of the objection. The trial court must have an opportunity to correct errors in the charge and make an informed ruling; *see City of Weatherford v. Cantron*, 83 S.W.3d 261, 272 (Tex. App.—Fort Worth 2002, no pet.) (definition of law enforcement authority). An objection which does not meet both requirements is properly overruled and does not preserve error for appeal. *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986).

In *LSR Joint Venture No. 2 v. Callewart*, 837 S.W.2d 693, 702 (Tex. App. – Dallas 1992, writ denied), the appellant's objection that the damages question implied to the jury that any money put into the building was recoverable damage, and that there was no way of distinguishing the purpose for which money was spent, sufficiently put the trial court on notice that a proper definition of "out of pocket expenses" does not encompass all money spent on the property. *Id.*

General objections do not give the court an opportunity to correct any mistake. *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987). *But see, Universal Underwriters Inc. v. Pierce*, 795 S.W.2d 771, 773 (Tex. App. – Houston [1st Dist.] 1990, no writ), *rev'd on rehearing*, 1990 WL 126645 (Tex. App. – Houston [1st Dist.] 1990, writ denied). In *Universal*, a generally worded objection to an instruction that it "was not in correct form and not a correct statement of the law," which was accompanied by a separately submitted request that clearly reflected the basis of the claimed error, was held to be sufficient.

f. Test: "Was the Court Fully Cognizant."

The objections must be specific and distinct enough to show that the court was fully cognizant of the ground of complaint and deliberately chose to overrule it. *City of Weatherford v. Cantron*, 83 S.W.3d 261, 272 (Tex. App. – Fort Worth 2002, no pet.) (definition of law enforcement authority)*; Anderson v. Higdon*, 695 S.W.2d 320, 324 (Tex. App.–Waco 1985, writ ref'd n.r.e.); *Citizens State Bank v. Bowles*, 663 S.W.2d 845, 850 (Tex. App. – Houston [14th Dist.] 1983, writ dism'd). Objections characterizing the fault of a submission generally will not suffice.

Examples of inadequate objections are:

(1) Issue constitutes comment on the weight of the evidence. *Tex. A & M Univ. v. Chambers*, 31 S.W.3d 780, 783 (Tex. App. B Austin 2000, pet. denied); *Aetna Cas. & Sur. Co. v. Depoister*, 393 S.W.2d 822, 827-28 (Tex. App. – Corpus Christi 1965, writ ref'd n.r.e.); *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145 (Tex. App. –Dallas 1985), *writ dism'd by agrmt*, 713 S.W.2d 96 (Tex. 1986).

(2) "The definition is not a correct definition." *Hayes v. Nichols*, 203 S.W.2d 274, 274 (Tex. Civ. App. – Eastland 1947, no writ).

(3) "The issue states an improper measure of damages." *Jim Walters Homes, Inc. v. Samuel*, 701 S.W.2d 351, 354 (Tex. App. – Beaumont 1985, no writ).

(4) "The definition is not a correct, legal definition." *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296, 301 (Tex. App. – Amarillo 1983, writ ref'd n.r.e.).

(5) "The charge is a comment on the weight of the evidence." *Hickman v. Durham*, 213 S.W.2d 569, 570 (Tex. Civ. App. – Eastland 1948, writ ref'd n.r.e.).

(6) "The instruction may confuse the jury." *Castleberry v. Branscurm*, 721 S.W.2d at 277.

(7) "The charge may prejudice the jury toward one party." *Castleberry v. Branscum*, 721 S.W.2d at 277.

(8) "The issue is global." *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 938 (Tex. 1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 575 (1980).

(9) "There is a variance between pleadings and proof in a broad issue submission." *Brown v. Am. Transfer & Storage*, 601 S.W.2d at 938.

(10) "The issue or instruction is `unintelligible,' `confusing,' `meaningless,' `misleading,' `indefinite' or `argumentative.'" *Tex. & N.O.R. Co. v. Dingfelder & Balish, Inc.*, 114 S.W.2d 666, 668 (Tex. Civ. App. – San Antonio 1938), *aff'd*, 134 Tex. 156, 133 S.W.2d 967 (1939).

(11) "The issue is too broad." *Mathis v. State*, 258 S.W.2d 200, 210 (Tex. Civ. App. – Beaumont 1953, writ ref'd n.r.e.).

(12) "The issue puts an improper and onerous burden on the defendant." *McDonald v. N.Y. Cent. Mut. Fire Ins. Co.*, 380 S.W.2d 545, 549 (Tex. 1964).

(13) "The issue does not inquire as to the proper measure of damages." *Whitson Co. v. Bluff Creek Oil Co.*, 293 S.W.2d 488, 492-93 (Tex.

1956).

(14) "The instruction omits essential elements." *Ford Motor Co. v. Maddin*, 124 Tex. 131, 76 S.W.2d 474, 479-80 (1934).

(15) "The instruction is improperly in the charge and gives undue emphasis, and is a comment on the weight of the evidence." *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562, 574 (Tex. App. – Houston [14th Dist.] 1983), *rev'd in part on other grounds*, 704 S.W.2d 742 (Tex. 1986).

(16) "There is no pleading to warrant the submission of said issue." *Monsanto Co. v. Milam*, 494 S.W.2d 534, 537 (Tex. 1973).

g. Stock Objections.

Stock objections, such as "no pleadings," "no evidence," "insufficient evidence," and "against the great weight and preponderance of the evidence," are not sufficient to preserve error because they obscure or hide what would otherwise be valid objections. *Monsanto Co.*, 494 S.W.2d at 537.

h. Obscured and Concealed Objections.

An objection obscured or concealed by voluminous stock objections is waived. TEX. R. CIV. P. 274.

i. Voluminous Objections.

The test for voluminous objections is whether the trial court was denied or deprived of a real opportunity to correct the errors in the charge. *Northcutt v. Jarrett*, 585 S.W.2d 874, 880 (Tex. Civ. App. – Amarillo 1979), *writ ref'd n.r.e.*, 592 S.W.2d 930 (Tex. 1979). However, voluminous *non*-stock objections do not *per se* conceal good objections. *Baker Material Handling Corp. v. Cummings*, 692 S.W.2d 142, 145 (Tex. App. – Dallas 1985), *writ dism'd by agrmt*, 713 S.W.2d 96 (Tex. 1986).

j. Invited error.

If a party requests that the trial court include substantially the same question in the charge to the jury as the party objected to, it may waive the objection under the equitable invited error doctrine. *Haley*, 80 S.W.3d at 119-20.

k. Laundry List Objections.

"Laundry list" objections preserve no error for appeal. TEX. R. CIV. P. 274. In *Mahan Volkswagen v. Hall*, 648 S.W.2d 324, 330 (Tex. App. – Houston [1st Dist.] 1982, writ ref'd n.r.e.), the parties crafted a novel approach to the practice of making stock objections. The objections – "no evidence," "insufficient evidence," "against the great weight and preponderance of the evidence," and "no pleadings" – were agreed by the parties in advance to be denominated "A," "B," "C," and "D," respectively. Not surprisingly, the court of appeals properly held that the use of such a "laundry list" of objections failed to appraise the trial court of a claim that the pleadings did not support one of the plaintiff's DTPA claims. *Id.* at 330. Furthermore, adoption by reference preserves nothing for appeal. *C.T.W. v. B.C.G.*, 809 S.W.2d 788, 793 (Tex. App. – Beaumont 1991, no writ); *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 728 (Tex. Civ. App. – Eastland 1964, no writ).

l. Look at Entire Charge.

The court of appeals will examine the charge in its entirety to determine the validity of an objection to any portion of the charge. *Briseno v. Martin*, 561 S.W.2d 794, 796 (Tex. 1977).

m. Order of Submission.

The order of submission of the charge is discretionary with the court. The arrangement of the jury questions for submission to the jury is not important as long as the sense and meaning of the results are clear. *Badger v. Symon*, 661 S.W.2d 163, 165 (Tex. App.– Houston [1st Dist.] 1983, writ ref'd n.r.e.).

K. Specific Areas of Objections.

1. Objections to the Charge as a Whole.

This is covered under Rule 271.

a. Charge Not Signed by the Judge.

The charge must be signed by the judge or else it is not a part of the record for appeal. TEX. R. CIV. P. 272.

b. Texas Pattern Jury Charges.

A trial court errs by altering a specific Pattern Jury Charge which the Texas Supreme Court has adopted as the law of this state to the exclusion of all other instructions, definitions and questions. *Whiteside v. Watson*, 12 S.W.3d 614, 623-34 (Tex. App. – Eastland 2000, pet. denied, rehearing on pet. for review granted and then withdrawn, vacated by settlement); *see also First Int'l Bank in San Antonio v. Roper Corp.*, 686 S.W.2d 602 (Tex. 1985); *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984); *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111 (Tex. 1984). However, the Pattern Jury Charges have not been adopted and approved in their entirety by the Supreme Court. Trial courts have broad discretion to add definitions to a Pattern Jury Charge that has not been declared the exclusive method of charging a jury in Texas. *Whiteside*, 12 S.W.3d at 623-24; *see also H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 344-45, 347 (Tex. App. – Austin 2000, pet. denied) (a requested definition of "unreasonable risk of harm" in a premises liability case was unnecessary where the Texas Pattern Jury Charge did not include such a definition).

c. Charge Not Filed With the Clerk.

The charge must be filed with the clerk or else it is not part of the record for appeal. TEX. R. CIV. P. 272.

d. Charge Not Presented to Counsel for Inspection.

The charge must be presented to counsel for inspection or else it is not a part of the record for appeal. TEX. R. CIV. P. 272.

e. Reasonable Time Not Given.

A reasonable time must be given to counsel to examine and present objections to the charge. TEX. R. CIV. P. 272.

PRACTICE NOTE: There is no exact time stated in Rule 272 as to when this is to be accomplished. It is a good practice to see that it is done no later than when the verdict is returned by the jury. A "reasonable time" is a matter committed to the discretion of the trial court, reviewable only for an abuse of that discretion. *Hargrove v. Tex. Employers Ins. Assn.*, 332 S.W.2d 121, 123 (Tex. Civ. App. – Amarillo 1959, no writ) (7 p.m. - 9 a.m. was held to be reasonable); *Burton v. Williams*, 195 S.W.2d 245, 249 (Tex. Civ. App. – Waco 1946, writ ref'd n.r.e.) (5:30 p.m. - 10:00 a.m. was held to be reasonable). To complain on appeal that the trial court abused its discretion, proof must be presented to the court of appeals in a bill of exceptions. *Standard Life & Accident Ins. Co. v. Kirk*, 465 S.W.2d 770, 773 (Tex. Civ. App. – Fort Worth 1971), *rev'd on other grounds*, 475 S.W.2d 570 (Tex. 1972). In *Paramount Nat'l Life Ins. Co. v. Williams*, 772 S.W.2d 255, 269-70 (Tex. App. – Houston [14th Dist.] 1989, writ denied), the court of appeals held that the "testy" nature of the trial court judge did not deprive counsel of an adequate opportunity to state his objections. Counsel wanted "another hour or two" and was given *some* time. *Id.*

> **Test**: In order to obtain a reversal for failing to allow sufficient time, counsel must show prejudice, including specifying the objections that would have been made (or requests that would have been tendered), show that such objections and/or requests were meritorious, and show the reason why the time allowed was insufficient. *See, e.g., Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. Civ. App. – Austin 1960, writ ref'd n.r.e.) (15 minutes perhaps inadequate, but counsel failed to advise the court of the manner in which harm had been done).

f. Charge Submits a Ground Which is Not a Basis for Recovery.

The charge may not include a ground which is not a basis for recovery, though this error can be raised for the first time on appeal. *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000).

2. Omitted Charges.

a. If It Is the Proponent's Question.

The *proponent* of the *question* must tender the question in substantially correct wording and get the question marked "refused," signed by

the judge, and filed with the clerk in order to preserve error for appeal. *Hernandez v. Montgomery Ward Co.*, 652 S.W.2d 923, 924-25 (Tex. 1983); *Lyles v. Tex. Employers Ins. Ass'n.*, 405 S.W.2d 725, 727 (Tex. Civ. App. – Waco 1966, writ ref'd n.r.e.).

b. If It Is the Opponent's Question.

The *opponent* of the *question* can elect to tender it in substantially correct wording and have it marked "refused," signed, and filed with the clerk, or can object specifically and distinctly to its omission and get a presumptive or apparent ruling on his/her objection. *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986).

c. All Definitions and Instructions, Proponent or Opponent.

All omitted definitions and instructions, *regardless of whom they help or hurt*, must be tendered in substantially correct form, marked "refused," signed by the court, and filed with the clerk. *Lyles*, 405 S.W.2d at 727; *Birdville Indep. Sch. Dist. v. First Baptist Church*, 788 S.W.2d 26, 30 (Tex. App. – Fort Worth 1988, writ denied). A party is required to request and tender to the trial court a substantially correct instruction in writing when the trial court omits the instruction from the jury. TEX. R. CIV. P. 278; *see, e.g., Mason v. S. Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App. – Houston [1st Dist.] 1994, writ denied).

3. Defective Questions.

A question is defective, warranting a new trial, if it plainly attempts to request a finding on a recognized cause of action, but does so improperly. *Se. Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999).

a. No Pleadings.

If a valid objection is made on the basis of "no pleadings," a valid judgment cannot be entered. *Dennis Weaver Chevrolet, Inc. v. Chadwick*, 575 S.W.2d 619, 624-25 (Tex. Civ. App. – Beaumont 1978, writ ref'd n.r.e.). Questions must be supported by the written pleadings. TEX. R. CIV. P. 278.

b. No Evidence.

A legal insufficiency objection can be raised for the first time after the verdict. TEX. R. CIV. P. 279. A "no evidence" objection is not a complaint that the jury question is immaterial. *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978). Questions are properly refused when they are not supported by the competent evidence. *PGP Gas Prods., Inc. v. Reserve Equip., Inc.*, 667 S.W.2d 604, 609 (Tex. App. – Austin 1984, writ ref'd n.r.e.).

PRACTICE NOTE: In order to preserve a "no evidence" complaint of error, the complaining party is required to raise it by:

(1) a motion for instructed verdict;

(2) or a "no evidence" objection to the submission of the question; or

(3) a motion based on TEX. R. CIV. P. 301 to disregard the issue; or

(4) a motion for judgment notwithstanding the verdict (JNOV); or

(5) a motion for new trial (but can only get a "remand," note a "rendition").

TEX. R. CIV. P. 324; *Dept. of Highways and Public Transp.ation v. King*, 795 S.W.2d 888, 893 (Tex. App. – Beaumont 1990), *writ denied with per curiam opinion*, 808 S.W.2d 465 (1991). *O'Connor, Appealing Jury Findings*, 12 Hous. L. Rev. 65, 71 (1974).

c. Variance Between Pleading and Proof.

The variance between the pleadings and the proof has rarely been the source of harmful error. Error, if any, is cured by the addition of a limiting instruction or changing the form of the question. *Scott v. Atchison, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273, 278 (Tex. 1978). For example: The failure to limit the jury's consideration to elements of damages properly proved and recoverable under the applicable law. *Jefferson County Drainage Dist. No. 7 v. Hebert*, 244 S.W.2d 535, 537 (Tex. Civ. App.– Austin 1951, writ ref'd n.r.e.). Courts repeatedly have held that in order for a variance between the pleadings and the question to be fatal, it must be substantial,

misleading, constitute surprise, and be a prejudicial departure from the pleadings. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 187 (Tex. 1977).

d. Duplicative Questions.

Example: Submission of two sets of questions on statutory and common law negligence. This practice is discouraged. *Thate v. Tex. & P Ry.* Co., 595 S.W.2d 591, 596-97 (Tex. Civ. App. – Dallas 1980, writ dism'd); *see also Kansas City S. Ry. v. Stokes*, 20 S.W.3d 45, 48 (Tex. App. – Texarkana 2000, no pet.)

e. Shades and Phases.

Examples: "Was X employee in the service of Y company?" versus "Did Y company authorize X employee to be in the service of Y company?" *J. V. Harrison Truck Lines, Inc. v. Larson,* 663 S.W.2d 37, 40 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.). "Did the tire have a dangerous wear pattern?" versus. "Did the tire have a potentially dangerous wear pattern?" *Sell v. C. B. Smith Volkswagen, Inc.*, 611 S.W.2d 897, 902 (Tex. Civ. App. -- Houston [14th Dist.] 1981, writ ref'd n.r.e.).

f. Burden of Proof Not Placed on Either Party.

Example: Requesting a question without an accompanying instruction on burden of proof. *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 182 (Tex. App. – Waco 1987, writ denied).

g. Burden of Proof Improperly Placed on the Wrong Party.

Failure to place the burden of proof properly is reversible error. *City of Austin v. Powell,* 299 S.W.2d 273, 274-75 (Tex. 1957); *Am. Home Assurance Co. v. Brandt*, 778 S.W.2d 141, 143 (Tex. App. – Texarkana 1989, writ denied); *Scott,* 572 S.W.2d at 278. When in doubt, give more than "Yes" or "No" instructions on the answer to the submitted question. *Walker v. Eason*, 643 S.W.2d 390, 391 (Tex. 1982).

h. Comment on the Weight of the Evidence.

A question or instruction to the jury must be worded so as not to indicate an opinion by the trial court on a fact inquired about. *Molina v. Payless Foods, Inc.*, 615 S.W.2d 944, 946-47 (Tex. Civ. App. – Houston [1st Dist.] 1981, no writ). After examining the entire charge, a court may find that an instruction constitutes an impermissible comment on the weight of the evidence, if it is determined that the judge assumed the truth of a material controverted fact, or exaggerated, minimized, or withdrew some pertinent evidence from the jury's consideration. *Moody v. EMC Ser., Inc.*, 828 S.W.2d 237, 244 (Tex. App. – Houston [14th Dist.] 1992, writ denied). In *Moody,* an instruction that did not suggest the judge's opinion concerning a matter about which the jury was asked was held not to be a comment on the weight of the evidence. *Id*.

Examples:

(a) Introductory "if" clauses in jury questions create a reasonable probability the jury will think that it was required to assume or suppose the existence of disputed facts, and thus constitute comment on the weight of the evidence. *Mooney Aircraft Corp. v. Altman*, 772 S.W.2d 540, 542-43 (Tex. App. –Dallas 1989, writ denied).

(b) Unnecessary or superfluous instructions. *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.– Beaumont 1987, writ ref'd n.r.e.).

PRACTICE NOTE: Use of the words "failure" and "not timely" in questions involving negligence are "at most a harmless comment and are not a proper ground for reversal of the trial court." *Alvarez v. Missouri-Kansas-Texas R.R.*, 683 S.W.2d 375, 378 (Tex. 1984). If the word or phrase is uncontradicted, the question does not assume a controverted fact. *Id.* at 377.

In *Steak & Ale of Tex., Inc. v. Borneman,* 62 S.W.3d 898, 904 (Tex. App. – Fort Worth 2001, no pet.), a dram shop case, the defendant objected to an instruction stating *"[t]he law forbids* an alcoholic beverage licensee to provide, sell, or serve, . . . " because that language was not found in the applicable statutory law, conveyed a punitive

or criminal connotation to the jury and was an impermissible comment on the weight of the evidence. (emphasis added). The Fort Worth appeals court held the objection was adequate to preserve error in the trial court's misstating the law but not for commenting on the evidence. *Id*.

i. Advises the Jury of the Effect of the Answer.

The charge cannot directly inform the jury of the legal effect of its answer. *Gulf Coast State Bank v. Emenhiser,* 562 S.W.2d 449, 453 (Tex. 1978). A jury instruction which predicates an award of damages on an affirmative finding of the defendant's liability is expressly authorized by TEX. R. CIV. P. 277 and is therefore proper. *H. E. Butt Grocery Co. v. Bilotto,* 985 S.W.2d 22, 23-25 (Tex. 1998). The fact that the jury instruction merely directs the jury to answer damages questions only if some condition or conditions have been met does not directly instruct the jury about the legal effect of its answers. *Id.*

A jury instruction must suggest to the jury the trial court's opinion on the matter in order to constitute a direct comment on the weight of the evidence. *Id.* Still further, a jury instruction in order to improperly directly advise the jury of the legal effect of its answers, must instruct the jury how to answer each question in order for the plaintiff or defendant to prevail. *Id.* A jury instruction which directed the jury to answer the damages question only if it first determined that the negligence of the plaintiff did not proximately cause the accident in question or that the plaintiff's negligence was 50 % or less, did not directly inform the jury of the legal effect of its answers, but merely incidentally informed the jury of such effect and was therefore proper. *Id.* If any juror with ordinary intelligence would know its effect, neither the letter nor the spirit of the rule is violated by a charge which assumes such knowledge. *H. E. Butt Grocery Co. v. Paez,* 742 S.W.2d 824, 825-26 (Tex. App. – Corpus Christi 1987, writ denied).

PRACTICE NOTE: Predicating damage questions on affirmative findings of liability is not erroneous. TEX. R. CIV. P. 277; *Bilotto,* 985 S.W.2d at 23-25.

j. Disjunctive Submission.

Disjunctive submission is appropriate where two alternative grounds of recovery are developed through pleadings. *Select Ins. Co. v. Boucher,* 561 S.W.2d 474, 477 (Tex. 1978). The question is whether each answer (finding) is mutually exclusive of the other. *Lake LBJ Mun. Util. Dist. v. Coulson,* 692 S.W.2d 897, 908 (Tex. App. – Austin 1985), *rev'd on other grounds,* 781 S.W.2d 594 (Tex. 1989).

k. Not an Ultimate Question Controlling the Disposition of the Case.

An ultimate question is one that, when answered favorably to the theory in which it is presented, will form the basis for a judgment for the proponent of the jury question. *Stone v. Metro Rest. Supply, Inc.*, 629 S.W.2d 254, 256 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.). If there is some evidence to support the questions, the trial court must submit questions controlling the disposition of the case. The failure to do so, under such circumstances, is reversible error. *Chrysler Corp. v. McMorries*, 657 S.W.2d 858, 866 (Tex. App. – Amarillo 1983, no writ).

l. Inferential Rebuttal Question.

Inferential rebuttal questions are "denial questions," that is, they disprove some element of the opponent's case or defense. They are argumentative denials rather than direct negatives. They are argumentative denials because they disprove by establishing the truth of a positive factual theory which is inconsistent with the existence of some factual element of the ground of recovery or defense relied upon by the opponent. Therefore, they are to be distinguished from a flat denial, a mere "no."

Examples of Inferential Rebuttal Questions:

(a) The defense of "self defense" in a suit arising under the wrongful death statute, because the plaintiff has the burden of pleading and proving that the killing was "wrongful," as opposed to an assault action where the plaintiff need only plead and prove that the assault was committed

"knowingly" or "intentionally." *Cooper v. Boyar,* 567 S.W.2d 555, 559 (Tex. Civ. App. – Waco 1978, writ ref'd n.r.e.).

(b) "Partial incapacity" as an inferential rebuttal to a "total incapacity" question when only total incapacity is pleaded. *Select Ins. Co. v. Boucher,* 561 S.W.2d 474, 477 (Tex. 1978).

In the past, inferential rebuttals were submitted to the jury as special issues and were required to be affirmatively pleaded and supported by evidence at trial. *See Webb v. W.* Cas. *& Sur.* Co., 517 S.W.2d 529, 530 (Tex.1974); *Quintanilla v. TEIA,* 250 S.W.2d 751, 752 (Tex. Civ. App. – San Antonio 1952, writ ref'd n.r.e.); *see also* 34 Gus M. Hodges & T. Ray Guy, *Texas Practice: The Jury Charge in Texas Civil Litigation*, § 72 (1988). However, in 1952, the Texas Supreme Court began shifting away from including inferential rebuttals as special issues in favor of simply including them as definitional instructions. *See Dallas Ry. & Terminal Co. v. Bailey,* 151 Tex. 359, 250 S.W.2d 379 (Tex. 1952); *see also Yarborough v. Berner* 467 S.W.2d 188, 193 (Tex.1971). The Texas Supreme Court eventually completed this shift in 1973 by amending TEX. R. CIV. P. 277, thereby abolishing the requirement that issues be submitted distinctly and separately. *Lemos v. Montez,* 680 S.W.2d at 801.

This amendment provided that inferential rebuttals may not be submitted to the jury as questions, but may be submitted as instructions or definitions. *Sw. Airlines* Co. *v. Jaeger,* 867 S.W.2d 824, 832 (Tex. App. – El Paso 1993, writ denied), *disapproved of on other grounds, Dallas Market Ctr. Development Co. v. Liedeker,* 958 S.W.2d 382, 386 (Tex. 1997); *see also* 34 Gus M. Hodges & T. Ray Guy, *Texas Practice: The Jury Charge in Texas Civil Litigation*, §§ 73, 75 (1988). *See generally Buls v. Fuselier,* 55 S.W.3d 204, 212 (Tex. App.– Texarkana 2001, no pet.) (negligent rendition of health services).

Inferential rebuttal instructions for the jury may be stated in broad form, avoiding the need for separate inferential rebuttal instructions for each cause alleged. *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005). Under broad form submission rules, jurors need not agree on every detail behind a decision but only need to agree on the result of the case. *Dillard*, at 434. When the court's charge adequately informs the jury as to the inferential rebuttal defenses being made, there is no need for a granulated charge for each rebuttal defense. *Dillard*, at 434. For example, in *Dillard*, the court found a broad form jury submission appropriate when more than one inferential rebuttal defense was used. *Dillard*, at 434. The court reasoned that since the jury only had to find whether the defendant caused the accident or not, it was irrelevant which inferential rebuttal they relied on in coming to a conclusion. *Dillard*, at 434. The court stated, "Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason. *Dillard*, at 434.

m. Uncontroverted Question.

Uncontroverted jury questions need not be submitted to the jury by the trial court. Texas *Employers Ins. Assoc. v. Miller,* 596 S.W.2d 621, 625 (Tex. Civ. App. – Waco 1980, no writ).

n. Immaterial Question.

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 S.W.2d 750, 752 (Tex. 1995). Questions may be disregarded as immaterial where they are not grounds for rendering a judgment for or against a party. *Estate of Lee,* 564 S.W.2d 392, 394-95 (Tex. Civ. App. – Dallas 1978, writ ref'd n.r.e.). The immateriality of a jury question may be raised by a post-verdict motion to disregard or even by the trial court on its own motion. *Carey v. Am. Gen. Fire & Cas. Co.*, 827 S.W.2d 631, 632-633 (Tex. App. – Beaumont 1992, writ denied). When the evidence conclusively established that a prior injury was noncompensable, certain jury questions were immaterial and the trial court erred in failing to disregard the jury's answers to them. *Id.*

Submission of an immaterial issue is not

harmful error, unless the submission confused or misled the jury. *Alvarado,* 897 S.W.2d at 752. When determining whether a particular question could have confused or misled the jury, the appellate court will "consider its probable effect on the minds of the jury in the light of the charge as a whole." *Id.*

Examples:

(a) Inquiring whether a prenuptial agreement is "fair." There is no statutory requirement that a prenuptial agreement be fair. *Chiles v. Chiles,* 779 S.W.2d 127, 129 (Tex. App.– Houston [14th Dist.] 1989, writ denied).

(b) In *a negligence* case, the question of whether the defendant bus driver was justified in ejecting the decedent from the bus, because the decedent caused a disturbance on the bus, was immaterial and was not grounds for rendering judgment for or against a party. *Estate of Lee*, 564 S.W.2d 392, 394-95 (Tex. Civ. App. – Dallas 1978, writ ref'd n.r.e.).

(c) In a products liability case, the trial court properly excluded evidence of a post-sale assumption of a duty to retrofit a product, therefore, any tender of requested questions on the assumption of the duty was immaterial. *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex. App. – Eastland 1991, writ denied).

o. Questions Permitting a Double Recovery.

Questions permitting a double recovery must be objected to on that basis. *La. Pac.Corp. v. Smith,* 553 S.W.2d 771, 776 (Tex. Civ. App. – Tyler 1977, no writ).

p. Assumes Material Controverted Facts.

Example: Error to assume in a question that a defendant did or failed to do the acts complained of which are in dispute, such as: "failing to notify" or "agreeing to hold." *Capital Title Co. v. Mahone*, 619 S.W.2d 204, 206 (Tex. Civ. App. – Houston [1st Dist.] 1981, no writ).

q. No Predication or Improper Predication.

"Clusters" of questions, when submitted, must be predicated. TEX. R. CIV. P. 277. Conditional submission of jury questions is authorized and the practice should not be discouraged. *Strauss v. LaMark*, 366 S.W.2d 555, 558 (Tex. 1963). The failure to predicate or an improper predication can result in reversible error. *Placencio,* 724 S.W.2d at 22 (no predication was placed on comparative causation question following liability inquiries). If a question is not properly conditioned, the court can refuse it. *Id.* For example, when the facts are disputed in an action for loss of parental consortium, there must be a threshold finding by the fact-finder that the injury to the parent was a serious, permanent and disabling injury before the fact-finder determines the consortium damage issue. *Reagan v. Vaughn,* 804 S.W.2d 463, 468 (Tex. 1990); *see also Christie v. Brewer,* 374 S.W.2d 908, 913 (Tex. Civ. App. -Austin 1964, writ ref'd n.r.e.).

PRACTICE NOTE: When an answer to a controlling question is prevented by an improper conditional question *without objection,* or request by the party who is entitled to (and should insist upon) a finding, such a conditional submission is equivalent to a failure to submit, and the omitted question will be deemed found in such manner as to support the judgment. *Strauss v. LaMark,* 366 S.W.2d 555, 557-58 (Tex. 1963). "Where the court instructs the jury to answer a special issue conditioned upon an affirmative finding to another issue which should not have been given because [it inquires] about an undisputed established fact, and the jury in compliance with the instruction fails to answer the disputed issue because of not having made such an affirmative finding to the preceding issue, a party who did not object to the conditional submission waives the right to have the issue answered, and also necessarily waives the right to any benefits which he might receive to a favorable answer to such issue." *Barras v. Monsanto Co.*, 831 S.W.2d 859, 865-66 (Tex. App. – Houston [14th Dist.] 1992, writ denied). Thus, although the trial court disregarded the jury's negative finding and held as a matter of law that appellee's activities were "abnormally dangerous," the appellants could not recover because they

failed to object to the conditional submission, which the jury did not answer. *Id.* at 866.

r. Questions of Law.

Questions of law should not be submitted to the jury. *Mercier v. MidTexas Pipeline* Co., 28 S.W.3d 712, 722 (Tex. App. – Corpus Christi 2000, pet. denied) (authority of pipeline company to condemn land was a question of law); *C&C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707, 715 (Tex. App. – Dallas 1989, writ denied). In today's broad form submission practice, however, pure questions of law asking the jury to apply (as opposed to construe) legal concepts are not per se objectionable, if they are accompanied by explanatory definitions and instructions. *See Maples v. Nimitz*, 615 S.W.2d 690, 692 (Tex. 1981). In *Maples*, the question asked whether a tract of land was "community property." The question was accompanied by a definition of "community property" and an instruction that property acquired by gift during marriage was community property.

An objection that stated that a jury question on whether an easement affected the property should not be submitted because it called for a legal conclusion has been held to preserve error for appeal. *First Am. Title Ins. Co. v. Adams*, 829 S.W.2d 356, 360-61 (Tex. App. – Corpus Christi 1992, writ denied). The trial court erred in submitting the jury question because it should have been decided by the court in favor of appellant as a matter of law. *Id.* at 364.

Caveat: Mixed questions of law and fact are not necessarily erroneous. *Castleberry v. Branscum*, 721 S.W.2d 270, 277 (Tex. 1986). What is or is not a question of law will be determined on a case-by-case basis. In *Castleberry*, the Court held that a question that asked "Did Defendants X and Y use Z company as a shell to perpetuate a fraud?"

It was proper because the different bases for disregarding the corporate veil involve questions of fact. *Id.*

Generally accepted questions of law include:

(a) The legal effect of an instrument. *Nat'l Union Fire Ins. Co. v. Hudson Energy* Co., 780 S.W.2d 417, 420 (Tex. App. – Texarkana 1989), *aff'd*, 811 S.W.2d 552 (Tex. 1991).

(b) Contract ambiguity. *Exxon Corp. v. West Tex. Gathering Co.*, 868 S.W.2d 299, 302 (Tex. 1993).

(c) What constitutes duress is a question of law, but whether duress existed under the facts is a question for the jury. *Bank of El Paso v. T O. Stanley Boot Co.*, 809 S.W.2d 279,289 (Tex. App.– El Paso 1991), *aff'd in part and rev'd and rendered in part on other grounds*, 847 S.W.2d 218 (Tex. 1992).

(d) Statutory interpretation. *E.g., Payne*, 838 S.W.2d at 238.

(e) Whether a plaintiff is a consumer under the D.T.P.A. *Tex. Cookie Co.*,747 S.W.2d at 879.

(f) The proper measure of damages. *Tex. Commerce Bank v. Lebco Constr. Inc.*, 865 S.W.2d 68, 75 (Tex. App. -- Corpus Christi 1993, writ denied). The jury's consideration should be limited to the specific facts that are properly part of the damages allowable. *Id.*

The submission of a question of law is harmless unless there is a showing of extraneous prejudice. *Alamo Carriage Serv., Inc. v. City of San Antonio*, 768 S.W.2d 937, 942 (Tex. App. – San Antonio 1989, no writ). "[I]f [the question] is answered as the court should have decided, it can hardly damage; if it is answered to the contrary, the finding would be immaterial and hence should be ignored." *U.S. Life Title Co. of Dallas v. Andreen*, 644 S.W.2d 185, 193 (Tex. App. – San Antonio 1982, writ ref'd n.r.e.). *Niemeyer v. Tana Oil and Gas Corp.*, 39 S.W.3d 380, 386-87 (Tex. App. – Austin 2001, pet. denied) (even if the trial court erred in submitting a breach of contract issue to the jury, the error was harmless because, even if it was a legal issue, the court could have deemed an incorrect verdict immaterial and disregarded it).

4. Defective Definitions and Instructions.

a. Misstates the Law/Misleads the Jury.

Example: The court instructed the jury that in arriving at their answer they could take into consideration certain elements of damages "and none other." The instruction listed the elements which could be considered as past and future physical and mental pain and suffering, and loss of earnings and impaired earning capacity, which were found to have been proximately caused by the accident. On the basis of the testimony, the instruction was incomplete and therefore defective because it did not exclude from consideration in arriving at the sum to be awarded, such damages, if any, as may have been proximately caused by the failure of the plaintiff to care for and treat his knee injury as a reasonable prudent person would have done in the exercise of ordinary care under the same or similar circumstances. *Moulton v. Alamo Ambulance Serv. Co.,* 414 S.W.2d 444, 449 (Tex. 1967).

Caveat: An instruction in federal court in a damage question, which states: "if *now* paid in cash," may cut off the recovery of prejudgment interest. *Aetna Ins. Co. v. Paddock,* 301 F.2d 807, 813 (5th Cir. 1962).

b. Inclusion of Instruction.

Complaints of the inclusion of an instruction cannot be preserved for appeal by suggesting an additional instruction which is not also tendered. *Szmalec v. Madro,* 650 S.W.2d 514, 518 (Tex. App. – Houston [14th Dist.] 1983, writ dism'd w.o.j. and writ refused n.r.e.).

c. No Pleadings.

Rule 278 requires pleadings to support the submission of definitions and instructions. TEX. R. CIV. P. 278.

5. Immaterial, Unnecessary or Superfluous Charges.

A charge is objectionable when it is immaterial, unnecessary or superfluous (1) *Acord v. Gen. Motors Corp.*, 669 S.W. 2d 111,116 (Tex. 1984) [Where the Court held that it was reversible error to submit an unnecessary instruction that, while not technically incorrect, served only to "tilt" or "nudge" the jury. See also *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718 (Tex. 2003) [Instructing jury that it could presume, as a result of spoliation of evidence, that missing reindeer Christmas decoration that fell on patron from shelf, had it been preserved, could have been adverse to store was reversible error on patrons' negligence action. The very purpose of unnecessary spoliation instruction was to "nudge" or "tilt" the jury.] See also *In Re V.L.K.*, 24 S.W.3d 338 343 (Tex. 2000); *H.E. Butt Grocery Co. v. Billatto*, 985 S.W.2d 22, 36 (Tex. 1998); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). For additional examples, see:

(1) An instruction, which singled out for the jury that a manufacturer was neither an insurer nor a guarantor of a perfect or accident-proof product incorporating ultimate safety features, was a comment on the case as a whole and harmful error. *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984).

(2) A requested instruction in a products case that the defendant's negligence should not be considered was properly refused. *Fleishman v. Guadiano,* 651 S.W.2d 730, 731 (Tex. 1983).

(3) An instruction on either element of "ordinary consumer" or of "prudent manufacturer" may not be given. *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979).

(4) A question, in premises liability case, whether the occurrence (the plaintiff's fall) caused the plaintiff's death was properly rejected by the trial court. The trial court did submit a question asking whether the defendant's negligence caused the occurrence, and the causal link between the plaintiff's injury from the occurrence and his death years later was uncontroverted and, therefore, established as a matter of law. As a result, the "occurrence in question" and the "death of [the plaintiff]" had virtually the same meaning. *Star Enter. v. Marze,* 61 S.W.3d 449, 457-59 (Tex. App. – San Antonio 2001, pet. denied).

(5) An instruction that a person has a duty to protect another's person or property was unnecessary. *Park v. Larison,* 28 S.W.3d 106, 113 (Tex. App. – Texarkana 2000, no pet.), *disap'd of on other grounds,* 46 S.W3d 829, 841 (Tex. 2000).

(6) A requested definition of "unreasonable risk of harm" in a premises liability case was unnecessary where the Texas Pattern Jury Charge did not include such a definition. *Reliable Consultants, Inc. v. Jaquez,* 25 S.W.3d 336, 344-45, 347 (Tex. App. – Austin 2000, pet. denied). The appeals court explained that the judicious employment of conditions has many advantages, such as simplifying the charge, clarifying the jury's task, avoiding findings on immaterial questions, and forestalling conflicting findings. *BML Stage Lighting, Inc. v. Mayflower Transit, Inc.,* 66 S.W.3d 304, 306-07 (Tex. App. – Houston [14th Dist] 2000, pet. denied).

L. Appellate Review.

1. Standard of Review - Abuse of Discretion.

The standard for review for a charge error is abuse of discretion, and abuse of discretion occurs *only* when the trial court acts without reference to any guiding principle." *Tex. Dept. of Human Serv. v. E.B.,* 802 S.W.2d 647, 649 (Tex. 1990). *See also In Re K.M.B.,* 91 S.W.3d 18 (Tex. App. – Ft. Worth 2002, no pet.) (family law case).

2. Trial Court's Requirements.

The trial court's discretion is subject only to the requirement that the questions submitted must: (1) control the disposition of the case; (2) be raised by the pleadings and the evidence; and (3) properly submit the disputed issues for the jury's determination. *Tex. Employers Ins. Assoc. v. Alcantara,* 764 S.W.2d 865, 867 (Tex. App. – Texarkana 1989, no writ).

3. Test for Abuse of Discretion.

In determining whether there has been an abuse of discretion, the court of appeals may not substitute its judgment for that of the trial court, but must determine only whether the trial court's action was arbitrary or unreasonable. *Barham v. Turner Constr. Co.,* 803 S.W.2d 731, 735 (Tex. App. – Dallas 1990, writ denied), citing *K-Mart Corp. Store No. 7441 v. Trotti,* 677 S.W.2d 632, 636 (Tex. App. – Houston [1st Dist.] (1984), *writ ref'd n.r.e.,* 686 S.W.2d 593 (Tex.1985).

4. Test for Reversal.

To determine whether an alleged error in the jury charge is reversible, the appeals court considers the pleadings of the parties, the evidence presented at trial, and the charge in its entirety to determine if the trial court abused its discretion. Reversal is warranted when the trial court denies a proper submission of a valid theory of recovery raised by the pleadings and evidence. Otherwise, the court does not reverse unless harm results.

Rosell v. Cent. West Motor Stages, Inc. , 89 S.W.3d 643 (Tex. App. – Dallas 2002 pet. denied); *Tex. A & M Univ. v. Chambers,* 31 S.W.3d 780, 785 (Tex. App. – Austin 2000 pet. denied) (reversal required in whistleblower case because the inclusion of a rebuttable presumption of retaliation in the jury charge placed a heavier burden of proof on defendant than was required by law; an instruction that misstates the law cannot be expected to produce a correct verdict; evidence in this case was vigorously disputed, and the jury might well have found in favor of either of the parties absent the presumption instruction) *See also Reinhart v. Young,* 906 S.W.2d 471, 473 (Tex. 1995) (concluding that no evidence in the case suggested that the unavoidable accident instruction caused the case to be decided differently than it would have been without it.); *Lone Star Gas Co. v. Lemond,* 897 S.W.2d 755, 756-57 (Tex. 1995) (per curiam); *Exxon Corp. v. Perez,* 842 S.W.2d 629, 631 (Tex. 1992) (per curiam).

For harm to result, the error must probably cause the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); TEX. R. APP. P. 61.1(a); *Rosell,* 2002 WL 1933083, slip op., at 4. Alternatively, the alleged error must have probably prevented the petitioner from properly presenting the case to the appellate courts. TEX. R. APP. P. 61.1(b); *Harris County v. Smith,* 96 S.W.3d 230 (Tex. 2002).

When error in the charge relates to a contested issue in the case, the erroneous instruction will probably be considered reversible error. *Star Enter.s,* 61 S.W.3d at 456. The submission of an improper jury question is a harmless error if the jury's answers to the other questions render the improper question immaterial. *Alvarado,* 897 S.W.2d at 752. For example, a jury's affirmative liability finding under the insurance code rendered harmless a finding for the same damages under a defective DTPA question. *Colonial County Mut. Ins. Co. v. Valdez,* 30 S.W.3d 514, 520 (Tex. App. – Corpus Christi

2000, no pet.).

5. Reversal: Remand or Rendition.

If the court of appeals finds harmful (as opposed to harmless) error in the charge, the next and important question is whether the court should reverse and remand or reverse and render. The answer to this question depends on whether the complaining party raised and properly preserved "no evidence" and/or "insufficient evidence" points of error. If so, the following rules will apply. The court of appeals must first consider the "no evidence" point, which is subject to review by the Supreme Court on application for writ of error. If it sustains the "no evidence" point, it will reverse and render. If it denies the "no evidence" point but sustains the factual insufficiency point, it will remand. The court of appeals has no jurisdiction to render based on a factual insufficiency point.

Accordingly, the prayer for relief in your appellate brief is very important. In the court of appeals, ask for a reversal and rendition on your "no evidence" point of error, if you are the complaining party. In the Supreme Court, ask for reversal and remand to the court of appeals (if the supreme court overrules the no evidence point) to consider and decide the "factual insufficiency" point. In the court of appeals, ask for a reversal and remand for a new trial if the court sustains your "factual insufficiency" point of error. The Supreme Court has no jurisdiction to review the sufficiency of the evidence. *See Glover v. Tex. Gen. Indem. Co.*, 619 S.W.2d 400, 401-02 (Tex. 1981); *Wright Way Spraying Serv. v. Butler*, 690 S.W.2d 897, 898 (Tex. 1985); *In Re King's Estate*, 244 S.W.2d 660, 661-62 (Tex. 1951);Tex. Const., Art. 4, § 6.

In determining whether there is no evidence of probative force to support a jury's finding, the court will consider all of the evidence in the record in the light most favorable to the party in whose favor the verdict has been rendered and apply every reasonable inference that could be made from the evidence in that party's favor, disregarding all evidence and inferences to the contrary. *Hoffmann-La Roche, Inc. v. Zeltwanger*, 69 S.W.3d 634, 640 (Tex. App. – Corpus Christi 2002, pet. granted).

A jury's negative answer to the question asking "Did the negligence, if any, of the persons named below proximately cause the occurrence in question?" represents a refusal to find from a preponderance of the evidence that a person's negligence proximately caused the occurrence. *Dealers Elec. Supply v. Pierce*, 824 S.W.2d 294, 294-95 (Tex. App. – Waco 1992, writ denied). In *Pierce*, when the appellant attacked an adverse finding on an issue on which it had the burden of proof, the appellate court treated the point of error as if it asserted that negligence was established as a matter of law. *Id*.

XII. FINAL ARGUMENT.[1]

A. Right to Open and Close.

1. TEX. R. CIV. P. 269 and 266.

a. TEX. R. CIV. P. 269 provides that the party who has the burden of proof on the whole case, or the party who has the burden on all matters in the charge has the right to open and close the argument.

b. TEX. R. CIV. P. 266 provides that ordinarily the plaintiff has the right to open and close the argument.

2. The Four Exceptions to the Right to Open and Close.

a. TEX. R. CIV. P. 266 provides two exceptions:

(1) when the burden of proof on the whole case under the pleadings rests upon the defendant.

(2) when all defendants admit that the plaintiff is entitled to recovery, subject only to proof of the defensive allegations in the defendant's answer. *4M Linen & Uniform Supply Co. v. W.P. Ballard & Co.*, 793 S.W.2d 320, 324-25 (Tex. App.– Houston [1st Dist.] 1990, writ denied).

PRACTICE NOTE: The defendant's admission of the plaintiff's right to recover must be such that if neither party were to introduce evidence, the plaintiff

1 Frank Herrera, Jr., "Final Argument: Ending on a Winning Note," State Bar of Texas – Ultimate Trial Notebook Powerful Presentation of Evidence Seminar.

would receive a judgment. *Trice v. Stamford Builders Supply*, 248 S.W.2d 213, 215 (Tex. Civ. App.--Eastland 1952, no writ). A partial admission will not suffice. *Montoya v. Nueces Vacuum Service, Inc.*, 471 S.W.2d 110, 121 (Tex. Civ. App.--Corpus Christi 1971, writ ref'd n.r.e.)[admission covered liability but not damages]. Neither will the erroneous assignment of the burden of proof. *Reynolds v. Park*, 485 S.W.2d 807, 817 (Tex. Civ. App.- Amarillo 1972, writ ref'd n.r.e.). Nor will a party be allowed to assume the burden of proof in order to obtain the right to open and close, absent a Rule 266 admission.

b. TEX. R. CIV. P. 269 also provides two exceptions:

(1) when the defendant shows that only the defendant bears the burden of proof as to all issues that will be submitted to the jury. *City of Corpus Christi v. McCarver*, 289 S.W.2d 420, 422 (Tex. Civ. App.-San Antonio 1956, writ ref'd n.r.e.).

PRACTICE NOTE: This exception requires no admission like Rule 266.

(2) when the case involves multiple parties having separate claims and defenses, Rule 269 allows the court to prescribe the order of argument between them. *4M Linen & Uniform Supply Co. v. W.P. Ballard & Co., supra*, at 324-25.

PRACTICE NOTE: The manner of directing the order of argument is within the sound discretion of the trial court and its action will not be revised unless injury is clearly shown. *Panhandle Grain & Elevator Co. v. Dowlin*, 247 S.W.2d 873, 877 (Tex. Civ. App. – Amarillo 1923, no writ).

3. Allocation of Time for Final Argument.

(1) Court's Discretion.

i. The trial judge has wide discretion in fixing the time allowed for argument. *Aultman v. Dallas Ry. & Terminal Co.*, 260 S.W.2d 596, 600 (Tex. 1953); *Aetna Cas. & Sur. Co. v. M.E. Shiftlett*, 593 S.W.2d 768, 772 (Tex. Civ. App.– Texarkana 1979, writ ref'd n.r.e.).

ii. Unless actual injury is shown, the trial court's discretion will not be disturbed on appeal. *Brownsville Med. Ctr. v. Garcia*, 704 S.W.2d 68, 77 (Tex. App.– Corpus Christi 1985, writ ref'd n.r.e.) [refusing additional time for arguing punitive damages was harmless where the jury did not assess punitive damages against defendant.].

iii. allocation of time for argument, unequally as between the parties, does not necessarily constitute actual injury which will lead to reversible error. *Aultman v. Dallas Ry. & Term Co., supra*, at 600 [no error in allotment of 50 minutes to plaintiff and 30 minutes to each of two defendants].

iv. Only if such allocation was so arbitrary and unreasonable so as to constitute and abuse of discretion, will there be grounds for reversal. *Pirrung v. Tex. & New Orleans Ry. Co.*, 350 S.W.2d 50, 51 (Tex. Civ. App.– Houston 1961, no writ).

(2) Changes in the Court's Charge.

If a new charge is made to the jury as a result of charge error, part of the court's duty to correct the error may include allotting additional time for rearguing the new charge. *Brazos River Conservation and Reclamation. Dist. v. Costello*, 169 S.W.2d 977, 979-82 (Tex. Civ. App.–Eastland 1943, writ ref'd w.o.m.).

PRACTICE NOTE: If the jury requests further instructions pursuant to Rule 286, the court may also in its discretion allow further argument.

B. Scope of Final Argument.

The requirement to open fully TEX. R. CIV. P. 269 provides that the party opening the argument "shall present his whole case as he relies on it, both of law and facts." *Brownsville Med. Ctr. v. Gracia*, 704 S.W.2d 68, 78 (Tex. App.– Corpus Christi 1985, writ ref'd n.r.e.), held that a motion to fully open must be filed in order to preserve error caused by a

concluding statement containing matter not included in the opening and not responsive to the opponents reply argument. Failure to file such a motion constitutes a waiver of the requirement to open fully and the waiving party will not be entitled to object to the new matters covered in the concluding remarks, nor will said party be entitled to additional time to argue the new matters.

C. Scope of Closing Argument.

If a motion to fully open is filed, the closing argument is a rebuttal limited in scope to issues raised in the reply argument. TEX. R. CIV. P. 269(b).

D. Denial of Right to Argue.

1. Denial of Right to Open and Close.

"Wrongfully" depriving a party of the exercise of the right of jury argument constitutes reversible error. *Vick v. George*, 696 S.W.2d 160, 163 (Tex. App.– San Antonio 1985, writ ref'd n.r.e.). "Wrongful" deprivation is determined by examining the entire record of the case. *Seigler v. Seigler*, 391 S.W.2d 403, 404 (Tex. 1965). Only if a denial of the right to open and close was reasonably calculated to cause and probably did cause a rendition of an improper judgment will reversible error be found. *Phillips v. Sw. Bell Tel. Co.*, 559 S.W.2d 464, 465 (Tex. Civ. App.– Houston [14th Dist.] 1977, no writ). The party having the burden of proof on all matters shall be entitled to open and close. *Wagoner v. City of Arlington*, 345 S.W.2d 759, 761 (Tex. Civ. App.– Fort Worth 1961, writ ref'd n.r.e.). If a party has no interest in the case at the time it is submitted to the jury, that party has no right to jury argument. *City of Houston v. Wallace*, 585 S.W.2d 669, 672 (Tex. 1979).

2. Denial of the Right to a Reply Argument.

A party's waiver of right to open does not result in denial of the opposing party's right to make a reply argument. *Vick v. George, supra*; *Cornelison Motor Co. v. Morris*, 30 S.W.2d 509, 510-11 (Tex. Civ. App.– Fort Worth 1930, no writ).

E. Propriety of the Argument.

1. The Standard for Reversal.

In *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979), the Texas Supreme Court outlined seven factors that must be considered in order to establish reversible error resulting from improper argument, to-wit:

(1) there must be an error;

(2) that was not invited or provoked;

(3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct or a motion for mistrial;

(4) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge;

(5) that the argument by its nature, degree and extent, constituted reversibly harmful error, taking into consideration how much repetition or emphasis was placed on the argument;

(6) that the argument had an effect on a material finding in light of an examination of all of the evidence; and,

(7) that the parties seeking relief must have established its right to reversal based on an evaluation of the whole case, beginning with voir dire and ending with closing arguments.

2. General Limitations.

It is the provence of the court to inform the jury as to the law of the case. TEX. R. CIV. P. 269(d); *Sisk v. Glens Falls Indem. Co.*, 310 S.W.2d 118, 122 (Tex. Civ. App.– Houston 1958, writ ref'd n.r.e.). Counsel may not inform the jury of the legal effect of its answers. *TEIA v. Dilleshaw*, 373 S.W.2d 856, 860 (Tex. Civ. App.– Houston 1963, writ ref'd n.r.e.). Counsel is entitled to argue reasonable deductions and inferences that can be made from the evidence as they relate to the court's charge. *Dover Corp. v. Perez*, 587 S.W.2d 761, 767 (Tex. Civ. App.– Corpus Christi 1979, writ ref'd n.r.e.).

3. Counsel's Opinions and Inferences.

In discussing the weight or prohibitive effect of the evidence, counsel has a right to give his personal opinion. *Cooper v. Argonaut Ins. Co.*, 430 S.W.2d 35, 41 (Tex. Civ. App.– Dallas 1968, writ ref'd n.r.e.). However, see *Wallace v. Lib. Mut. Ins. Co.*, 413 S.W.2d 787, 790 (Tex. Civ. App.– Houston 1967, writ ref'd n.r.e.), when the court stated that

counsel "had no business stating what he believed or knew." Counsel is entitled to give his opinion on the credibility of witness testimony supported by the evidence of record. *Howsley & Jacobs v. Kendall*, 376 S.W.2d 562, 566 (Tex. 1964). Sidebar remarks, when considered with other improper arguments, may have the aggregate and cumulative effect of constituting reversible error. *Magaline v. Harrison Truck Lines, Inc.*, 446 S.W.2d 920, 926 (Tex. Civ. App.– Houston [14th Dist.] 1969, writ ref'd n.r.e.).

4. Demonstrative Evidence.

Charts diagram and other demonstrative evidence used in the presentation of evidence can be persuasive in final argument as well as being a summary or short hand rendition of volumes of evidence.

5. Evidence Not Produced.

It is generally permissible for counsel to comment on the opposition's failure to produce certain evidence, however, there must generally be some indications in the record that the opposition had access to or was in control of the evidence that was not presented. *Dover Corp. v. Perez, supra* at 767. However, when evidence not produced was the testimony of a witness, counsel may not comment on the opposition's failure to call the witness if the witness was equally available to both parties. *First Interstate Bank v. Bland*, 810 S.W.2d 277, 289 (Tex. App.– Fort Worth 1991, no writ). If the witness is an employee of the opposing party or otherwise closely related to the opposing party, counsel can comment on the opposition's failure to call such witness. *Brazos Graphics, Inc. v. Arvin Industries*, 574 S.W.2d 240, 243-44 (Tex. Civ. App.– Waco 1978) *writ ref'd per curiam*, 586 S.W.2d 841 (Tex. 1979). The right to comment on the failure to call such a witness does not grow out of the unavailability of the witness, but rather from the witness' relationship with the opposing party. *First Interstate Bank v. Bland, supra* at 289. Permissible comments addressed at the failure to call a witness raised the presumption that the failure to call the witness was based on the belief that the witness' testimony would have been unfavorable. *Claybrook v. Acreman*, 373 S.W.2d 287, 290-91 (Tex. Civ. App.–Beaumont 1963, writ ref'd n.r.e.). Once proper comment has been made on the failure to produce the witness, the opposing party may not try to rebut the presumption raised by telling the jury what the witness would have testified had the witness been called. *Smerke v. Office Equip. Co.*, 158 S.W.2d 302, 305 (Tex. 1941). The party failing to call the witness is, however, allowed to rebut the negative presumption by explaining the absence of the witness. *Biard Oil Co. v. St. Louis Sw. Ry. Co.*, 522 S.W.2d 588, 590 (Tex. Civ. App.– Tyler 1975, no writ).

6. Appeals to Bias and Prejudice.

It is improper to ask the jury to place themselves in the shoes of the party making the argument, and then ask them what they would want to receive. *Fambrough v. Wagley*, 169 S.W.2d 478, 481-82 (Tex. 1943). The reason for this rule is that it asks the jurors to view the case from one party's view point, rather than from what the evidence establishes. *Worldwide Tire Co. v. Brown*, 644 S.W.2d 144, 146 (Tex. App.--Houston [14th Dist.] 1982, no writ). Comments by counsel indicating that the opposition is from out of town are improper attempts to influence the jury. *Twin City Fire Ins. Co. v. King*, 510 S.W.2d 370, 375 (Tex. Civ. App.– Houston [1st Dist.] 1974, writ ref'd n.r.e.).

7. The Doctrine of Invited Argument.

Error is harmless when the improper argument is provoked. *State v. Bryan*, 518 S.W.2d 928, 934 (Tex. Civ. App.– Houston [1st Dist.] 1975, no writ).

F. Responding to Improper Argument.

The general rule concerning improper jury argument is that any impropriety of allegedly offensive statements is waived by the failure to make proper and timely objection. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). The exception occurs when the argument is so prejudicial that an instruction to disregard would not have removed the prejudice produced. *S. Pacific Co. v. Hubbard*, 297 S.W.2d 120, 125 (Tex. 1956). Some types of arguments recognized by the Texas Supreme Court as incurrable include:

1. Appeals to racial prejudice.

2. Epithets such as "liar," "faker," "fraud," "cheat," and "imposter." *Alright Inc. v. Pearson*, 711 S.W.2d 686, 688-89 (Tex. App.--Houston [1st Dist.] 1986), *affirmed*, 735 S.W.2d 240 (Tex. 1987).

XIII. JURY DELIBERATION, JURY MISCONDUCT AND RETURN OF THE JURY'S VERDICT.

A. Presiding Juror of Jury.

Each jury shall appoint one of their body, to be the presiding juror. TEX. R. CIV. P. 280.

B. Jury Kept Together.

The jury may decide the case in open court or retire to the jury room for deliberations. If the jury retires for deliberation, they are to remain together until a verdict is reached or the court permits them to separate for the night, meals or other proper purpose. TEX.R. CIV. P. 282. "Deliberations" means when the jury as a group weighs the evidence to reach a decision. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000).

C. Taking Exhibits to Jury Room.

The jury may request or a party may require that the jury take all exhibits with them to the jury room for their deliberations. Only exhibits offered and admitted during the trial may be taken to the jury room. Demonstrative exhibits and other exhibits not specifically admitted by the court are not allowed in the jury room. *Evry v. U. S. Automobile Assn. Cas. Ins. Co.*, 979 S.W.2d 818, 820 (Tex. App. – Eastland 1998, pet. den.).

D. Inquiry Into Jury's Verdict.

1. In an inquiry into the jury's verdict, a juror may not testify in person or by affidavit to any matter or statement occurring during deliberations or to the effect of anything on any juror's mind or emotions or mental processes as influencing that juror's decision. A juror may testify to the following [TEX. R. EVID. 606(b); TEX. R. CIV. P. 327(b)]:

    (1) Whether an outside influence was improperly brought to bear on the jury.

    (2) In rebuttal of a claim that a juror was not qualified to serve.

2. Outside influence means information coming from outside the jury and not from within the jury. *Strauss v. Cont'l Airlines*, 67 S.W.3d 428, 446 (Tex. App. – Houston [14th Dist.] 2002, no pet.). An improper outside influence does not include information obtained by a juror after the start of a trial and disseminated by that juror to other members of the jury during their deliberations. *Brandt v. Surber,* 194 S.W.3d 108, 133 (Tex. App. – Corpus Christi 2006, no pet.) (discussion of newspaper articles during deliberations was not evidence of an outside influence but merely what was on the minds of the jurors while they deliberated, and did not constitute evidence of juror misconduct).

3. A juror and others may testify when a motion for new trial is premised on jury or bailiff misconduct, improper communication with the jury, or that a juror gave erroneous or incorrect voir dire response. The testimony of the juror is limited to the allegations of the motion. TEX. R. CIV. P. 327(a). Erroneous or incorrect voir dire answers must be material and the source of injury to the complaining party to support the granting of a motion for new trial. Concealment is not the failure to disclose information due to lack of knowledge or forgetfulness. Proof of concealment must be from a source other than the jury's deliberations. *Kiefer v. Cont'l Airlines,* 10 S.W.3d 34, 40 (Tex. App. – Houston [14th Dist.] 1999, pet. den.).

4. Several policies underlie the prevention of inquiries into jury deliberations [*Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 367 (Tex. 2000)]:

    (1) Jury deliberations are held in private to encourage candid discussions.

    (2) Jurors should be protected from post-trial harassment and tampering.

    (3) A dissenting juror could seek to set aside the jury's decision to vindicate that juror's position.

    (4) Litigation must have a finite end.

5. While the court may exclude a juror's evidence regarding matters occurring during deliberations, the court may admit competent evidence from a non-juror source. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 369 (Tex. 2000). The court may also

admit evidence relating to conversations among members of the jury not gathered as a group to weigh the evidence, since those conversations are not part of the jury's deliberations. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000). The term "deliberations" applies to those discussions where the jury weighs the evidence attempting to reach a decision and not incidental discussions among jurors during trial. Discussions among jurors about the case occurring during breaks in deliberations are part of the deliberations of the jury. *Chavarria v. Valley Transit Co.,* 75 S.W.3d 107, 111 (Tex. App. – San Antonio 2002, no pet.).

E. Trial Court Determines Jury Misconduct.

1. The trial court determines whether jury misconduct requires a new trial as a question of fact. The appellate court will uphold the trial court's determination if there is conflicting evidence. *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996). Juror misconduct necessitates a new trial where the complaining party establishes misconduct occurred, that the misconduct was material, and the misconduct probably caused the rendition of an improper verdict. *Mercado v. Warner–Lambert Co.*, 106 S.W.3d 393, 396 (Tex. App. – Houston [1st Dist.] 2002, no pet.).

2. Jury misconduct requires a new trial if it appears from the record that the complaining party suffered injury. The determination of injury is a question of law, and the burden of proof is upon the complaining party. To constitute injury, the misconduct must have caused a juror to vote differently than the juror would otherwise have voted on an issue vital to the judgment. *Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex. 1996). There is no injury if the jury would have reached the same verdict regardless of the alleged misconduct. Thus, when the verdict is unanimous and misconduct is alleged only as to one juror, the complaining party will not be able to show injury because the verdict would not have changed regardless of the misconduct. *Williams v. Viswanathan*, 64 S.W.3d 624, 637 (Tex. App. – Amarillo 2001, no pet.).

3. When the jury misconduct is highly prejudicial and inimical to the fairness of the trial, injury is presumed. Highly prejudicial misconduct arises to the level of jury tampering and violates a party's constitutional right to trial by jury. *Strauss v. Cont'l Airlines, Inc.,* 67 S.W.3d 428, 448 (Tex. App. – Houston [14th Dist.] 2002, no pet.).

F. Return of Verdict.

1. Definition of a Verdict.

a. The return of a verdict in a civil trial is controlled by the applicable rules of Civil Procedure. Strict conformance to those rules is necessary to avoid waiver of any alleged error.

b. A verdict is a written declaration of a jury's decision as to all of the issues submitted to the jury. A verdict is either general or special. A general verdict is one whereby the jury pronounces generally in favor of one or more parties upon all or any of the issues which were submitted to the jury. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court. A special verdict is as to the parties to the litigation conclusive as to the facts found. TEX. R. CIV. P. 290.

2. Form of a Verdict.

A verdict does not have to conform to any special form and is not subject to being arrested or reversed for mere want of form so long as there has been substantial compliance with the requirements of the law in rendering a verdict. TEX. R. CIV. P. 291.

3. Verdict by a Portion of Jury.

Except as regards to exemplary damages, a verdict may be rendered by ten or more jurors of an original jury of twelve, or five or more of an original jury of six. A jury may return a verdict provided that nine members remain after allowance of death and disability. When less the original number of jurors remains, the verdict must be signed by each juror who concurs in the verdict. TEX. R. CIV. P. 292(a). A unanimous jury must concur in a verdict finding liability for and the amount of exemplary damages. TEX. R. CIV. P. 292(b). The failure to require a unanimous verdict in regards to exemplary damages may be preserved by a motion for new trial. *DeAtley v. Rodriguez*,

246 S.W.3d 848, 850 (Tex. App. – Dallas 2008, no pet.) (jury returned a non-unanimous verdict for exemplary damages and was discharged without objection or motion to correct by losing party. The losing party did file a motion for new trial, which was held to preserve the error).

4. Return of a Verdict.

Once a verdict is reached, the jury returns to the courtroom and delivers their verdict to the clerk of the court, who then reads the verdict once the jury states they have reached agreement. The verdict is then entered upon the records of the court if (1) it is in proper form, (2) no juror objects to its accuracy, (3) no juror who agreed to the verdict expresses a dissent from the verdict, and (4) neither party requests a poll of the jury. TEX. R. CIV. P. 293. A verdict does not become an official act until it is received and accepted by the trial court. A judgment may not be rendered on a verdict until it is received and accepted by the court. Until the verdict is accepted by the trial court it may be modified and amended by the jury. *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 689 (Tex. App. – Dallas 2000, no pet.)

XIV. POST-VERDICT MOTIONS - ENTRY OF JUDGMENT AND JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV).

A. Judgment on the Jury Verdict.

1. Duty of the Court.

When a special verdict is rendered, the court must render judgment on it unless the verdict is set aside, a new trial is granted, or judgment is rendered notwithstanding the verdict or jury finding. TEX. R. CIV. P. 300; *Ponce v. Sandoval*, 68 S.W.3d 799, 805 (Tex. App. – Amarillo 2001, no pet.)

2. Verdict Must be Sufficient for Judge to Enter Judgment.

In order for the judge's ministerial duty to render judgment to arise, the jury must return a sufficient verdict for the judge to enter judgment. *Astec Ind., Inc. v. Suarez*, 921 S.W.2d 794, 798 (Tex. App.– Fort Worth 1996, no writ). The verdict's sufficiency can be tested and/or weakened by a motion for judgment notwithstanding the verdict.

3. Motion for Judgment Notwithstanding the Verdict (JNOV).

Upon motion and reasonable notice, the court may render judgment withstanding the verdict if a directed verdict would have been proper. TEX. R. CIV. P. 301; *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). To uphold a trial court's judgment notwithstanding the verdict, an appellant court must determine that no evidence supports the jury's findings. *Id.* A motion for judgment notwithstanding the verdict should be granted when a fact was established contrary as a matter of law to the jury's response to a question. *Juliette Fowler Homes, Inc. vs. Welch Assoc., Inc.*, 793 S.W.2d 660, 666 (Tex. 1990). When the trial court does not specify its reasons for granting a motion for judgment notwithstanding the verdict, the appellant has the burden to oppose each potential reason as stated in the appellee's motion. *Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 593 (Tex. App.–Dallas 1995, writ denied). The court may also disregard any jury finding on a jury question having no support in the evidence. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990).

4. Verdict on Alternative Theories of Recovery.

When a party tries a case on alternative theories of recovery and a jury returns favorable findings on two or more theories, the party has a right to a judgment on the theory entitling him/her to the greatest or most favorable relief. *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988).

5. Motion for Entry of Judgment.

When a litigant moves the court to enter judgment, which the court then enters, the litigant cannot later complain of that judgment except on jurisdictional grounds. *JCW Elec., Inc. v. Garza*, 176 S.W.3d 618, 628 (Tex. App.–Corpus Christi 2005, no pet.). When a party ask the court to render judgment for a particular amount, and the court renders judgment for that amount, the party cannot later challenge the judgment on appeal. *Chappel Hill Bank v. Lane Bank Equip. Co.*, 38 S.W.3d 237, 247 (Tex. App.– Texarkana 2001, pet. denied). When mandamus is sought to compel rendition of a judgment, the movant has a burden of showing that the judge is required to enter judgment as a ministerial act and has refused to do so. *In re Am. Media Consol.*, 121

S.W.3d 70, 73 (Tex. App. – San Antonio, 2003, orig. proceeding).

B. Entry of Judgment.

1. Entry of judgment is a ministerial act by which evidence of the judicial act or rendering a judgment is afforded. *Flores v. Onion*, 693 S.W.2d 756, 758 (Tex. – San Antonio 1985, orig. proceeding).

2. Rendition is the first age in the judgment process. A judgment is rendered when a trial court's decision on the matter before it is officially announced, either orally or in open court or by memorandum filed with the clerk. *Garza v. Tex. Alco. Bev. Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002).

3. Awards used by the trial court must clearly reveal an intent to render judgment at the time awards are spoken. *Bailey-Mason v. Mason*, 122 S.W.3d 894, 897 (Tex. App. – Dallas 2003, pet. denied).

C. Motion to Disregard Jury Findings.

1. Motions to disregard jury finds are authorized by TEX. R. CIV. P. 301, which states that a court may disregard any finding "which has no support in the evidence." TEX. R. CIV. P. 301; *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990).

2. There are at least two purposes of a motion to disregard jury findings, that is, (1) to eliminate one or more specific findings, as opposed to the in dire verdict with a motion for judgment notwithstanding the verdict, and (2) to preserve the right to bring a legal sufficiency complaint on the evidence behind the finding, and to secure rendition of judgment should the court sustain the legal sufficiency complaint. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992).

D. Motions for New Trial.

1. Motions for new trials are authorized and governed by TEX. R. CIV. P. 320, 321, 324, 326, 327, and 329(b).

2. Motions for new trial are filed to change the court's mind about the judgment so that the court orders a new trial, to preserve error on appeal for certain types of complaints, and to extend appellate deadlines.

3. A motion for new trial may be granted upon motion by any party. Unlike a judgment notwithstanding the verdict or the disregarding of a jury finding, a new trial may be granted on the court's own motion. TEX. R. CIV. P. 320; *City of Marshall v. Gonzalez*, 107 S.W.3d 799, 805 (Tex. App. – Texarkana 2003, no pet.).

4. General objections cannot be considered by the court, and general complaints in the motion for new trial cannot support a point of error on appeal. *In re C.A.T.*, 193 S.W.3d 197, 211 (Tex. App. – Waco 2006, pet. denied).

5. A motion for new trial may be granted for "good cause." TEX. R. CIV. P. 320; *City of Marshall v. Gonzalez*, 107 S.W.3d 799, 805 (Tex. App. – Texarkana 2003, no pet.); or for jury misconduct TEX. R. CIV. P. 327.

6. Although the granting or refusal to grant a motion for new trial is within the trial court's discretion, it is an abusive discretion to refuse to set aside a prior judgment if good cause is shown. *Cliff v. Huggins*, 724 S.W.2d 778-7 (Tex. 1987).

XV. JUDGMENT AFTER NON-JURY TRIAL - REQUESTING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Time Deadlines.

1. A party to a case tried without a jury may request that the court state in writing its findings of fact and conclusions of law. The request must be filed within 20 days after the judgment is signed. TEX. R. CIV. P. 296; *IKB Ind. Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997).

2. A timely filed request for findings of fact and conclusions of law extends the deadline for perfecting appeal from 30 to 90 days after the judgment, based in part on an evidentiary hearing, is signed in a case tried without a jury. TEX. R. APP. P. 26.1(a)(4); *IKB Ind. Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997).

3. When a request for findings of fact and conclusion of law is timely filed, a trial court must file its findings and conclusions within 20 days after the request. TEX. R. CIV. P 297; *In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App. – Texarkana 2003, no pet.).
4. If the court fails to timely file its findings of fact and conclusions of law, the requesting party should, within 30 days after filing its original request, file with the clerk and serve on all other parties a "Notice of Past Due Findings of Fact and Conclusions of Law," noting the date the original request was filed and the date that the findings of fact and conclusions of law were due. TEX. R. CIV. P. 21a; *Lee v. Perez*, 120 S.W.3d 463, 466 (Tex. App. – Houston [14th Dist.] 2003, no pet.). Failure to file a notice of past due findings waives any right to findings of fact and conclusions of law after a bench trial. *Gaxiola v. Garcia*, 169 S.W.3d 426, 429 (Tex. App. – El Paso 2005, no pet.).

B. Request Does Not Extend Court's Plenary Power.

A request for findings of fact and conclusion of law does not extend a trial court's plenary power, which would allow it to modify its judgment. *Pursley v. Ussery*, 982 S.W.2d 596, 599 (Tex. App.– San Antonio 1998, pet. denied).

C. Effect of Failure to Request Findings.

When the losing party does not request findings of fact under TEX. R. CIV. P. 296, all findings are deemed in favor of the judgment. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

D. Omitted Findings.

TEX. R. CIV. P. 299 allows omitted unrequested findings when support by the evidence, to be deemed to support the trial court's judgment, when one or more elements of the recovery or defense have been found by the trial court. *Bernal v. Chavez*, 198 S.W.3d 15, 20 (Tex. App.– El Paso 2006, no pet.).

E. Request for Additional Findings.

Within 10 days after the court files original findings of fact and conclusions of law, any party may file with the clerk a request for additional or amended findings or conclusions. The request must be served on each party of the suit according to TEX. R. CIV. P. 21a. TEX. R. CIV. P. 298.

F. Findings on Ultimate Issues.

Upon a timely request, the court must make additional findings, but only on ultimate issues. Requested findings that merely relate to an evidentiary point are improper. TEX. R. CIV. P. 298; *In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App. – Texarkana 2003, no pet.).

G. Findings Are Separate from Judgment.

It is improper for the trial court to recite findings of fact and conclusions of law in a judgment. An appellant court will not consider findings improperly included in a judgment. TEX. R. CIV. P. 299a; *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App. – Houston [1st Dist.] 1998 pet. dism'd).

APPENDIX 1

COMMON OBJECTIONS AND COMMENTS

COMMON OBJECTIONS AND COMMENTS

	NAME OF OBJECTION	EXAMPLE	FORM OF OBJECTION	COMMENT
1	Ask and answered	(Self explanatory)	Objection, the question has been asked and answered.	Prevents unnecessary waste of time with repetitive testimony.
2	Argumentative	"*You* have no idea what you are talking about, do you?"	Objection, the counsel is arguing with the witness.	Courts will give great latitude with argumentative questions on cross-examination.
3	Assuming facts not in evidence	"When did you stop beating your wife?"	Objection, the question assumes the facts not in evidence.	Counsel can always request the Court to permit the answer with the assurance that he will link up the evidence at a later time.
4	Best evidence	"Tell the jury what the deed said."	Objection, the best evidence of the deed is the deed itself.	When one of the issues is the actual content of the document, the best evidence rule requires the production of that document.
5	Compound	"What did you do with the boat and did you buy a new car?"	Objection, counsel has asked a compound question and the response will be misleading to the jury.	Usually the Court will instruct counsel to ask one question at a time.
6	Demonstrative evidence	"The exhibit is an illustration based upon documents not previously provided or produced or is based upon inaccurate data.	Objection, the exhibit lacks adequate foundation in that it does not properly characterize the underlying data.	As long as the demonstrative evidence accurately depicts the underlying data, it should be admissible.
7	Hearsay	Multiple possibilities	Objection, the response calls for hearsay.	Once a hearsay objection is raised, the burden shifts to the proponent to state the proper exception for the statement's admission.
8	Immaterial	Witness testimony that has no bearing on any issue in the case.	Objection, the witness's response to the question is immaterial because_____.	The objecting counsel should point out to the Court that regardless of the witness's response, it will have no bearing whatsoever on the outcome of the case.
9	Incompetency of witness	Testifying witness has no personal knowledge concerning the subject matter or suffers from a disability (age, mental, physical) which renders them incompetent to testify on the disputed issue.	Objection, the witness is incompetent to respond to the question in that he/she has no personal knowledge of the event (or is incapable of responding because _____.)	If counsel believes that the witnesses' lack of personal knowledge will be an issue, he should take the witness on voir dire prior to any material questions being asked.

	NAME OF OBJECTION	EXAMPLE	FORM OF OBJECTION	COMMENT
10	Judicial notice	"I ask the Court take judicial notice of the divorce decree entered in another court."	Objection, a decree entered in another court is not the proper subject of judicial notice by this Court.	A court can always take judicial notice of its own file and its contents. A court paper of another court's file should be offered and admitted as a certified copy.
11	Leading and suggestive	"Did it look like he had gone through your things?"	Objection, counsel is leading the witness and suggesting the answer.	The courts normally permit great latitude on direct examination on mundane matters such as name, address, etc. The court should never permit counsel to lead their witness through the entire testimony.
12	Misstating former testimony	Counsel informs the witness as to what a prior witness said and the statement is erroneous.	Objection, counsel has misstated the prior testimony.	If a jury trial, objecting counsel should ask that the statement be stricken and the jury instructed to disregard and to rely on their own memories as to what the witness actually said.
13	Non-responsive	Witness's response does not answer the question asked or goes beyond the question and includes matter not requested.	Objection, the answer is non-responsive and request is made that it be stricken from the record,	Any type of volunteer statements by the witness will be considered non-responsive to the question. This is really a problem between the questioner and the witness and not opposing counsel and the witness.
14	Opinions and conclusions	Lay witness: "Tell us what you thought happened." Expert: "It is my opinion that"	Objection, the question calls for the witness to state an opinion or conclusion which he/she has not been qualified to give.	Fact finders need to hear facts, not conclusions. Experts may give their conclusions and opinions provided they have been properly qualified and the proper predicate has been layed.
15	Parol Evidence Rule	"Tell us what other agreements you had that weren't contained in the contract."	Objection, the question calls for a response that violates the Parol Evidence Rule.	Exceptions: Mutual mistake, fraud, ambiguity, etc.
16	Privilege	"Tell us what your lawyer told you about the temporary restraining order."	Objection, a response would violate the attorney/client privilege.	The privilege exists only between those persons enumerated in Texas Rules of Evidence Article V. Either the client or their counsel, on their behalf, has the right to invoke the privilege.
17	Narrative answer	"Tell the jury what you have done since you arrived in Houston in 1993."	Objection, the question calls for a narrative answer.	At any time a type of question like this is asked, or the witness voluntarily begins a lengthy narrative response, request should be made that the courtconfine the witness to question and answer.

	NAME OF OBJECTION	EXAMPLE	FORM OF OBJECTION	COMMENT
18	Refreshed recollection	"Now that you have had your recollection refreshed, would you please read from the document you referred to."	Objection, it is improper for the witness to read from the document. Once the recollection is refreshed, the witness is then to testify from their refreshed memory.	Documents are most often used to refresh the witness's memory regarding a particular date or event. They are not permitted to read from the document once their recollection is refreshed.
19	Speculation / Conjecture	"What do you think will happen if Mr. Jones is awarded custody of the children?"	Objection, the questions calls for speculation on the part of the witness.	Unless the witness has been qualified as an expert under IRE 702 and should not be permitted to give a speculative answer.

APPENDIX 2

QUICK REFERENCE GUIDE TO COMMONLY USED PREDICATES

INDEX TO PREDICATES

QUICK REFERENCE GUIDE TO COMMONLY USED PREDICATES

1. **ADMISSIONS** [R. 801 (E) (2)]

A. Party's Own Statement:

1. other party made statement in individual, or representative capacity; and,

2. statement is contrary or inconsistent with declarant's position at time statement is offered.

B. Party's Implied Admission:

1. definite statement of a matter of fact, affecting a party or his rights;

2. made in opposing party's presence or hearing so that he/she was capable of understanding it;

3. the statement is of such a nature as to call for a reply;

4. party against whom offered:

   (1) assented to the statement or

   (2) failed to deny the truth of the statement, which would support an inference of concession by the opposing party of the truth of the fact stated; and

   (3) opportunity existed at time statement made for party to deny statement; and,

5. statement is contrary to, or inconsistent with, the position of party (against whom offer is made) at the time the statement is offered.

C. Judicial Admissions:

1. statement, oral or written, made in the course of a judicial proceeding;

2. it is contrary to an essential fact for that party's recovery;

3. it is deliberate, clear and unequivocal;

4. it is related to a fact upon which judgment for the opposing party could be based; and,

5. enforcing the admission would be consistent with public policy.

2. AUTHENTICATION & IDENTIFICATION *– Extrinsic Proof Required* [R. 901]

A. Writing - By Author or Signator:

1. witness wrote or signed the exhibit;

2. relevant details of writing or signing evidencing author's intent to assert matters contained in exhibit; and,

3. witness recognized the exhibit and/or handwriting as his.

B. Writing - By Observing Witness:

1. witness observed the signing or execution of exhibit;

2. when, where, who present;

3. relevant details of writing or signing evidencing author's intent to adopt or execute document;

4. exhibit marked is one (or accurate copy) that was written or signed; and,

5. details of how witness recognizes exhibit.

C. Writing - By Witness Familiar with Handwriting:

1. witness is familiar with author's hand-writing or signature;

2. details and extent of familiarity;

3. familiarity not acquired for purpose of testifying;

4. witness recognizes author's handwriting or signature on exhibit.

D. Writing - By Adverse Party:

1. witness is familiar with author's hand-writing or signature;

2. details and extent of familiarity;

3. familiarity not acquired for purpose of testifying; and

4. witness recognizes author's handwriting or signature on exhibit.

E. Writing - By Use of Reply Letter:

1. witness prepared, properly wrapped, addressed, stamped and mailed letter to another;

2. witness received letter purportedly from addressee of letter sent by witness in the due course of mail;

3. letter received and referred to was in response to letter sent; and,

4. witness identifies the exhibit as letter received.

F. Voice Identification:

1. witness has heard speaker's voice before, either firsthand or off recording;

2. witness subsequently heard voice that connected it to a specific person; and

3. based on other instances of hearing the voice, witness is of opinion the statement was in the voice of the specific person.

G. Telephone Conversation (Speaker's Voice Recognized):

1. witness has heard speaker's voice before, either firsthand or off recording;

2. witness subsequently heard voice that connected it to a specific person; and

3. based on other instances of hearing the voice, witness is of opinion the statement was in the voice of the specific person.

H. Telephone Conversation (Speaker's Voice Not Recognized):

1. speaker identifies himself to caller;

2. number called was that assigned by telephone company to self-identifying person;

OR

2. speaker acknowledges certain facts that only speaker likely to know;

OR

2. subsequent events substantiate phone call, e.g., witness testifies person called fire department and fire department responds at a later time.

I. Business Phone Calls:

1. call made to place of business; and,

2. conversation relates to business reasonably transacted over telephone.

J. Identification of Unique Physical Item:

1. item sought to be admitted is relevant and has a unique characteristic(s) that is perceptible by human senses;

2. witness had previously perceived the item;

3. witness recognized the item as the same one previously perceived; and,

4. relevant characteristic(s) of exhibit have not changed substantially since it was previously perceived;

OR

4. if changed in appearance, witness explains so that exhibit will not be unfairly misleading.

K. Identification of Common Physical Item:

1. witness recognized exhibit as one obtained/received at specific time, place, and certain circumstances;

2. witness has maintained possession or control of item to extent that it is unlikely it was substituted or tampered with by others;

3. changes, if any, in item while in witness's possession was caused or occasioned by witness; and,

4. how witness disposed of item (where it has been prior to presentation in court).

L. Photographs:

1. witness observed the subject at or near the time of the event in issue;

2. witness recognizes the exhibit as a representation of the subject observed; and

3. exhibit is a true and accurate representation of the subject as it appeared at the relevant time.

M. Tape Recordings - Audio and Video:

1. witness recorded a certain conversation or event;

2. recording device used was capable of recording the sights/sounds involved and at the time was in good working order;

3. witness was competent to operate the device;

4. the recording offered is the correct version of the recording;

5. there were no material changes, additions or deletions made to the recording;

6. the manner of preservation of the recording;

7. the recording is a true and accurate representation of the matter recorded at the time; and,

8. playback device used in court is capable of reproducing the recording and is in normal operating condition.

N. Transcripts of Audio Recordings:

1. the tape recording accurately reflects a representation of the conversation;

2. the witness has read the transcript exhibit and it is a true and accurate transcription of the audio tape; and

3. offer transcript for limited purpose of aiding the jury in listing to the tape.

3. SELF AUTHENTICATION – *No Extrinsic Proof Required* [R. 902]

A. Public Documents Under Seal -*Domestic*- (902(1):

1. document bears the seal of one of the entities listed in TRE 902 (1); and

2. document bears a signature purporting to be an attestation or execution.

B. Public Documents Not Under Seal - *Domestic*- 902(2):

1. document bearing signature of officer or employer, in his official capacity, of one of the entities listed in TRE 902 (1); and,

2. that signer has the official capacity and signature is genuine.

C. Public Documents Under Seal -*Foreign* - 902(3):

1. foreign country document;

2. executed or attested by official with capacity as authorized by laws of foreign country;

3. accompanied by final certification as to genuineness of the signature and official position of the executing or attesting person;

OR

4. of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation;

OR

5. is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation (e.g. consulate).

D. Certified Copies - 902 (4):

1. document bears certification from person with official capacity to keep such records; and,

2. document is one authorized by law to be recorded and filed and actually recorded and filed in a public office.

E. Official Publications - 902 (5):

1. book, pamphlet, etc.; and,

2. issued by a public authority.

F. Newspapers and Periodicals -902(6):

1. Show relevancy; and,

2. introduce publication.

G. Trade Inscriptions - 902 (7)

1. inscription, tag, label or sign; and,

2. label, trademark, etc. purports to have been placed on the item in the course of business.

H. Acknowledged Documents - 902 (8):

documents acknowledged before a person empowered to administer oath.

I. Business Records with Affidavit -902(10):

1. records which would be admissible under TRE 803 (6) or (7);

2. proper affidavit attached to records offered and the records and affidavit were;

3. filed with clerk 14 days prior to day trial commences;

4. notice of filing given to opposing side; and,

5. notice included name and employer of person making affidavit and that records were available to other parties for inspection and copying.

4. BEST EVIDENCE RULE[R. 1001-1008]

A. Items Covered by Best Evidence Rule:

1. writings and recordings (including letters, numbers, typewriting, photostating, photographing, magnetic impulse, mechanical or electronic recording, data compilations);

2. photographs (including videos and motion pictures);

3. original writing/recording;

4. writing or recording itself; or

5. any counterpart, intended to have same effect by person executing (e.g. executed copy of a will); and,

6. original photograph includes the negative or print therefrom.

B. When is 'Original' Not Required? R. 1003.

1. when a lack of authenticity question is not raised as to a duplicate, or

2. where it would not be unfair to the other party to admit the duplicate, or

3. original lost or destroyed through no fault of proponent (TRE 1004 (1)), or

4. original not obtainable (TRE 1004 (2)),

OR

4. original outside state (TRE 1004 (3)), or

5. original in possession of opponent, and

6. he was put on notice that content would be subject of proof at hearing; and

7. opponent does not produce original at

hearing;

8. contents collateral to controlling issue;

9. contents of public records (TRE 1005);

10. summary of originals are offered, provided, (TRE 1006);

11. the originals or duplicates have been or are made available to opposing side for examination and copying prior to offering summaries;

12. the contents of the original or duplicates are otherwise admissible; and,

13. contents of original provided by other party (TRE 1007) (no need to account for non-production of original).

C. Function of Court. (R. 1008):

1. whether exhibit is an 'original';

2. whether exhibit qualifies as a duplicate;

3. whether a genuine question is raised as to authenticity under TRE 1003;

4. fairness or unfairness in admitting duplicate instead of original;

5. whether original is lost or destroyed;

6. whether proponent lost or destroyed original in bad faith;

7. whether original can be obtained by available judicial process;

8. whether proper notice was given a party in control of evidence; and,

9. whether evidence goes to controlling or collateral issue.

D. Function of Jury:

1. whether writing/recording ever existed; and,

2. whether other evidence of contents accurately reflects the contents.

5. BUSINESS RECORDS -*No Affidavit* [R. 803(6)]

1. exhibit is memorandum, report, etc. of an act, event, etc.;

2. exhibit was made by a person with personal knowledge or from information transmitted by a person with personal knowledge of the matter recorded;

3. the exhibit was made at or near the time of the act, event, etc. that is reflected in the entry;

4. the exhibit was kept in the regularly conducted business activity; and,

5. that it was the regular practice of that business to make such memorandum, report, etc.

6. CHARACTER EVIDENCE [R.404, 405, 608-610]

A witness' credibility may be attacked or supported by opinion evidence if: 1) evidence only refers to witness' reputation or character for truthfulness or untruthfulness, and 2) the witness' credibility has been attacked by prior opinion or reputation testimony supporting or attacking the credibility of a witness as to truthfulness.

A. To Prove Character for Truthfulness:

1. person attacked has appeared as witness;

2. person's character has been attacked in this proceeding;

3. establish facts showing witness' knowledge of character (i.e. business partner, neighbor, etc.);

4. ask if witness has opinion as to character for truthfulness or untruthfulness; and,

5. ask for opinion.

B. To Prove Reputation for Truthfulness:

1. person attacked has appeared as witness;

2. person's reputation in community for truthfulness has been attacked in this proceeding;

3. establish facts showing witness' knowledge of community opinion;

4. ask if witness knows person's reputation in community for truthfulness; and

5. ask for opinion.

C. To Prove Character/reputation for Untruthfulness:

1. person under attack appeared as witness;

2. establish basis for witness' knowledge of person's lack of trustworthiness;

3. ask if they have opinion or know reputation;

4. ask what reputation is in community or what character is for truthfulness.

D. Specific Instances of Conduct:

Evidence that a person acted in a certain way by proving prior instance(s) of conduct is inadmissible.
Exceptions - [404 (a)(1)-(3) (b); 405 (b)]

1. conduct involving moral turpitude; or

2. violent or assaultive conduct (self defense) or peaceable character.

R. 607, 608, 609.

1. motive, opportunity, intent, preparation, etc.

2. character or trait is an essential element of claim or defense (i.e. fraud).

7. CHARTS & DIAGRAMS [R. 1001, 1002, 1003, 1004, 1006,1008]

Admission of charts and diagrams which summarize a witness' testimony is within the discretion of the court.

1. witness properly identifies or authenticates the exhibit (see authentication and best evidence);

2. witness describes or explains purpose of exhibit (summarizes or illustrates a particular act(s) or object(s); and,

3. witness testifies it will aid trier of fact (not required but recommended).

8. DEPOSITIONS (as substantive evidence) [R. 801 (e) (3)]

1. assure that deposition has been properly certified by the court reporter according the Tex.R.Civ.P;

2. state that the witness is being called by deposition;

3. state the time, date, and parties and counsel present at time of taking of depo;

4. state the line, page of the deposition and name of questioner at the beginning of each segment which will be read; and,

5. state when the offer of testimony is concluded.

9. FOREIGN COUNTRY LAW [R. 203]

1. Proof of 30 days notice prior to trial that copy of foreign law text was furnished to opposing counsel;

2. Proper translation, if not in English, of the foreign law relied upon (R. 1009); and,

3. Offer the translation.

OR

Ask court to take judicial notice.

10. GOODWILL OF A BUSINESS [R. 702-703]

Qualify expert;

1. authenticate and have witness explain data relied on;

2. establish whether the practice/business has any personal and/or professional goodwill;

3. if so, explain the difference and that any consideration of the value of personal goodwill has been excluded from the calculation; and,

4. have witness state opinion as to value.

11. HEARSAY [R. 801-806]

A. DEFINITIONS:

"*Statement*" - an oral or written verbal expression; or, non-verbal conduct of a person (gesture), if intended as a substitute for verbal expression.

"*Declarant*" - person who makes a statement.

"*Matter Asserted*" means 1) any matter explicitly asserted or any matter implied by a statement; and 2) if probative value of the statement, as offered flows from the declarant's belief as to the matter.

"*Hearsay*" means 1) statement (verbal, written, nonverbal), 2) made by the declarant other than while testifying at court or hearing, and, 3) offered to prove the truth of the matter asserted.

B. STATEMENT OFFERED TO PROVE STATEMENT MADE (Not Hearsay).

(1) State of Mind of the Declarant.

1. that statement was made;

2. that statement circumstantially, rather than directly, supports a reasonable inference

of the belief of the declarant;

3. that the statement is offered for such inference rather than the truth of the statement; and,

4. that the statement was "_____".

(2) State of Mind of Receiver of Statement:

1. certain statement made, when;

2. that attendant facts and circumstances indicate that the statement was heard by another person;

3. the hearing of the statement by the other person supports a reasonable inference by such other person;

4. that statement is offered for such inference rather than to prove that truth of the matter asserted; and,

5. the statement was "_____".

(3) Impeachment by Prior Inconsistent Statement:

See Impeachment, *infra.*

(4) Operative Facts:

1. certain statement was made by a person who has certain relationship to the court action;

2. that facts and circumstances attendant to the making of the statement gave it legal significance or effect, regardless of the truth or falsity of the matter asserted; and,

3. the statement was "_____".

C. STATEMENTS NOT HEARSAY BY STATUTORY FIAT [R. 801 (e)]

(1) Prior Statements by Witnesses - 803(e)(1):

1. declarant testifies at trial, hearing, deposition and is subject to cross-examination concerning statement and the statement is:

2. given under oath and inconsistent with testimony at trial; or

3. consistent with trial testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or

4. one of identification of a person made after perceiving him.

(2) Admission by Party Opponent - 801(e) (2):

See Admissions, supra.

(3) Depositions - 801 (e) (3):

See use of Depositions, *supra*.

D. STATEMENTS NOT HEARSAY BY STATUTORY EXCEPTION -AVAILABILITY IMMATERIAL [R. 803]

(1) Present Sense Impression - 803 (1):

1. that an event occurred or condition existed;

2. that the declarant observed or acquired knowledge of the event or condition;

3. that the declarant made a statement while perceiving the event or condition or immediately thereafter; and,

4. that the statement described or explained the event or condition.

(2) Excited Utterance - 803 (2):

1. that a starting event or condition occurred;

2. that the declarant participated in, observed, or acquired knowledge of the event or condition;

3. that the event or condition caused the declarant to be under the stress of excitement;

4. that the declarant made a statement while under that stress; and,

5. that the statement related to the startling event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition - 803 (3):

1. that statement was made as to declarant's state of mind;

2. the statement described or stated the presence of the state of mind which existed at the time of the statement; and,

3. statement was spontaneously and unreflectively (optional) made.

(4) Statements For Purpose of Medical Diagnosis or Treatment -803(4):

1. declarant made statement to physician or other health functionary;

2. statement made for purpose of making some form of medical diagnosis or treatment;

3. statement described:

   a. present symptoms, pain or sensation;

   b. past symptoms, pain or sensation;

   c. declarant's medical history; and,

   d. inception or character of the cause or external source thereof.

4. statement made is reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection - 803 (5):

1. that the witness once had personal knowledge of the matter, but currently has insufficient recollection to enable him to fully and accurately testify;

2. that refreshment of the witness's recollection is not possible;

3. the exhibit is a record or memorandum of concerning that matter;

4. the exhibit accurately reflects his prior knowledge of the matter reflected in the writing; and,

5. Offer exhibit.

(6) Business Records - 803 (6):

See Business Records, *supra*.

(7) Absence of Entry in Records - 803(7):

1. that memoranda, reports, etc., in any form, were made and kept in a particular business, as defined;

2. they were made and kept in the course o f a regularly conducted business;

3. it was the regular practice to keep them;

4. that they regularly reflect acts, events, etc. of a certain kind;

5. that search was made of the records for a particular memorandum, report, etc.; and,

6. the particular memorandum, report, etc. could not be found.

(8) Public Records and Reports - 803 (8):

1. the report/record is of a public office / agency; and,

2. the report/record sets forth:

   a. the activities of the office/agency, or

   b. matters observed pursuant to a duty imposed by law at to which matters there was a duty to report; or,

   c. factual findings resulting from an investigation made pursuant to authority granted by law.

(9) Records of Vital Statistics - 803 (9):

1. Birth, death, marriage, etc., records; and,

2. Record was made by agency/public office, pursuant to requirement of law.

(10) Absence of Public Record or Entry - 803 (10):

1. that memoranda, reports, etc., in any form, were made and kept in a particular business, as defined;

2. they were made and kept in the course of a regularly conducted business;

3. it was the regular practice to keep them;

4. that they regularly reflect acts, events, etc. of a certain kind;

5. that search was made of the records for a particular memorandum, report, etc.; and,

6. the particular memorandum, report, etc. could not be found.

(11) Religious Records - 803 (11):

1. that a certain record exists which contains assertions of fact of personal history;

2. authenticate record;

3. the marked exhibit was obtained from the records of a religious organization; and,

4. the religious organization regularly maintains such records.

(12) Marriage, Baptismal, and Similar Certificates - 803 (12):

See Public Records and Reports, *supra*.

(13) Family Records - 803 (13):

1. the relevant family maintained a certain record, e.g., Bible;

2. authenticate record;

3. entries in record related to members of that family; and,

4. the entries in that record recited facts concerning personal or family history.

(14) Records of Documents Affecting an Interest in Property - 803 (14):

1. record/document document; and,

2. execution and delivery by each person to whom it purports to have been executed.

(15) Statements in Documents Affecting Interest in Property - 803 (15):

1. record/document;

2. statement contained in document was relevant to purpose of the document; and,

3. dealings with property since made have not been inconsistent with the truth of the document, or purport of the document.

(16) Ancient Documents - 803 (16):

1. statement offered is contained in a document;
2. Authenticate record;

3. document is in such condition as to be free from suspicion of having been tampered;

4. document was obtained from a place where, if authentic, it would likely be; and,

5. document is at least 20 years old at the time of offer.

(17) Market Reports, Commercial Publications - 803 (17):

1. eport, list, tabulation is generally used/relied upon by the public, or person of a particular occupation; and,

2. Offer Report, list, tabulation, or copy.

(18) Learned Treatises - 803 (18):

Calling Attention to the Authority (on cross).

1. establish that the witness relies on certain reference materials in his field of expertise;

2. establish that he routinely reviews such materials (to stay abreast of changes);

3. ask if he is familiar with the materials you seek to use;

4. have witness look at the material and ask if it appears to be duly published;

5. have witness review the particular section or chapter you desire to use; and,

6. ask if he has an opinion as to the statement or position in the book.

(19) Reputation Concerning Family History- 803 (19):

1. witness is family member, or person's associate; and,

2. statement offered relates to person's birth, death, adoption, etc. or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries on General History - 803 (20):

1. existence of fact is general knowledge to the whole community (not just private interest); and,

2. fact to be established may then be admitted through testimony of witness from "community".

(21) Reputation as to Character - 803 (21):

See Character Evidence, *supra.*

(22) Judgment of Previous Conviction - 803 (22):

1. prove proper judgment; and,

2. establish relevancy of statement contain in judgment.

(23) Judgment as to Personal, Family, Etc. 803 (23):

1. prove proper judgment; and,

2. establish relevancy of statement contain in judgment.

(24) Statement Against Interest - 803 (24):

1. time statement made;

2. statement was so far contrary to declarant's pecuniary / proprietary interest or subject declarant to civil or criminal liability; and,

3. establish no reasonable person would have made the statement unless believing it was true.

12. STATEMENT NOT HEARSAY BY STATUTORY EXCEPTION

(*Declarant Must Be Unavailable)*

A. Unavailability - 804(a):

– court exempts witness based on claim of privilege; or

– persists in refusing to testify, despite order of the court to do so; or

– testifies to lack of memory of the subject matter of his statement; or

– unable to be present or testify because of death or then existing illness; or

– witness is absent and proponent cannot secure his attendance or testimony by reasonable means or process.

B. Former Testimony - 804 (b)(1):

1. prior hearing, etc. was properly convened;

2. party against whom statement is offered was represented by counsel;

3. declarant testified under oath;

4. party against whom testimony is offered, has opportunity to develop testimony; and had similar motive to develop testimony;

5. declarant is now unavailable; and,

6. testimony offered is not admissible under any other rule of law.

C. Dying Declaration - 804 (b)(2):

1. statement was made;

2. at time of making statement, declarant

believed his death was imminent;

3. statement concerned the cause or circumstances of what declarant believed to be his impending death;

4. facts exist which infer that declarant had personal knowledge of the matters declared;

5. facts exist which infer that declarant was physically and mentally capable at the time of the statement to recollect and narrate accurately the cause or circumstances stated; and,

6. declarant is unavailable at time of trial.

D. Statement of Personal or Family History- 804 (b)(3):

1. statement made concerning personal, family, history;

2. declarant was related to or intimately associated with other's family; and,

3. declarant is unavailable as witness.

13. IMPEACHMENT (Deposition) [R. 613]

1. hand copy of depo to witness;

2. ask witness is particular statement was made (phrase question exactly as stated in depo)

3. permit witness to admit or deny making the prior statement;

OR

3. <u>if denied,</u> reference page & line of depo containing prior inconsistent statement and read question; and,

4. have witness read the impeach able response from depo;

OR

4. <u>if admitted</u>, impeachment is complete, and prior inconsistent statement is <u>not</u> admissible.

14. INVENTORY

1. have court take judicial notice of inventory in its file;

OR

1. have witness identify their inventory which has been marked as an exhibit;

2. that the items of property and related values reflect their opinion as to the nature and value of the items reflected;

3. that if asked to testify as to each item and its value they would testify as reflected on the exhibit; and,

4. offer the inventory as a shorthand rendition.

15. JUDGMENT [R. 902]

1. obtain certified copy of subject judgment;

2. show that it is properly certified (authenticate as public record);

3. show relevancy of judgment in current proceeding; and,

4. mark and offer judgment.

16. JUDICIAL NOTICE [R. 201]

A. FACTS:

1. establish the fact to be judicially noticed is generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;

2. show relevancy of fact to be judicially noticed; and,

3. request the court to take judicial notice.

B. LAW (Other State):

1. motion by requesting party;

2. party requesting shall furnish sufficient information to court (copy of law) to enable court to properly comply with request (actual copy of statute not required);

3. show that proper notice was given to opposing party to enable fair preparation to meet request; and,

4. request court to take judicial notice of law.

17. PAST RECOLLECTION RECORDED [R. 803(5)]

1. that the witness once had personal knowledge of the matter, but currently has insufficient recollection to enable him to fully and accurately testify;

2. that refreshment of the witness's recollection is not possible;

3. the exhibit is a record or memorandum of concerning that matter;

4. the exhibit accurately reflects his prior knowledge of the matter reflected in the writing; and,

5. Read the contents of the memorandum.

18. PRIOR CONSISTENT STATEMENTS [R. 613(c)]

1. call attention to in-court testimony which establishes consistency of statement sought to be introduced;

2. time, place, who present and that witness made the statement;

3. that statement made prior to event shown by the opponent used as the basis for accusation of recent fabrication, etc.;

4. contents of prior statement and fact that statement was consistent with in-court testimony; and

5. that statement was made at a time closer to matter which it relates (witness's memory probably clearer at that time).

19. SHORT HAND RENDITION [R. 611, 1006]

1. the summary was prepared by witness or by another with the witness' assistance;

2. witness has reviewed the underlying records from which the summary was prepared;

3. witness describes the documents from which the information was taken; and,

4. the exhibit reflects what the witness would testify if asked to testify to each entry on the exhibit.

20. SUMMARIES[R. 611, 1006]

1. witness explains & authenticates summaries to be offered;

2. witness testifies as to the underlying data relied on to prepare the summary;

3. witness testifies that the underlying data/documents have been made available to or were obtained from the opposing party (or are available in courtroom); and,

4. offer summaries and other explanatory testimony.

21. WRITING USED TO REFRESH MEMORY [R. 612]

1. witness does not now remember certain matters or portions thereof that were once within his knowledge;

2. witness believes if permitted to see/inspect the item, it would refresh his memory;

3. after review of item, he now has independent recollection of the matter(s); and,

4. that his present recollection is "_____";

Note: *Evidence is the oral testimony, not the writing*.

APPENDIX 3

SBOT TOOL KIT OBJECTIONS CHECKLIST

The Family Lawyer's Essential

TOOL KIT

2008

edition

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of the State Bar of Texas

Basic Testimony Evidenciary Objections

Confuses the Issues ----------E 403
Opinion (not competent) -------E 104(a), 704-707
Conclusion (impermissible conclusion) ----E 701
Cumulative (Needless Presentation) -E 403
Improper **Hypothetical** ----------E 611(a), 703
Violates **Dead Man's Rule** -------E 601(b)
Improper **Bolstering** ----------E 607-610
Excluded by **Pretrial Order** -------No Rule
Improper **Impeachment** --------E 607-610, 613
Impermissible **Character Evidence** E 404 - 406, 608
Irrelevant (immaterial) ----------E 401 - 402, 611(b)
Inconsistent with pleadings ------P 66, 67
Involves **Undue Delay** ----------E 403, 611(a)
Settlement Offers Excluded ------E 408
Violates **Parol Evidence** Rule -----UCC § 2.202
Violates **Best Evidence** Rule -----E 1002, 1003, 1004
Privileges ----------E 501-513
-Lawyer / Client ----------E 503
-Communication to Clergy -----E 505
-Doctor / Patient ----------E 509
-Mental Health Information -----E 510
Violates **Stipulation** ----------No Rule
Unfairly Prejudicial ----------E 403
(Probative value substantially outweighed)
Improper **Predicate / Foundation** -E 602-3,701-2,901-2
Improper **Cross Examination** -----E 608(b), 611(b)
Evidence **Speaks for Itself** -------No Rule
Calls for **Speculation** ----------E 403, 611(a)
Calls for Incompetent **Opinion** ----E 104(a), 701-704
Misleading the Jury ----------E 403

Objections to the Form of the Question

Ambiguous / Vague / Unintelligible --E 611(a)(1)
Asked and Answered ----------E 403, 611(a)
Argumentative ----------E 611(a)
Assumes Facts Not in Evidence -----E 403, 611(a)
Compound / Complex / Confusing --E 611(a)
Creating Undue Delay ----------E 403, 611(a)
Harassing the Witness ----------E 611(a)(3)
Improper Hypothetical Question ----E 611(a), 703
Improper Cross-Examination -------E 608(b), 611(b)
Leading; Suggestive ----------E 611(c)
Misleading ----------E 403, 611(a)
Misquoting witness ----------E 403, 611(a)
Misstating Facts ----------E 403, 611(a)
Narrative Answer Required --------E 403, 611(a)
Overly broad / General ----------E 403, 611(a)
Speculative ----------E 403, 611(a)
Unfairly Prejudicial ----------E 403
(Probative value substantially outweighed)
Unintelligible Question ----------E 611(a)
Witness Not Allowed to Finish Answer -E 611(a)

Objections to the Response (Answer)

Argumentative ----------E 611(a)
Narrative ----------E 403, 611(a)
Lack of Personal Knowledge -------E 602
But see E 703 regarding experts
Unresponsive ----------E 611
Volunteered ----------E 403, 611(a)

Hearsay Objections

Defined: "Hearsay" is a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. (E 801 (d))

Statements which are NOT Hearsay

Prior Statement By a Witness ----------E 801(e)(1)
Admission by a Party Opponent ----------E 801(e)(2)
Deposition ----------E 801(e)(3)

Hearsay EXCEPTIONS (Avail. of Declarant Immaterial)

Present Sense Impression ----------E 803(1)
Excited Utterance ----------E 803(2)
Then Existing Mntl, Emtionl or Physical Condition -E 803(3)
Statements for Medical Diagnosis or Trtment ----E 803(4)
Recorded Recollection ----------E 803(5)
Business Records Exception ----------E 803(6)
1) Records made at or near the time
2) By, or from, information transmitted by a person with knowledge
3) Kept in the course of regularly conducted business activity
4) It was the regular practice of that business activity to make records
*** Or by Affidavit which complies with 902(10)
Absence of Entry of Records ----------E 803(7)
Public Records or Reports ----------E 803(8)
Records of Vital Statistics ----------E 803(9)
Absence of Public Record or Entry ----------E 803(10)
Records of Religious Organizations ----------E 803(11)
Marriage, Baptismal & Similar Certificates ------E 803(12)
Family Records ----------E 803(13)
Records of Docs. Affecting an Interest in Property E 803(14)
Stmts in Docs Affecting an Interest in Property ---E 803(15)
Statements in Ancient Documents ----------E 803(16)
Market Reports, Commercial Publications ------E 803(17)
Learned Treatises ----------E 803(18)
Reputation Concerning Personal or Family History E 803(19)
Reputation Concerning Boundaries or Gen. History -E 803(20)
Reputation as to Character ----------E 803(21)
Judgment of Previous Conviction ----------E 803(22)
Judgment as to Personal, Family, or
General History or Boundaries ----------E 803(23)
Statement Against Interest ----------E 804(24)

Hearsay EXCEPTIONS (Declarant Unavailable)

Former Testimony ----------E 804(b)(1)
Dying Declaration ----------E 803(b)(2)
Statement of Personal or Family History -------E 803(b)(3)

KEY: E = Texas Rule of Evidence P = Texas Rules of Civil Procedure UCC = Texas Uniform Commercial Code

Non-Testimony Trial Objections

AMBIGUITY

Evidence as to meaning; extrinsic evidence; not admissible when document not ambiguous on its face.

DeWitt County Elec. Co-op v. Parks, 1 S.W.3d 96 (Tex. 1999)
Miles v. Martin, 321 S.W.2d 62 (Tex. 1969)

AUTHENTICATION

No Proper Authentication ----------E 901

BEST EVIDENCE

Not the best evidence (original) ----------E 1002
Exceptions: Not Avail./Not Obtainable/Not in Tex.
Not Produced/Not closely related to controlling issue -----E 1004

CHARACTER

Character Evidence not admissible to show conformity with that character trait (or other acts or wrongs) on a particular occasion
----------E 404, 405, 608

CHART

Cumulative / Adds Nothing New [Within Discretion of Court]

CHILD'S TESTIMONY

Competency not established ----------E 601

COLLATERAL ESTOPPEL

Identical Issue / Prior Lawsuit / Actually Litigated
Van Dyke v. Boswell et. al., 697 S.W.2d 381 (Tex 1985).
Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986).

COMPETENCE OF WITNESS

Insane/Children/No Personal Knowledge ----------E 601-606, 614

COMPROMISE / OFFERS TO COMPROMISE

Not admissible ----------E 408

COMPUTER RECORDS

Authentication same as business records ----------E 803(6)

COPIES / DUPLICATES

Duplicate admissible unless 1) question raised as to its authenticity or (2) would be unfair to admit the copy in lieu of original ---E 1003

EXHIBITS (MISCELLANEOUS)

Confuses the Issues ----------E 403
Cumulative (needless presentation) ----------E 403
Evidence Speaks for Itself
Excluded by Pretrial Order
Improper Predicate / Foundation ----------E 901, 902
Lack of Authentication ----------E 901, 902
Improper Character Evidence ----------E 404-406, 408
Irrelevant (Immaterial) ----------E 401, 402
Inconsistent with Pleadings ----------C 10.001(3)
Involves Undue Delay ----------E 403, 611(a)
Violates Parol Evidence Rule ----------UCC § 2.202
Violates Stipulation

GOVERNMENT RECORDS

Must be properly authenticated ----------E 1005

HABIT AND ROUTINE

Admissible to show conformity ----------E 406

ILLEGALLY ACQUIRED EVIDENCE

Not admissible
Turner v. P.V. Int'l Corp., 778 S.W.2d 865 (Tex. 1989)

INSANITY

Witness Not Competent ----------E 601(a)(1)

JUDICIAL ESTOPPEL

Different Position taken under oath in prior proceeding
Long v. Knox, 291 S.W.2d 292 (Tex. 1956)

JUDICIAL NOTICE

Fact must be one not subject to reasonable dispute in that it is either:
1) generally known within the territorial jurisdiction of the court or
2) capable of accurate and ready determination by resort to the source whose accuracy cannot be reasonably questioned ----E 201
Judicial Notice of Law of Other States ----------E 202

LAW

Witness cannot testify as to legal conclusion
U.S. v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977)

LIMITED PURPOSE

If evidentiary objection sustained, may be offered for limited purpose.

LYING

A witness cannot opine as to whether another witness is lying or not.
Ochs v. Martinez, 789 S.W.2d 949 (Tx. App.-San Antonio 1990, w.d.)

OPINION - LAY WITNESS

Lay Opinion Testimony must be: ----------E 701
1) rationally based on a perception of witness
2) helpful to a clear understanding of his testimony or the determination of a fact in issue

OPTIONAL COMPLETENESS

Contemporaneous offering of complete document -----E 106, E 107

PAROLE EVIDENCE RULE

Absent Fraud, Mistake or Accident, extrinsic evidence not admissible to vary the terms of a valid written instrument.
Kelley v. Martin, 714 S.W.2d 303, 305 (Tex. 1986)
Knox v. Long, 257 S.W.2d 289, 296-297 (Tex. 1953)

PERSONAL KNOWLEDGE

Testimony must be based upon personal knowledge -----E 602

PHOTOGRAPHS (also: x-rays, videotapes, slides, & motion pictures)

Must be authenticated by a person with knowledge of the circumstances portrayed in the photograph ----------E 901
If verbal description the photo would be be admissible,
State v. City of Greenville, 726 S.W.2d 162
(Tx. App. — Dallas 1986, writ ref'd n.r.e.)
Witness need not have taken photo or been present
Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314-15(Tex. 1988)
Inaccuracy of photo goes to weight and credibility
Davidson v. Great Nat'l Life Ins. Co., 737 S.W.2d 312, 314-15(Tex. 1988)

PRIOR CONVICTIONS

Inadmissible ----------E 609, 803(22)

PRIOR INCONSISTENT STATEMENT

Must follow proper procedure and inform witness of: -----E 613(a)
1) time it was made
2) when it was made
3) place it was made
4) person to whom it was made
5) contents of the Statement
If in writing, need not show it to witness, but must show to opp. atty.

PUBLICATIONS

Hearsay unless meets Exception of 803 (See Hearsay Exceptions)

RELEVANCE

Must be relevant to issue in case ----------E 401, E 402

RELIGIOUS BELIEFS

Not Admissible for showing that credibility enhanced/impaired -E 610

The "RULE"

Rule of Exclusion of Witnesses ----------E 614

SOCIAL STUDIES

Must be received 7 days after completion or 5 days before trial whichever is earlier ----------F 107.055(b)

SUMMARIES

Contents of voluminous writings, recording, or photos which cannot be conveniently examined in court may be presented in form of a chart, summary or calculation. Underlying records must be made available for examination or copying. ----------E 1006
*** Underling records must also be admissible
Aquamarine Assoc. v. Burton Shipyard, 659 S.W.2d 820 (Tex. 1983)

UNDISCLOSED WITNESS

Must be excluded ----------P 215(5)

WIRETAPS

See ILLEGALLY ACQUIRED EVIDENCE

WITNESS

Undesignated Witness
1) Person w/ knowledge of relevant facts --P 166b(2)(d), 166b(6), 215(5)
2) Testifying Expert ----------P 166b(2)(e), 166b(6), 215(5)
Incompetent Witness ----------E 104, 601, 602, 702
1) Inability to observe, remember and communicate
2) Inability to understand duty to tell the truth -----E 603
3) Lacks personal knowledge ----------E 602
Failure to Take Oath or Make Affirmation ----------E 603
Improper Foundation/Predicate ----------E 602, 603, 701, 702, 901, 902
Expert Not Qualified (Daubert Issues) -----E 104(a), 401-403, 702-703

KEY: E = Rules of Evidence F = Family Code P = Rules of Civil Proc. UCC = Uniform Commercial Code C = Civil Practice & Remedies Code

APPENDIX 4

TABLE OF AUTHORITIES

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CASES

STATE STATUTES

MISCELLANEOUS