TRENDS IN PRESERVATION OF ERROR (AT TRIAL, CHARGE, AND POST VERDICT)

EDWIN J. (TED)TERRY, JR.
JIMMY VAUGHT
KARL E. HAYS
Law Offices of Edwin J. (Ted) Terry, Jr.
805 W. 10th, Suite 300
Austin, Texas 78701
(512) 476-9797
Fax: (512) 476-6106

The authors thank Justice Ann Crawford McClure for permission to use substantial portions of "Preservation of Error: Ten Ways to Lose Your Appeal," presented to Litigation All-Stars (1999 State Bar of Texas Annual Meeting June 1999)
and
Charles R. "Skip" Watson, Jr. for permission to use substantial portions of "Charge Error Preservation and Defense," 12th Annual Advanced Civil Appellate Practice Course (State Bar of Texas September 1998)

THIRTEENTH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE
STATE BAR OF TEXAS
October 7-8, 1999
D

TABLE OF CONTENTS

I. INTRODUCTION. 1

II. PROCEEDINGS IN JURY TRIALS. 1
- **A. Right to Trial by Jury**. 1
- **B. Motion in Limine**.. 2
- **C. Voir Dire**. 3
  - 1. SPECIFIC QUESTIONS DISALLOWED. 3
  - 2. TIME CONSTRAINTS. 3
- **D. Challenging Jurors for Cause**. 4
- **E. Peremptory Challenges**. 5
  - 1. EQUALIZATION. 5
  - 2. JUROR DISCRIMINATION. 6
    - a. Rule Applies to Both Criminal and Civil Cases. 6
    - b. Standard of Review.. 7
    - c. Focus on the Record. 7
    - d. Timing is Everything. 8
    - e. *Batson* Expanded to Gender 8
    - f. but Not to Religion. 8
    - g. Tips for Preserving Error. 8
- **F. Instructed Verdict**. 9
- **G. Jury Argument**. 9

III. PRESERVING EVIDENTIARY ERROR AT TRIAL.. 10
- **A. Requirement of Objection**. 10
  - 1. WHEN OBJECTION IS REQUIRED. 10
  - 2. WHEN OBJECTION IS NOT REQUIRED. 11
  - 3. RECONCILIATION: FUNDAMENTAL ERROR. 12
- **B. Requisites of a Proper Objection**. 12
  - 1. OBJECTION MUST BE TIMELY.. 12
  - 2. OBJECTION MUST BE SPECIFIC.. 13
  - 3. OBJECTION MUST BE RULED UPON.. 13
  - 4. OFFERS OF PROOF. 14
    - a. Getting It In. 14
    - b. Keeping It Out. 14
- **C. Waiver of Error**.. 15
  - 1. SIMILAR EVIDENCE ADMITTED WITHOUT OBJECTION. 15
  - 2. GROUNDS OF OBJECTION AS A LIMITATION. 15
  - 3. NO UTILIZATION OF ALIGNED PARTY'S OBJECTION.. 16
  - 4. WITHDRAWAL OF OBJECTION. 16

D. Running Objection . . . 16
E. Partially Admissible Evidence . . . 17
1. WHEN COMPLAINT IS MADE OF ADMISSION . . . 17
2. WHEN COMPLAINT IS MADE OF EXCLUSION . . . 17
F. Motions to Strike and Motions for Mistrial . . . 18
1. NO RESURRECTION OF ERROR AFTER WAIVER . . . 18
2. WHEN REQUIRED . . . 18

IV. PRESERVING EVIDENTIARY ERROR ON APPEAL . . . 18
A. Standard of Review . . . 18
B. Reversible Error . . . 19
C. Challenges to the Sufficiency of the Evidence . . . 20
1. "NO EVIDENCE" POINTS (LEGAL INSUFFICIENCY) . . . 20
a. Appellate Remedy . . . 21
b. The "Scintilla" Standard . . . 21
2. "INSUFFICIENT EVIDENCE" POINTS (FACTUAL INSUFFICIENCY) . . . 22
a. Jury vs. Nonjury Trials . . . 22
b. Court of Appeals is Final Arbiter of Factual Sufficiency . . . 22
c. Findings of Fact and Conclusions of Law Not Required to Raise Sufficiency . . . 23
d. Appellate Remedy . . . 23
3. METHOD OF ANALYSIS . . . 23
a. Legal Sufficiency Analysis . . . 23
b. Factual Sufficiency Analysis . . . 23
c. When the Standard of Review is Abuse of Discretion . . . 24
d. A Word to the Wise . . . 25
4. SUFFICIENCY REVIEW OF ENHANCED BURDENS OF PROOF . . . 25
a. Higher Standard Cases . . . 25
b. Same Standard Cases . . . 26

V. CHARGE ERROR . . . 27
A. The Continuing Debate on the Supreme Court . . . 27
B. Broad-Form Submissions Made the Debate Inevitable . . . 29
C. Conflict Arises Over Broad-Form Submission and Preservation of Error . . . 29
D. Purpose of the Charge . . . 30
1. PREPARATION . . . 30
a. Raised by the Pleadings . . . 30
b. Supported by Sufficient Evidence . . . 31
c. The Materiality Paradox . . . 31
2. REQUESTING THE CHARGE TO PREVAIL AND TO PRESERVE ERROR . . . 32
a. Questions . . . 32

b. Instructions and Definitions. . . . 33
c. When Requested. . . . 33
d. How to Request. . . . 33
(1) IN WRITING. . . . 33
(2) TENDERED TO COURT. . . . 33
(3) SEPARATE FROM OBJECTIONS 33
(4) SUBSTANTIALLY CORRECT. . . . 33
(5) NOT "EN MASSE". . . . 34
e. Court's Action. . . . 34
f. Invited Error. . . . 34
3. PRESERVING ERROR BY OBJECTING. . . . 34
a. When to Object. . . . 35
b. How to Object. . . . 35
c. Effective Objections. . . . 36
d. Ineffective Objections. . . . 36
e. Comments on the Weight of the Evidence 37
f. Advising the Jury of the Effect of Its Answers 37
g. Voluminous or Unfounded Objections. . . . 38
h. Adoption by Reference. . . . 38
i. Courts Ignore Their Own Requirements. . . . 38
j. Court's Ruling. . . . 39
k. Before *Payne*: Object and Request. . . . 39
4. PRESERVATION AFTER *PAYNE* AND *SPENCER*. . . . 40
a. *Payne* Permits Preservation by Request. . . . 40
b. *Spencer* Permits Preservation by Objection. . . . 40
c. Courts of Appeals Interpret *Payne* and *Spencer*. . . . 40
5. INTERPRETING THE VERDICT. . . . 41
a. Conflicts. . . . 41
b. Omitted Findings. . . . 42
6. CHARGE ERROR ON APPEAL. . . . 42
a. Standard of Review. . . . 42
b. Broad Form Omissions. . . . 43
c. Identifying Harmful Error. . . . 43
d. What is Reversible Error?. . . . 44
e. Rendition or Remand?. . . . 45
7. PROPOSED RULE CHANGES. . . . 45
a. Rule 271. Charge of the Jury. . . . 45
b. Rule 272. Standards for the Jury Charge. . . . 46
c. Rule 274. Preservation of Appellate Complaints. . . . 46
d. Rule 279. Omissions From the Charge. . . . 47
e. Purposes Behind the New Rules. . . . 47
F. Conclusion. . . . 47

VI. PRESERVING ERROR POST-TRIAL 47
A. Motion for Directed Verdict, JNOV or to Disregard Jury Findings 47
B. Motions to Modify, Correct or Reform the Judgment 48
C. Motion for New Trial 48
1. PRESERVATION OF ERROR 48
2. ERRORS MADE IN RENDERING JUDGMENT 50
3. TIMETABLE FOR FILING: TEX.R.CIV.P. 329(b) 50
a. Plenary Power of Trial Court 50
b. Amended or Supplemental Motions 51
c. Citation by Publication 51
4. GROUNDS FOR NEW TRIAL 51
a. Errors In the Charge 52
b. Jury Misconduct 52
(1) REQUIREMENTS 52
(2) OUTSIDE INFLUENCE 53
(3) "DURING THE COURSE OF DELIBERATIONS" 54
(4) MISCONSTRUCTION OF CHARGE 54
(5) CONCEALMENT OF INFORMATION 54
(6) INFORMATION OVERHEARD 54
(7) STANDARD OF REVIEW 54
c. Newly Discovered Evidence 55
d. Default Judgments 55
e. Mistakes Made at Trial 56
f. No Reporter's Record Available 56

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW 57
A. TEX.R.CIV.P. 296 Findings and Conclusions 57
1. ENTITLEMENT 57
2. IMPORTANCE OF OBTAINING 59
3. IMPACT OF FILING REQUEST ON APPELLATE DEADLINES 59
4. SEQUENCE FOR OBTAINING FINDINGS 60
a. Initial Request 60
b. Presentment Not Necessary 60
c. Response by Court 60
d. Untimely Filing by Court 60
e. Reminder Notice 61
f. Additional or Amended Findings 62
(1) FAILURE TO REQUEST 62
(2) COURT'S FAILURE TO RESPOND 62
(3) BILL OF EXCEPTIONS 62
g. Effect of Premature Request 62

5. WHAT FORM IS REQUIRED? . . . 62
a. Predecessor Rules. . . . 63
b. TEX.R.CIV.P. 299a . . . 63
6. WHAT FINDINGS ARE AVAILABLE? . . . 63
7. CONFLICTING FINDINGS AND FINDINGS AT VARIANCE WITH THE JUDGMENT . . . 65
8. CONFLICT BETWEEN FINDINGS AND ADMISSIONS . . . 65
9. WHICH JUDGE MAKES THE FINDINGS? . . . 65
10. EFFECT OF COURT'S FAILURE TO FILE . . . 66
a. Must Complain In Brief . . . 66
b. When Does the Failure to File Cause Harmful Error? . . . 66
c. Remedy: Remand vs. Abatement . . . 67
d. Failure to Make Additional Findings . . . 67
11. EFFECT OF COURT'S FILING . . . 67
12. DEEMED FINDINGS . . . 67
13. PECULIARITIES OF CONCLUSIONS OF LAW . . . 68
14. CHALLENGES ON APPEAL . . . 68
a. Challenging the Trial Court's Failure to Make Findings of Fact . . . 68
b. Challenging Findings and Conclusions on Appeal . . . 68
B. Findings In Sanction Orders . . . 69
1. TEX.R.CIV.P. 13 SANCTIONS . . . 69
2. TEX.R.CIV.P. 215 SANCTIONS . . . 70
3. TEX.CIV.PRAC. & REM.CODE SANCTIONS . . . 71
C. Findings In Child Support Orders . . . 72
1. REQUEST . . . 72
2. PURPOSE . . . 72
3. TRIAL COURT'S DUTY . . . 73
4. REQUIREMENTS . . . 73
5. WHAT'S YOUR REMEDY? . . . 74
D. Findings In Visitation Orders . . . 75
1. REQUEST . . . 75
2. TRIAL COURT'S DUTY . . . 75
3. REQUIREMENTS . . . 75

TRENDS IN PRESERVATION OF ERROR(IN (AT TRIAL, CHARGE, AND POST VERDICT)

I. INTRODUCTION

The rules as to preservation of error are constantly in flux, as the various appellate courts judicially expand on the application of those rules. In some cases, the courts have required an attorney to take steps to preserve error that are not required by the rules. In other instances, the courts are returning to a more liberal interpretation and overruling prior restrictive decisions. Thus, a mere reading of the Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules of Evidence will not in and of itself prepare you to adequately preserve error in the trial court and lay an appropriate predicate for appeal.

We have all interviewed a new client who is seeking to appeal an unsatisfactory judgment. No doubt you have discussed the facts, learned what the testimony involved, what the issues were and then reached some sort of conclusion as to the chances of a successful appeal. Mind boggling is the only word to describe your reaction when a review of the reporter's record indicates that no error has been preserved.

Justice McClure has described the ten most common ways that practitioners fail to preserve as:

1. Failure to preserve appellate issues via a motion to correct or modify the judgment, a motion for new trial or findings of fact and conclusions of law.

2. Failure to preserve charge error.

3. Failure to segregate partially admissible and inadmissible evidence.

4. Failure to make timely and specific objections to evidentiary issues.

5. Reliance on a motion *in limine* to preserve objections.

6. Failure to move to strike improper testimony elicited prior to objection.

7. Failure to tender an offer of proof on excluded evidence.

8. Failure to develop the record for a *Batson* review.

9. Failure to object to impanelment of the jury prior to the exercise of peremptory challenges.

10. Failure to ensure that the court reporter reports voir dire.

This article will discuss preservation of error at trial, in the charge and post verdict and not necessarily in the order of the ten most common ways that practitioners fail to preserve error.

II. PROCEEDINGS IN JURY TRIALS

A. Right to Trial by Jury

A timely request for a jury plus a timely payment of the jury fee are essential to preserving the right to trial by jury. *Huddle v. Huddle,* 696 S.W.2d 895, 895 (Tex. 1985); *Whiteford v. Baugher*, 818 S.W.2d 423 (Tex.App.--Houston [1st Dist.] 1991, writ denied). The request and payment of the fee must be made at a reasonable time before trial, but not less than 30 days prior to the date of trial. TEX.R.CIV.P. 216. A demand made 30 days prior to trial is not necessarily timely, but a trial court would abuse its discretion if the jury trial were refused unless it is demonstrated that granting the request will result in injury to the opposing party or will disrupt the court's docket and handling of court business. *Dawson v. Jarvis,* 627 S.W.2d 444 (Tex.Civ.App.--Houston 1981, writ ref'd n.r.e.).

In *Halsell v. Dehoyos,* 810 S.W.2d 371 (Tex. 1991), the Supreme Court clarified the law relating to the deadline for requesting a jury trial. Before *Halsell,* many appellate courts held that if a party filed a jury demand more than 30 days before trial, but after the case was certified for trial on the nonjury docket, the request was not timely, and the party was not entitled to a jury trial. Since *Halsell,* a request for a jury trial that is made 30 days before the trial is timely, even if it is made after

the case is certified for trial. If the case is re-set, the final trial date is the one that controls the 30 day deadline. *Halsell,* 810 S.W.2d at 371; *Whiteford,* 818 S.W.2d at 425. In calculating the 30 day period, the first day of the prescribed period is not included, while the last day of the period is included. *Wittie v. Skees,* 786 S.W.2d 464 (Tex.App.--Houston [14th Dist.] 1990, writ denied).

Payment of the jury fee in advance of the deadline creates a presumption that the jury demand has been made within a "reasonable time". The opponent may rebut the presumption if the record shows that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the trial court's business. *Halsell,* 810 S.W.2d at 371; *Grossnickle v. Grossnickle*, 865 S.W.2d 211, (Tex.App.--Texarkana 1993, no writ); *Wittie*, 786 S.W.2d at 466. Rebuttal apparently requires affirmative action by the litigant to present competent evidence of injury, disruption or impediment. In *Wittie,* the appellate court determined that since the appellee had presented no reporter's record indicating such testimony, he had failed to rebut the presumption. Accordingly, the trial court's refusal to conduct a jury trial was reversible error.

Further, the refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. *Halsell*, 810 S.W.2d at 372. In *Grossnickle,* the court concluded that because jury findings as to characterization and valuation of community property are binding upon the trial court, fact issues existed concerning the extent and value of the community estate. Because an instructed verdict would have been inappropriate, the error required remand.

Note that TEX.R.CIV.P. 220 provides that the failure of a party to appear for trial shall be deemed a waiver of the right to trial by jury. It additionally provides that when any party has paid the jury fee, the cause may not be withdrawn from the jury docket over the objection of another party. This rule has been interpreted as requiring some affirmative action on the part of the litigant desiring the jury trial. Unless an objection is made to the withdrawal of the case, the non-requesting party has no right to a jury trial. Waiver may be shown by mere acquiescence to the withdrawal of the jury request. *Lambert v. Coachman Industries of Texas,* 761 S.W.2d 82 (Tex.App.--Houston [14th Dist.] 1988, writ denied). *See also, Green v. W.E. Grace Manufacturing Company,* 422 S.W.2d 723 (Tex. 1968).

The right to trial by jury may also be waived by a party who gives the trial court the option to try the case as a bench trial. *Barber v. Barber,* 621 S.W.2d 671 (Tex.Civ.App.--Waco 1981, no writ). In *Duvall v. Sadler,* 711 S.W.2d 369 (Tex.App.--Texarkana 1986, writ ref'd n.r.e.), the parties began a jury trial and midway attempted to settle the case. Settlement attempts failed, and there was apparently some discussion of releasing the jury and continuing the trial to the bench on the basis of stipulations of fact. The trial court did in fact dismiss the jury and stated in the record that the remainder of the case would be heard by the court on stipulations. When the appellant challenged the court's dismissal of the jury, the judge stated the jury had been waived. He further attempted to read into the record facts which would support his finding that the jury had been waived. The appellate court reversed, holding that the right to trial by jury had not been waived because neither the judgment nor findings stated that the agreement or waiver was made in open court and the remainder of the record established that they were not. Without an agreement having been made in open court, no agreement could properly be entered of record.

B. Motion in Limine

The granting or overruling of a motion *in limine* is not in and of itself error. *Rodarte v. Cox,* 828 S.W.2d 65 (Tex.App.--Tyler 1991, writ denied); *Bifano v. Young,* 665 S.W.2d 536 (Tex.Civ.App.--Corpus Christi 1983, no writ). The Supreme Court discussed motions *in limine* in *Acord v. General Motors Corp.,* 669 S.W.2d 111 (Tex. 1984) and *Hartford Accident and Indemnity, Co. v. McCardell,* 369 S.W.2d 331 (Tex. 1963), stressing that if a motion *in limine* is overruled, a judgment will not be reversed unless the questions or evidence were **in fact** asked or offered. If they were **in fact** asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal. *Acord,* 689 S.W.2d at 116. *See also Amarillo Oil Company v. Energy - Agri Products,* 731 S.W.2d 113 (Tex.App.--Amarillo 1987), *rev'd on other grounds,* 794 S.W.2d 20 (Tex. 1989).

C. Voir Dire

The scope of voir dire examination is a matter within the sound discretion of the trial court. *Dickson v.*

Burlington Northern Railroad, 730 S.W.2d 82 (Tex.App.--Fort Worth 1987, writ ref'd n. r. e.); *Texas Employers Ins. Ass'n v. Loesch,* 538 S.W.2d 435 (Tex.Civ.App.--Waco 1976, writ ref'd n.r.e.). The court abuses its discretion when it denies a litigant the right to ask a proper question since it prevents an intelligent use of peremptory challenges. *Smith v. State,* 703 S.W.2d 641 (Tex.Crim.App. 1985).

The court reporter is not required to make a record of the voir dire proceedings unless specifically requested to do so. TEX.R.CIV.P. 376b. A party wishing to complain of questions asked by opposing counsel must object, obtain a ruling, and request that the court instruct the jury to disregard the question or comment. Error is preserved by the reporter's record if the voir dire is being reported. Otherwise, a formal bill of exceptions must be secured.

1. SPECIFIC QUESTIONS DISALLOWED

A party wishing to voir dire the jury on certain questions which are not permitted by the trial court must make a bill of exceptions, offer the questions to the court, inform the court as to the necessity of the questions, and obtain a ruling. If the matters complained of are not in the reporter's record or in a bill of exception, they are not preserved for appellate review. *Lauderdale v. Insurance Company of North America,* 527 S.W.2d 841 (Tex.Civ.App.--Fort Worth 1975, writ ref'd n.r.e.).

Must the specific questions which a litigant desires to ask of the panel be read into the record? The Supreme Court has considered this issue in *Babcock v. Northwest Memorial Hospital,* 751 S.W.2d 277 (Tex. 1988). There, the plaintiff brought suit for medical malpractice arising from her hospitalization. During her recovery from a broken pelvis, Mrs. Babcock developed blisters on her heels which ultimately resulted in the amputation of both of her legs. Two pretrial motions *in limine* were granted at the request of the defendant. The first prohibited the mention of any liability insurance crisis, medical malpractice crisis or other similar statement to the jurors regarding the current state of affairs in the liability insurance industry. The second prohibited calling the jury's attention to any advertisements of a malpractice crisis paid for by and credited to insurance companies. During voir dire, one of the panel members mentioned the advertisements and stated that his concern for the effect of jury awards on insurance premiums might impede his ability to be impartial. He was stricken for cause, but as a result, the plaintiffs renewed their request for permission to question the entire panel about the lawsuit crisis. The trial court denied the request. After the jury was selected, the plaintiffs again objected to the trial court's refusal and asked for an opportunity to include in the record the questions they would have asked the jurors. The trial court denied this request as well. The court of appeals concluded that since the Babcocks did not specifically state to the trial court in a timely fashion the questions they wished to ask on voir dire, they could not complain on appeal. The Supreme Court disagreed, noting that the Babcocks had properly preserved error because they presented a timely request to the trial court, stating the specific grounds for the ruling they desired, and obtained a ruling from the court. The Court declined to require that specific questions be placed in the record provided the nature of the questions is apparent from the context. The Court further found that the language of the motions *in limine* and the recorded voir dire of the excused juror made it obvious what questions the Babcocks wanted to ask. Additionally, the Babcocks attempted to place their proposed questions into the record, but their request was denied by the trial court.

Keep in mind that when an appellate court has before it only the portion of the voir dire in which the question is asked, objection lodged, and the right denied, nothing is preserved for review. Without the entire voir dire examination, the appellate court cannot determine whether the questions asked were duplicative or whether the answers sought were not otherwise obtained. *Burkett v. State,* 516 S.W.2d 147 (Tex. Crim.App. 1974); *Dickson v. Burlington Northern Railroad,* 730 S.W.2d 82 (Tex.App.--Fort Worth 1987, writ ref d n.r.e.).

2. TIME CONSTRAINTS

In *Kendall v. Whataburger, Inc*., 759 S.W.2d 751 (Tex.App.--Houston [1st Dist.] 1988, no writ), the appellate court determined that a complaint concerning the insufficiency of the time allotted for voir dire requires a showing of a desire to continue, a request for additional time, and the making of a bill of exceptions showing any questions that were not asked because of a lack of time. One other court has held that an additional step is required. In *Hall v. Birchfield,* 718 S.W.2d 313 (Tex.App.--Texarkana 1986, no writ), the court held there was no reversible error when the complaining party failed to show that they were required to take an objectionable person on the jury

because of the trial court's refusal to permit questions to be asked during voir dire.

In *Dickson v. Burlington Northern Railroad*, 730 S.W.2d 82 (Tex.App.--Fort Worth 1987, writ ref'd n.r.e.), the appellate court noted that the general principles enunciated in criminal case law also apply in the safeguarding of similar rights in civil cases. It then specifically cited with approval *Smith v. State,* 703 S.W.2d 641 (Tex.Crim.App. 1985). The *Smith* opinion references *Ratliff v. State,* 690 S.W.2d 597 (Tex.Crim.App. 1985), in which the court established a three-pronged test for evaluating the reasonableness of a time limitation. A litigant must demonstrate:

• that it did not attempt to prolong the voir dire;

• that it was not permitted to ask proper and relevant questions; and

• it was not permitted to examine jurors who ultimately served on the jury because of insufficient time.

Many courts have undertaken yet another means by which to impose time constraints. The newest methodology is limiting the total amount of time available for trial. For example, you are advised at the outset that you will have 20 hours in which to present your side of the case. Your time allotment includes all of your direct testimony, all of your cross examination of your adversary's witnesses and all of your objections. To date, we have no appellate cases advising us as to whether such a restriction is constitutional and if so, what steps are necessary in order to preserve error on appeal concerning the amount of time allotted. Is a "prior restraint" timetable a violation of the due process clause and/or the open courts provision of the Texas Constitution? One could argue that while a court certainly has the discretion, authority and probably the responsibility of controlling the docket [which would include the ability to tell counsel to "move along" or to begin restricting repetitive and cumulative testimony] the authority does not extend to a blanket prior restraint of the amount of testimony which may be tendered, particularly in light of the fact that the court has no knowledge at the beginning of the trial that such limitations will be necessary. Furthermore, what steps must be taken to complain of an overly restrictive timetable? Must counsel comply with the restrictions imposed by the cases detailing how to preserve error from an imposition of a time restriction in the voir dire process? If so, then arguably more time must be requested, along with a tender by way of an offer of proof, of the evidence a party was unable to adduce because of the time limitations. It is also questionable whether we can equate a limitation of the right to question potential jurors with the ability to present evidence on the case in chief. In the meantime, to be on the safe side, cover all of these steps when complaining of an unreasonable time limitation.

D. Challenging Jurors for Cause

A challenge for cause is an objection to a panelist, alleging some fact that by law disqualifies the person to serve as a juror or renders the person unfit to sit on the jury. TEX.R.CIV.P. 228. The rules provide that the court should decide the challenge, and if sustained, discharge the juror, but they do not provide the procedure to be used for preserving error when the challenge is not sustained and an objectionable juror is permitted to serve.

In *Hallett v. Houston Northwest Medical Ctr.,* 689 S.W.2d 888, 890 (Tex. 1985), the Supreme Court concluded that the refusal of the trial court to excuse an unqualified juror does not necessarily constitute harm. The harm occurs only if the party uses all of its peremptory challenges. It concluded that to preserve error when a challenge for cause is denied, a party must, before exercising peremptory challenges, advise the trial court that (1) all peremptory challenges will be used, and (2) after exercising the peremptory challenges, specific objectionable jurors would remain on the jury list. *Id.; Wooten v. Southern Pacific Trans. Co.,* 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ). By failing to give such notice to the trial court, a party waives any error committed by the court's refusal to discharge jurors challenged for cause.

Two opinions from the Dallas Court of Appeals have interpreted *Hallett.* In *Sullemon* v. *U. S. Fidelity & Guaranty Company,* 734 S.W.2d 10 (Tex.App.--Dallas 1987, no writ), the defendant claimed the plaintiff had waived error by not requesting additional peremptory challenges and by failing to establish on the record how the jurors were objectionable so that the trial court could determine if the jurors were in fact objectionable. The Dallas court determined that *Hallett* required no such showing. The language in *Hallett* does not require a request for additional peremptory challenges. It merely requires a party to show that because it has used its peremptory challenges on jurors who should have been stricken for cause, those challenges are no longer available to strike the jurors which the party would have

been able to strike if the trial court had properly stricken the first jurors for cause.

Further, *Hallett* does not require a showing of how or why the prospective jurors which the party was not able to strike are objectionable. Instead, the court must determine whether the objecting party would have in fact used the peremptory challenges had they been available. If the objecting party had no intention of peremptorily striking any other jurors, no harm is shown by the court's failure to excuse an unqualified juror.

The Dallas court tackled the issue again in *White v. Dennison,* 752 S.W.2d 714 (Tex.App.--Dallas 1988, writ denied), holding that the complaining party, prior to exercising any peremptory challenges, must advise the court (1) that it would exhaust all peremptory challenges; and (2) that after exercising peremptory strikes, **specific** objectionable jurors would remain on the jury list. In *White,* the appellant failed to advise the trial court of specific objectionable jurors who would remain. In short, White did not "name names".

Note that *Hallett* requires that the two-prong showing be made **prior to the exercise of the peremptory challenges.** When the objection is made after the challenges are utilized and the jury empaneled, error is waived. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 830 (Tex.App.--El Paso 1993, no writ). A party exercises its peremptory challenges by delivering its list of strikes to the court. *Operation Rescue v. Planned Parenthood,* 937 S.W.2d 60, 69 (Tex.App.--Houston [14th Dist.] 1996), *aff'd. as modified,* 975 S.W.2d 546 (Tex. 1998); *Wooten v. Southern Pacific Transportation,* 928 S.W.2d 76, 81 (Tex.App.--Houston [14th Dist.] 1995, no writ); *Lopez,* 847 S.W.2d at 830. Appellate review in this area requires an analysis of the timing of the delivery of notice to the trial court versus the exercise of the strikes. In *Brown v. Pittsburgh Corning Corp.,* 909 S.W.2d 101 (Tex.App.--Houston [14th Dist.] 1995, writ denied), the parties disputed on appeal whether appellant's counsel had given the *Hallett* notice prior to delivering the strike list, or whether at the time the complaint was lodged, counsel was reading from a duplicate strike list, the original already having been tendered to the court. Concluding that the record did not clearly reflect timely notice, the court held that no error was preserved. *Id.* at 104. *See also Red River Pipeline v. Amonett,* 695 S.W.2d 802 (Tex.App.--Amarillo 1985, no writ) (The appellate court determined the trial court had erred in refusing to disqualify the jurors, but such error was reversible only if Red River used all of its peremptory strikes and then informed the court that it was prevented from striking the objectionable jurors because it had no additional peremptory challenges. The court concluded that Red River had failed to preserve error for appeal.)

E. Peremptory Challenges

1. <u>EQUALIZATION</u>

Pursuant to TEX.R.CIV.P. 233, each party to a civil action is entitled to six peremptory challenges in district court and three in county court. When there are multiple parties, however, it shall be the duty of the trial court to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. Upon proper motion, the court shall equalize the number of peremptory challenges so that no litigant or side is given unfair advantage as a result of alignment of parties. In determining allocation of the challenges, the court shall consider the "ends of justice". The existence of antagonism is a question of law. *Garcia v. Central Power and Light Co.*, 704 S.W.2d 734 (Tex. 1986); *Hyundai Motor Co. v. Alvarado,* 989 S.W.2d 32, 42 (Tex.App.--San Antonio 1998, no pet.); *Cecil v. TME Investments, Inc.,* 893 S.W.2d 38 (Tex.App.--Corpus Christi 1994, no writ); *Frank B. Hall & Co. v. Beach, Inc.,* 733 S.W.2d 251 (Tex.App.--Corpus Christi 1987, writ ref'd n.r.e.). In making this determination, the court considers the pleadings and discovery which has been conducted in the case, information presented and representations made during voir dire, and any other information brought to the attention of the trial court before the exercise of the strikes. *Id.; Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986); *Hyundai Motor Co.*, 989 S.W.2d at 42. The trial court has wide discretion in determining the number of strikes, and in most cases a 2-to-1 ratio between sides would approach the maximum disparity allowed. *Patterson Dental Co. v. Dunn,* 592 S.W.2d 914 (Tex. 1979). On appeal, the complaining party must show that the trial which resulted was materially unfair, without having to show more. *Id.*; *Hyundai Motor Co.*, 989 S.W.2d at 42; *Parker v. Associated Indemnity Company,* 715 S.W.2d 398 (Tex.App.--San Antonio 1986, writ ref'd n.r.e.). Whether an error in awarding peremptory strikes resulted in a materially unfair trial must be determined

from an examination of the entire record. If the trial is hotly contested and there is sharply conflicting evidence, the error in awarding strikes results in a materially unfair trial. *Lopez v. Foremost Paving, Inc.,* 709 S.W.2d 643 (Tex. 1986); *Mann v. Ramirez,* 905 S.W.2d 275 (Tex.App.--San Antonio 1995, writ denied). In general, all cases that are submitted to a jury involve conflicting evidence and contested issues; if there were no conflict, there would be no need for a trial. *Hyundai Motor Co.*, 989 S.W.2d at 42. Thus, the appellate court must delve deeper and review such facts as the number of questions which were submitted to the jury, whether the verdict was unanimous, and whether any motions for summary judgment or instructed verdict were made. *Id.* In *Hyundai,* the court of appeals noted that although Hyundai had moved for an instructed verdict, only eight questions were submitted to the jury and the verdict was unanimous. The jury did not find gross negligence and they failed to award punitive damages; they also failed to award damages on a bystander claim. A review of the entire record convinced the court that the trial had not been materially unfair. *Id.*

Note that in order to preserve error, the motion to equalize and/or objections to the allocation of peremptory challenges must be lodged **prior** to the exercise of the challenges.

2. JUROR DISCRIMINATION

a. Rule Applies to Both Criminal and Civil Cases

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court announced its mandate that in a criminal cause, a prospective juror may not be peremptorily challenged solely on the basis of race. *See also, Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Under *Batson*, the defendant is required to make a three-pronged showing. The first step requires that the defendant establish a *prima facie* case raising an inference of purposeful discrimination on the part of the prosecuting attorney. *Brewer v. State*, 932 S.W.2d 161, 164 (Tex.App.--El Paso 1996, no pet.); *Belton v. State,* 900 S.W.2d 886, 897 (Tex.App.--El Paso 1995, pet. ref'd). As for the second prong, once the accused establishes a *prima facie* case of racially motivated strikes, the burden of production shifts to the State to provide a race-neutral explanation. *Emerson v. State,* 851 S.W.2d 269, 271-72 (Tex.Crim.App. 1993); *Calderon v. State,* 847 S.W.2d 377, 382 (Tex.App.--El Paso 1993, pet. ref'd). In this context, a race-neutral explanation means one based on something other than the race of the juror. *Hernandez v. New York*, 500 U.S. 352, 358-60, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991); *Francis v. State,* 909 S.W.2d 158, 162 (Tex.App.--Houston [14th Dist.] 1995, no pet.). It must relate to the particular case to be tried, but need not rise to the level justifying exercise of a challenge for cause. *Batson,* 476 U.S. at 97, 98, 106 S.Ct. at 1723, 1724; *Francis,* 909 S.W.2d at 162. Moreover, the explanation need not be persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995); *Francis,* 909 S.W.2d at 162.

With regard to the third prong, if the prosecutor's explanation is facially valid, the burden of production shifts back to the accused to establish by a preponderance of the evidence that the reasons given were merely a pretext for the State's racially motivated use of its peremptory strikes. *Salazar v. State,* 818 S.W.2d 405, 409 (Tex.Crim.App. 1991); *Calderon,* 847 S.W.2d at 382. The defendant must do more than simply state his disagreement with some of the State's explanations; he must prove affirmatively that the State's race-neutral explanations were a sham or pretext. *Davis v. State*, 822 S.W.2d 207, 210 (Tex.App.--Dallas 1991, pet. ref'd); *Straughter v. State*, 801 S.W.2d 607, 613 (Tex.App.--Houston [1st Dist.] 1990, no pet.). In other words, the challenging party must prove purposeful discrimination. *Baker v. Sensitive Care-Lexington Place Health Care, Inc.,* 981 S.W.2d 753, 755 (Tex.App.--Houston [1st Dist.] 1998, no pet.).

The Court of Criminal Appeals has established a non-exclusive list of factors that may be used by a defendant to carry this burden:

• The reasons given are not related to the facts of the case;

• there was a lack of questioning to the challenged juror, or a lack of meaningful questions;

• disparate treatment such that persons with the same or similar characteristics as the challenged juror were not stricken;

• disparate examination of members of the venire, such that a question designed to provoke a certain response likely to disqualify the juror was asked to minority

jurors, but not to non-minority jurors;

• use of peremptory challenges to remove all minority members from the jury; and

• an explanation based on a group bias when the group trait is not shown to apply to the challenged juror specifically.

Keeton v. State, 749 S.W.2d 861, 868 (Tex.Crim.App. 1988).

Batson was specifically expanded to civil causes in *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), in which the Court mandated that racial exclusion violates the equal protection rights of the challenged juror, and that those rights may be asserted by the party not exercising the peremptory challenge. The *Edmonson* rule was specifically adopted by the Texas Supreme Court in *Powers v. Palacios,* 813 S.W.2d 489 (Tex. 1991). In *Powers,* the plaintiff was an African-American woman. Only one juror on the panel was African-American, and she was stricken by the defense counsel. The plaintiff's attorney inquired as to the reason for the strike, because he was concerned it was racially motivated. The defense attorney admitted that racial considerations "figured into" his decision, but that it was not the sole consideration. The Supreme Court reversed and remanded.

b. Standard of Review

In reviewing *Batson/Edmonson* issues in civil cases, the courts apply the abuse of discretion standard, as enunciated in *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997):

> Our civil jurisprudence in Texas has employed a deferential, but more familiar, 'abuse of discretion' standard in reviewing many of the decisions made by a trial court...
> In reviewing an *Edmonson* challenge, we will adhere to the abuse of discretion standard of review by which trial court rulings of this nature historically have been judged in civil cases in Texas.

A reviewing court will not be bound by a finding of no discrimination under the abuse of discretion standard if the justification offered for striking a potential juror is "simply too incredible to be accepted." *Id., citing Hernandez*, 500 U.S. at 369, 111 S.Ct. at 1871, in turn *citing Norris v. Alabama,* 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). For a study of the way in which appellate courts are handling the concept of "simply too incredible to be accepted", *see Baker v. Sensitive Care-Lexington Place Health Care, Inc.*, 981 S.W.2d 753, 758 (Tex.App.--Houston [1st Dist.] 1998, no pet.)(O'Connor, J., dissenting).

c. Focus on the Record

When the trial court finds no *prima facie* case, it is imperative that the challenging party include in the record evidence establishing that the challenged venire members were members of a protected class, together with a demonstration of the make-up of the jury panel as a whole. When the trial court proceeds to a hearing on the *Batson* issue, the *prima facie* case has already been sustained and a presumption of discrimination arises. At that point, further evidence on the jury panel's background becomes unnecessary. *Dominguez v. State Farm Ins. Co.,* 905 S.W.2d 713 (Tex.App.--El Paso 1995, writ dism'd by agr.). Thus, when the State offers an explanation for the challenged strike and the trial court makes its ruling, the issue of whether the defendant presented a *prima facie* case is moot. *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866, 114 L.Ed.2d at 406. Instead, the facial validity of the prosecutor's explanation becomes the central issue. *Purkett v. Elem,* 115 S.Ct. at 1771; *Francis,* 909 S.W.2d at 162. As a result, an appellate court bypasses the first prong and moves directly to the second prong. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. *Id.*

To further complicate matters, it is not uncommon for an attorney's reasons for striking a potential juror to be dependent on demeanor rather than a verbal response to a particular question. If the strike is indeed dependent upon a non-verbal response not reflected in the record (such as head nodding, facial expression, arm crossing), the attorney must describe the behavior relied upon. *Hill v. State,* 827 S.W.2d 860 (Tex.Crim.App. 1992); *Roberson v. State,* 866 S.W.2d 259 (Tex.App.--Fort Worth 1993, no pet.). While an explanation for the exercise of a peremptory strike that is based on non-verbal responses or subjective reasons is not necessarily insufficient to rebut the presumption of discrimination, it merits closer scrutiny than an explanation based on objective reasons. *Goodwin v. State,* 898 S.W.2d 380, 382 (Tex.App.--San Antonio 1995, no pet.); *Branch v.*

State, 774 S.W.2d 781, 784-85 (Tex.App.--El Paso 1989, pet. ref'd). Inattentiveness during voir dire is a sufficient racially neutral reason for striking a prospective juror. *Belton,* 900 S.W.2d at 897.

d. Timing is Everything

Remember that an objection to the racial and ethnic composition of a jury is untimely if it is raised after the jury is empaneled and sworn. This is true since a party may object to the jury composition by either challenging the array or demanding a shuffle. When neither remedy is requested, a complaint as to racial composition is waived.

e. *Batson* Expanded to Gender

In *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) the State of Alabama sued in civil court to establish paternity and obtain child support for a minor. The State's attorney used nine of its ten peremptory challenges on male venire members. The United States Supreme Court ultimately prohibited gender-based strikes:

> We have recognized that whether the trial is criminal or civil, potential jurors as well as litigants have an equal protection right to jury selection procedures that are free from state sponsored group stereotypes rooted in, and reflective of, historical prejudices. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality. *Id.* at 1421.

f. but Not to Religion

As an aside, it is interesting to note that the Court of Criminal Appeals originally ruled that *Batson* applies to religious-based strikes. *Casarez v. State,* 913 S.W.2d 468 (Tex.Crim.App. 1994). This ruling was ultimately rejected on rehearing. *Casarez,* 913 S.W.2d at 496.

g. Tips for Preserving Error

If we can glean any consistency from *Batson* and its progeny, it appears the following steps are necessary to preserve error:

• object before the panel is sworn and the remainder of the venire discharged;

• request, on the record, a copy of your adversary's strike sheet to determine any suspect patterns;

• establish a *prima facie* case by delineating the suspect patterns; for example, all Hispanics were stricken; all women were stricken; disparate treatment of similar jurors; no questions were asked of the stricken jurors; disparate examination of the stricken jurors; and

• obtain a ruling on whether *a prima facie* case has been made.

Also note that both high courts have determined that your adversary's voir dire notes are subject to disclosure if they are relied upon by the attorney while giving sworn testimony. *Pondexter v. State,* 942 S.W.2d 577, 579 (Tex.Crim.App. 1996); *Salazar v. State,* 795 S.W.2d 187, 193 (Tex.Crim.App. 1990); *Goode,* 943 S.W.2d at 449. Absent such reliance, the notes constitute privileged work product.

If the court rules that a *prima facie* case has been established, be prepared to counter your adversary's efforts to rebut the presumption with a neutral explanation for its strike. Argue the factors that weigh against the legitimacy of a neutral explanation:

• the reason given for the strike is not related to the facts of the case;

• the challenged juror was not asked meaningful questions;

• people with similar characteristics were treated differently;

• the attorney evoked a certain response from the challenged juror without asking the same question to other prospective jurors; and

• the attorney gives an explanation based on group bias but does not show that the group trait applies to the specific challenged juror.

Acceptable neutral reasons include

• juror's contradiction in answers

• failure to complete the juror information card

• contradiction between information on juror card and answers during voir dire

• eye contact

• body language such as rolling eyes in response to explanation of law, shrugging shoulders and crossing arms

• bored and inattentive; unhappy about being called for jury duty

• occupation including postal worker and clerical position (and spouse unemployed)

• particular characteristics including poor reading and writing skills, obesity, age, marital status, length of residence in community, health problems

THE MORAL OF THE STORY IS ALWAYS HAVE THE COURT REPORTER PRESENT FOR VOIR DIRE. IF NO IRREGULARITIES OCCUR, YOU NEED NOT HAVE THAT PORTION TRANSCRIBED OR FILED WITH THE REPORTER'S RECORD.

F. Instructed Verdict

A motion for instructed verdict may be oral rather than written, provided specific grounds are given. Lack of specificity is not fatal if no fact issues are raised by the evidence. *Texas Employers Insurance Association v. Page,* 553 S.W.2d 98 (Tex. 1977). If, after the motion for instructed verdict is presented and overruled, the moving party presents evidence, the motion is waived unless it is reurged at the conclusion of all of the evidence. *Nelson Cash Register v. Data Terminal,* 671 S.W.2d 594 (Tex.App.--San Antonio 1984, no writ); *Wenk v. City National Bank,* 613 S.W.2d 345 (Tex.Civ.App.--Tyler 1981, no writ). A ruling on the motion must be obtained before the verdict is returned in order to preserve error. *State v. Dikes,* 625 S.W.2d 18 (Tex.Civ.App.--San Antonio 1981, no writ).

G. Jury Argument

When an improper jury argument can be corrected by a jury instruction to disregard the statement, then any error is harmless. To preserve error on curable argument, an objection must be made along with a request for an instruction to disregard. Otherwise it is waived. *American Home Assurance Company v. Coronado, 628* S.W.2d 818 (Tex.Civ.App.--Amarillo 1981, no writ). Also be certain that a ruling is obtained on any objection made to argument. Failure to secure a ruling will result in failure to preserve error. *Duke v. Power Electric and Hardware,* 674 S.W.2d 400 (Tex.App.---Corpus Christi 1984, no writ).

Incurable argument is one which is so prejudicial or inflammatory that it could not have been cured by an instruction. Failure to object to incurable argument will not waive the error. *Magic Chef Inc. v. Sibley,* 546 S.W.2d 851 (Tex.Civ.App.--San Antonio 1977, writ ref'd n.r.e.). There are only rare instances of incurable harm from improper argument. *Standard Fire Ins. Co. v. Reese,* 584 S.W.2d 835, 839-40 (Tex. 1979). Note that TEX.R.CIV.P. 324(b) requires the filing of a motion for new trial to preserve error for appeal with regard to a claim of incurable jury argument if it has not otherwise been ruled upon by the trial court.

How can you determine whether error is "curable" or "incurable"? In *Dayton Hudson Corp v. Altus,* 715 S.W.2d 670 (Tex.App.--Houston [1st Dist] 1986, writ ref'd n.r.e.), the plaintiff brought suit for false imprisonment. She had been restrained by two security guards, both of whom were African-American. The plaintiff was Caucasian. During final argument, counsel for the plaintiff portrayed her as a God-fearing Christian woman and the appellant's security guards as "those two black people". No objection was made. The court of appeals, citing *Standard Fire Insurance Co. v. Reese.* 584 S.W.2d 835 (Tex 1979), determined that any error in improper jury argument was waived for failure to object. By interpretation, we can only assume that the majority found that the argument was "curable". In his dissenting opinion, Justice Hoyt concluded that the argument had provoked the jury and inflamed their passions, leading to a verdict of $150,000 in actual damages and $225,000 in exemplary damages.

A decision by the First District appellate court in Houston has discussed the test for determining whether improper argument is curable. *See, In re W.G.W.,* 812 S.W.2d 409 (Tex.App.--Houston [1st Dist.] 1991, no writ). There, a mother suffered from cervical cancer. During the course of the trial, the opposing counsel had made side bar remarks insinuating the mother had been involved in a homosexual relationship and his theory throughout the trial was that the mother's immorality would significantly impair the child's physical health or emotional development. During final argument, the opposing counsel made the following statement: "Think about cervical cancer and how you get it." No objection was lodged at trial, but on appeal, the mother contended that this statement was designed to inflame the jury, was

completely unprovoked and was incurable. The appellate court noted that to obtain reversal on the basis of improper jury argument, a litigant must prove four elements:

• Was the argument error? [here, the court commented that in searching the record, it could find nothing to support an inference that cervical cancer is caused by immoral conduct or abortions, which was the clear implication of the statement]

• Was the argument invited or provoked?

• Was the argument by its nature, degree, and extent, reversible error? and

• Did the appellant preserve error by making a proper trial objection?

Here, since no objection had been made, the court reasoned that the mother must demonstrate that the argument was incurable, which under these circumstances, becomes a fifth element:

• Is the probability that the improper argument caused harm greater than the probability that the verdict was based upon proper proceedings and evidence?

This requires that the court evaluate the improper jury argument in light of the entire case, beginning with voir dire and ending with closing argument. Finding the argument to be incurable, the court reversed and remanded. *See also, Household Credit Services, Inc., v. Driscol,* 989 S.W.2d 72, 94-95 (Tex.App. -- El Paso 1998, pet. filed).

Don't run the risk. The better practice of course is to object, secure a ruling, request an instruction, or in the case of incurable argument, move for a mistrial.

III. PRESERVING EVIDENTIARY ERROR AT TRIAL

A. Requirement of Objection

The most important line of defense is the objection. Objections are fundamental; they protect your client from the wrongful exercise of power by the trial court, its failure to exercise a power it should exercise, and abuse or misuse of the system by your opponent. Objections as to evidentiary issues relate to the trial court admitting evidence it should not admit, and to your opponent offering evidence in violation of some rule. Objections require practitioners to clear several hurdles to preserve evidentiary error for the appellate court.

1. WHEN OBJECTION IS REQUIRED

In order to preserve error complaining that improper or inadmissible testimony was admitted during the course of the trial, an objection must be made at the time the testimony is offered. TEX.R.APP.P. 33.1 provides the general rule that in order to preserve error for review on appeal, a party must present to the trial court a timely request, objection or motion stating the specific grounds for the ruling it desired the court to make if the specific grounds were not apparent from the context. The rule further states that it is necessary for the complaining party to obtain a ruling from the court to the party's objection. If the trial court refuses to rule, an objection to the court's refusal is sufficient to preserve the complaint.

Rule 103(a) of the Texas Rules of Evidence provides:

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

In *Hollon v. Rethaber,* 643 S.W.2d 783 (Tex.App.--San Antonio 1982, no writ), the managing conservator complained on appeal that evidence was admitted during a modification proceeding which related to

events occurring prior to the entry of the divorce decree. The court of appeals held that she could not for the first time on appeal urge alleged errors not raised at trial. Because no objection had been lodged against the testimony, error was not preserved.

2. WHEN OBJECTION IS NOT REQUIRED

Is there ever a situation when an objection to the admissibility of evidence is not required in order to preserve error? If the alleged error is fundamental in nature, then an objection will not be necessary. The Amarillo Court of Appeals addressed the issue in the context of a child custody case in *In the Matter of the Marriage of Knighton,* 723 S.W.2d 274 (Tex.App.--Amarillo 1987, no writ). The mother was a member of the Worldwide Church of God, a less than mainstream religion. She complained on appeal that evidence concerning her religious beliefs deprived her of a fair and impartial trial. It constituted fundamental error, she argued, because admission of the evidence violated her constitutional right to the free exercise of her religion and the separation of church and state. She also claimed that jury argument was inflammatory and prejudicial.

The court noted the father's position that the best interest of the children required his appointment as managing conservator because of the deviation from the norm of Mrs. Knighton's religious beliefs. Yet it concluded that other than Mr. Knighton's conclusory statements, there was no direct evidence, expert or otherwise, that the mother's religious beliefs would cause serious bodily or mental injury to the children or would cause the mother to neglect her children. Thus, without supporting evidence, Mr. Knighton's statements led to a constitutionally impermissible trial of the orthodoxy of the mother's religious beliefs.

Objections had been raised at various points in the trial, and at one point a motion for mistrial was made on behalf of the mother. The trial court indicated he would grant the mistrial, whereupon counsel for Mrs. Knighton withdrew the motion. Mr. Knighton contended on appeal that the withdrawal of the motion for mistrial waived all error. The majority opinion found the waiver issue to be immaterial:

> However, in a case involving the custody of a child or children, the interests of the State are involved since it is its duty as a sovereign to look after and protect the welfare of children located within its boundaries. . . . No action of, or failure to take action by, Mrs. Knighton could waive that State interest. *Id*. at 284-85.

In a concurring opinion, Justice Countiss disagreed that the waiver issue was unimportant. Speaking to the issue of preservation of error, he stated that the case was not one in which the State's interest was so overriding that error could not be waived, nor did he believe the trial court is protected from all antecedent error when it offers mistrial. He agreed that if the trial court offers a mistrial and the offer is declined, the parties should not thereafter be allowed to complain about the event that led to the offer. However, other errors or other events that preceded the offer should remain viable. *See, Eubanks v. Winn,* 420 S.W.2d 698, 702 (Tex. 1967). Otherwise, at the end of a hard and complex case, the trial court could cleanse itself and place counsel in an intolerable tactical position of offering a mistrial.

The Dallas Court of Appeals specifically declined to follow *Knighton* in *In the Matter of the Marriage of Rutland,* 729 S.W.2d 923 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). The mother in this modification case was a member of Jehovah's Witnesses. She failed to object to any testimony during the trial concerning her religious beliefs, yet she complained on appeal that the admission of the evidence violated her constitutional right to freedom of religion. Not surprisingly, she relied upon *Knighton.* The Dallas court refused to accept the argument that error of constitutional dimension is fundamental. Instead, it concluded that failure to object to the introduction of evidence waives any error, citing *Stonecipher v. Butts,* 686 S.W.2d 101, 108 (Tex. 1985). The court also noted an abundance of case law holding that even constitutional errors may be waived by the failure to object. *In re M.A.B.,* 641 S.W.2d 621, 623 (Tex.App.--Corpus Christi 1982, no writ); *Phillips v. Phillips*, 532 S.W.2d 161, 163 (Tex.Civ.App.--Austin 1976, no writ). It concluded that any error in the admission of evidence regarding the mother's religious beliefs and practices was not fundamental merely because it may have violated her rights under the federal and state constitutions. Nor did fundamental error exist simply because the State has an interest in promoting the welfare of children within its boundaries. Error, pronounced the court, was waived.

While it is inconceivable that counsel would not object to such testimony during the course of the trial, those cases sometimes arise. If you are employed as appellate counsel in a similar situation, you had best hope that your court of appeals agrees with the *Knighton*

approach.

3. RECONCILIATION: FUNDAMENTAL ERROR

Knighton and *Rutland* cannot be reconciled, but a glance at the writ histories suggests *Rutland* is the safer approach. The Supreme Court has narrowly construed the concept of fundamental error, holding that it exists in those rare instances in which the trial court lacked jurisdiction or the public interest is directly and adversely affected. *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 328 (Tex. 1993).

B. Requisites of a Proper Objection

1. OBJECTION MUST BE TIMELY

The window of opportunity for objections to evidence at trial slams shut not long after the jury is exposed to it. A timely objection, therefore, is one made either when the evidence is offered, *St. Paul Medical Center v. Cecil*, 842 S.W.2d 808, 816 (Tex.App.--Dallas 1992, no writ), or before the evidence is admitted. *Perez v. Bagous,* 833 S.W.2d 671, 674 (Tex.App.--Corpus Christi 1992, no writ). Testimonial evidence should be challenged when the question calling for objectionable testimony is asked, or if the question is not defective, when the witness begins giving objectionable testimony. A few moments after the jury is exposed, the opportunity is lost, and a motion for mistrial cannot resurrect the point. *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

The importance of timely objections is demonstrated by *Cactus Utility Co. v. Larson,* 709 S.W.2d 709 (Tex.App.--Corpus Christi 1986), *rev'd on other grounds,* 730 S.W.2d 640 (Tex. 1987). In *Cactus,* one party attempted to introduce into evidence a stock purchase agreement. The same agreement had been attached as an exhibit to the plaintiff's original petition. Special exceptions had been filed, along with other requests that the court not consider the agreement. The court had ruled it would carry the exceptions along with the trial. During the trial, the agreement was offered into evidence and defendant's counsel made no objection, obviously believing that his objections to the document had been made and that the court was still considering those objections. The agreement was admitted. At the beginning of trial the next day, counsel introduced an objection into the record to clarify his position as to the document to ensure that error was preserved. The court of appeals ruled that the objection was untimely, inasmuch as an objection must be made when the evidence is offered, not after it has been received. Upon rehearing, the appellate court acknowledged that the defendant had made a lengthy formal objection at the beginning of trial the next day and that he had excepted to the document from the beginning. However, the court noted that the trial court never ruled upon his objection. The court concluded that an objection must actually be overruled before error is preserved. Fortunately for counsel and his malpractice carrier, the case was reversed on other grounds. *See also, Harry Brown, Inc. v. McBryde,* 622 S.W.2d 596 (Tex.Civ.App.--Tyler 1981, no writ).

2. OBJECTION MUST BE SPECIFIC

Objections must be sufficiently specific so that the trial court can understand the objection and make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *Campbell v. Paschall,* 121 S.W.2d 593 (Tex. 1938)*; Texas Dept. of Transportation v. Olson*, 980 S.W.2d 890, 898 (Tex.App. -- Fort Worth 1998, no pet.). Objections which are not sufficiently specific include:

"I object", *Murphy v. Waldrip*, 692 S.W.2d 584, 590 (Tex.App.--Fort Worth 1985, writ ref'd n.r.e.);

"I object to the form of the question", *Scott v. Scruggs,* 836 S.W.2d 278, 280 (Tex.App.--Texarkana 1992, writ denied);

"Objection, the evidence is irrelevant and immaterial", *Wilkins* v. *Royal Indemnity Co.,* 592 S.W.2d 64, 67 (Tex.Civ.App.--Tyler 1979, no writ);

"Objection, no predicate has been laid", *Waldon v. City of Longview,* 855 S.W.2d 875, 878 (Tex.App.--Tyler 1993, no writ);

"Objection, there are no underlying data for the report", *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n.,* 809 S.W.2d 268, 272 (Tex.App.--Austin 1991, writ denied); and

"Objection, the testimony is incompetent and hearsay", *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

A valid objection identifies a specific rule of evidence violated by the offered evidence. *Smith Motor Sales, Inc.,* 809 S.W.2d at 273; *United Cab Co. v. Mason,* 775 S.W.2d 783, 785 (Tex.App.--Houston [1st Dist.] 1989, writ denied); *Burleson v. Finley,* 581 S.W.2d 304 (Tex.Civ.App.--Austin 1979, writ ref'd n.r.e.). General objections amount to no objection at all. *Murphy v. Waldrip,* 692 S.W.2d 584 (Tex.App.--Fort Worth 1985, writ ref'd n.r.e.). *See also, In Interest of McElheney,* 705 S.W.2d 161 (Tex.App.--Texarkana 1985, no writ), a termination suit, in which the mother failed to preserve any error concerning the admission of evidence of her homosexual preferences. The court of appeals determined that the objections which were raised at trial were in general terms and failed to state any grounds. Error was waived. And in *University of Texas System v. Haywood,* 546 S.W.2d 147 (Tex.Civ.App.--Austin 1977, no writ), an objection was made at a pre-trial conference but no objection was raised at trial. Because the objection did not specify a particular rule of evidence, it was considered too general and error was waived.

An objection that the proffered testimony is "irrelevant and immaterial' is too general to preserve complaint on appeal. *Wilkins v. Royal Indemnity, Company,* 592 S.W.2d 64 (Tex.Civ.App.--Tyler 1979, no writ). An objection as to irrelevancy does not enable the trial court to make an intelligible ruling or permit the offering party to remedy the defect. As such, it is insufficient to require consideration by an appellate court. *Mayfield v. Employer's Reinsurance Corp.,* 539 S.W.2d 398 (Tex.Civ.App.--Tyler 1976, writ ref'd n.r.e.). Relevance objections should incorporate the test contained in Rule 401 of the Rules of Evidence and identify the material fact issue to which the evidence is purportedly directed but irrelevant.

When a party seeks introduction of evidence without laying the proper predicate, it is insufficient to merely object that the predicate has not been laid. The complaining party must identify the portion of the predicate which is lacking. *See Seymour v. Gillespie,* 608 S.W.2d 897 (Tex. 1980); *In the Matter of Bates,* 555 S.W.2d 420 (Tex. 1977). Both cases involved the introduction of tape recordings over a general objection as to the predicate.

3. OBJECTION MUST BE RULED UPON

Appellate review of an objection requires that the trial court rule on the objection. TEX.R.APP.P 33.1 (a)(2)(A). *See In re Colony Ins.*, 978 S.W.2d 746, 747 (Tex. App. -- Dallas 1998, orig. proceeding)(intent to rule in the future does not constitute a present ruling). However, the ruling may be either express or implied. *See Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App. -- Fort Worth 1999, no pet.); TEX.R.APP.P 33.1 (a)(2)(A). A trial court cannot commit error if it does not act. If no ruling is obtained on an objection, it is waived. *City of Los Fresnos v. Gonzalez,* 848 S.W.2d 910, 914 (Tex.App.--Corpus Christi 1993, no writ). If a trial court refuses to rule, an objection to that refusal preserves the error. TEX.R.APP.P. 33.1(a)(2)(B); *Greater Houston Transp. Co. v. Zrubeck,* 850 S.W.2d 579, 585 (Tex.App.--Corpus Christi 1993, writ denied).

4. OFFERS OF PROOF

a. Getting It In

When evidence is admitted over objection, the reporter's record will provide the court of appeals with sufficient information to rule upon the point of error. So, as a proponent, the first procedural step in preserving evidentiary error is to offer the evidence. There is no refusal to admit evidence if there is no offer of that evidence. *Giles v. Cardenas,* 697 S.W.2d 422, 424 (Tex.App--San Antonio 1985, writ ref'd n.r.e.). The burden is on the proponent to show the admissibility of evidence. *Ruth v. Imperial Ins. Co.,* 579 S.W.2d 523, 525 (Tex.Civ.App.--Houston [14th Dist. 1979, no writ). Often the evidence itself reveals the basis for the offer, but if it is unclear, the proponent should insure that the record contains the rule of evidence under which the offer is made and sufficient facts to establish admissibility. *Vandever v. Goettee,* 678 S.W.2d 630, 635 (Tex.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see McInnes v. Yamaha Motor Corp.*, 659 S.W.2d 704, 710 (Tex.App.--Corpus Christi 1983), *aff'd,* 673 S.W.2d 185 (Tex. 1984), *cert. denied,* 469 U.S. 1107 (1985).

Evidence may be admissible for a more narrow purpose when an objection is sustained to a general offer. The proponent bears the burden on appeal of showing that no basis existed to exclude the evidence. *Minnesota Mining & Mfg. Co. v. Nishika, Ltd.,* 885 S.W.2d 603, 630 (Tex.App.--Beaumont 1994, no writ). This is avoided by narrowing the offer until the evidence is admissible. Failure to do so waives any complaint that the evidence was admissible given some more limited offer. *Brown v. Gonzalez,* 653 S.W.2d 854, 864 (Tex.App.--San Antonio 1983, no writ). In the same

vein, when evidence is objectionable on some grounds, but admissible on other grounds, there is no error if the trial court sustains an objection to a general offer; the proponent must re-offer the evidence on some admissible ground. *Ferguson v. DRG/Colony North, Ltd.,* 764 S.W.2d 874, 882 (Tex.App.--Austin 1989, writ denied).

b. Keeping It Out

When evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal. *Weng Enterprises, Inc. v. Embassy World Travel,* 837 S. W. 2d 217, 221 (Tex.App.--Houston [1st Dist. 1992, no writ); *see* TEX.R.EVID. 103. Compliance with the evidentiary rules on an offer of proof preserves error for appellate review. TEX.R.APP.P. 33.1(a)(1)(B). The reason for the offer of proof is explained in *Anderson v. Higdon,* 695 S.W.2d 320 (Tex.App.--Waco 1985, no writ):

> When tendered evidence is excluded, whether testimony of one's own witness on direct examination or testimony of the opponent's witness on cross examination, in order to later complain it is necessary for the complainant to make an offer of proof on a bill of exception to show what the witness' testimony would have been. Otherwise, there is nothing before the appellate court to show reversible error in the trial court's ruling. *Id.* at 325.

Thus, to preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show (1) the substance of evidence sought to be admitted was relevant and made known to the court; and (2) the court either adversely ruled, or after timely request affirmatively refused to rule. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ). An objection to the trial court's refusal to rule is sufficient to preserve error for appeal under TEX.R.APP.P. 33.1(a)(2)(B). Remember, however, that the offer of proof or the objection to the court's refusal to rule must be made prior to the court's charge being read to the jury, or it is waived. *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Company,* 766 S.W.2d 264 (Tex.App.--Amarillo 1988, writ denied).

C. Waiver of Error

1. SIMILAR EVIDENCE ADMITTED WITHOUT OBJECTION

Objections to evidence are unavailable when similar evidence to the same effect is offered and received without objection. The Supreme Court has considered this issue in *Bushell and Sydex Corporation v. Dean,* 803 S.W.2d 711 (Tex. 1991). Dean had sued her employer and former manager for sexual harassment. During the course of the trial, she offered the testimony of an expert witness who indicated that he would be able to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Counsel for Sydex objected to the testimony of the witness as a whole to the extent that it went to the "profile" of a harasser. The trial court determined that the witness had not yet crossed the line but that at some point the evidence might cross into character evidence prohibitions. The judge also advised counsel that he would need to reurge his objection at that point. Later, the expert testified as to the "profile" of a sexual harasser, but no objection was lodged. The Supreme Court concluded that error had been waived.

See also, Fabian v. Fabian, 765 S.W.2d 516 (Tex.App.--Austin 1989, no writ), in which the wife complained that the husband should not be able to use evidence derived as a result of a wire tap placed on her telephone to learn of her extracurricular sexual activities. The court never reached the question of the Texas Wire Tap Statute, however, holding that the complaint was waived because similar testimony was received without objection. *Accord, City of Houston v. Riggins,* 568 S.W.2d 188 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.); *Hundere v. Tracy & Cook,* 494 S.W.2d 257 (Tex.Civ.App.--San Antonio 1973, writ ref'd n.r.e.); *New Hampshire Fire Insurance Company v. Plainsman Elevators, Inc.,* 371 S.W.2d 68 (Tex.Civ.App.--Amarillo 1963, writ ref'd n.r.e.). In this instance, any error in admitting the proffered testimony is deemed harmless. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ); C *& H Nationwide, Inc. v. Thompson,* 810 S.W.2d 259 (Tex.App.-Houston [1st Dist.] 1991, no writ); *Top Value Enterprises v. Carlson Marketing,* 703 S.W.2d 806 (Tex.App.--El Paso 1986, writ ref'd n.r.e.); *Badger v. Symon,* 661 S.W.2d 163 (Tex.App. - 1983, writ ref'd n.r.e.).

2. GROUNDS OF OBJECTION AS A LIMITATION

On appeal, a party will be confined to the grounds of objection as stated in the trial court. *Banda v. Garcia,* 955 S.W.2d 270, 272 (Tex. 1997); *Texas Department of Transportation v. Olson,* 980 S.W.2d 890, 898 (Tex.App.--Fort Worth 1998, no pet.). A party cannot enlarge his complaint on appeal. *See Perez v. Baker Packers,* 694 S.W.2d 138 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack,* 491 S.W.2d 714 (Tex.Civ.App.--Corpus Christi 1973, error dism'd). Thus, the grounds which are urged in an objection to the trial court limit appellate review. This rule operates in two directions. When an objection is predicated on one ground during trial, but no point of error is predicated on that ground on appeal, error is waived. By the same token, if a ground of objection is not raised during the trial, but is raised by point of error on appeal, no error has been preserved. Two cases demonstrate the difficulty.

In re Estate of Plohberger, 761 S.W.2d 448 (Tex.App. --Corpus Christi 1988, writ denied) involved a dispute as to which of two wills of the deceased wife was entitled to probate. Her surviving husband sought to probate a will in which her entire estate passed to him. The proponent of the other will offered into evidence medical records which contained statements by the deceased that her husband was a Nazi who had exterminated Jews and who had treated her as a slave. The records were offered as a whole. The husband's objection concerning hearsay was overruled. When enlarged copies of the damaging sections of the records were marked as evidence, the husband objected again as to hearsay. This objection was overruled as well. The sections of the records were then read to the jury -- this time the objection was that the statements were inflammatory. The trial court overruled the objection. The court of appeals determined that any error in the admission of the statements was harmless. Its logic places definitive restrictions on the estoppel theory discussed above:

> Since the statements appellant objected to being read to the jury **had previously been admitted without objection** (that the statements were prejudicial and should be excluded under Rule 403), we conclude that if any error existed, it was not reversible error.

The underlined portion of the quotation is important. Obviously, the husband **had** previously objected. He had merely objected on a different and insufficient ground. Thus, it is imperative that you make the correct objection the first time the evidence is offered. If the first objection is predicated on the wrong basis or is a general objection, error will be waived inasmuch as the same or similar evidence will have been previously admitted without **proper** objection.

In *Lade v. Keller,* 615 S.W.2d 916 (Tex.Civ.App.--Tyler 1981, no writ), the proponent of a holographic will was represented by two attorneys. One of the attorneys called the other as a witness concerning the testator's testamentary capacity and state of mind. On cross examination, the attorney was asked whether he presently represented Lade in a criminal matter. The first objection lodged was that the answer was a matter of attorney-client privilege. The question was also objected to on the basis that it was immaterial. The privilege issue was not raised on appeal and was deemed waived. The immateriality issue was found to be too general to preserve any error. In the appeal, Lade urged that the testimony should have been excluded because it was highly prejudicial. This ground was waived because it had not been raised in the trial court. THE MORAL OF THIS STORY IS GET IT RIGHT THE FIRST TIME.

3. NO UTILIZATION OF ALIGNED PARTY'S OBJECTION

It is not unusual, particularly in family law matters, to have two distinct parties aligned by a common purpose. Paternal grandparents and the father may seek substantially similar relief against the mother. It is important to note that a party complaining of the improper admission of evidence must have objected to that evidence at trial. Thus, if the grandparents had objected to evidence at trial but the father did not, and only the father appealed, he would be precluded from reliance upon the grandparents' objection.

A party must either make its own objection to the evidence or state an exception to the ruling of the court regarding the objection if it wishes to preserve any error for appeal. *Wolfe v. East Texas Seed Co.,* 583 S.W.2d 481 (Tex.Civ.App.--Houston [1st Dist.] 1979, error dism'd).

4. WITHDRAWAL OF OBJECTION

It is also important to note that when an objection to the admissibility of testimony is withdrawn, even following an adverse ruling by the court, the objection is not

preserved for review. The same is true if the exhibit is withdrawn by the party offering it. *Paramount Petroleum v. Taylor Rental Center,* 712 S.W. 2d 534 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). Counsel should never withdraw an exhibit or an objection if an appeal is even remotely likely.

D. Running Objection

Less delineated are running objections, when a trial court allows one objection to apply to an area of testimony generally. Since Rule 611(a) of the Rules of Evidence permits the court to exercise reasonable control over the mode and order of interrogation of witnesses and presenting evidence so as to avoid the needless consumption of time, the granting of running objections is within the trial court's discretion.

The appellate courts are inconsistent in their view of running objections, so they should be exercised with caution. Generally, any variance between the testimony given to which a formal objection is made and testimony which may be slightly different or dissimilar may render the running objection a waiver. Further, the later admission of testimony successfully excluded earlier in a trial is considered a waiver of error. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 201 (Tex.App.--Corpus Christi 1990, no writ).

In *City of Houston v. Riggins,* 568 S.W.2d 188 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.), the appellate court concluded that the trial court had not erred in admitting testimony when the party offering the testimony thereafter introduced the same type of testimony from other witnesses without objection and full cross examination was conducted. *See also, Kelso v. Wheeler,* 310 S.W.2d 148 (Tex.Civ.App.--Houston 1958, no writ); *F. W. Woolworth Co. v. Ellison, 232* S.W.2d 859 (Tex.Civ.App.--Eastland 1950, no writ). Some courts hold, however, that a party who makes a proper objection to testimony that is overruled is entitled to assume the judge will make the same ruling as to other offers of similar evidence, and is not required to make further objections. *See Atkinson Gas Co. v. Albrecht,* 878 S.W.2d 236, 242-43 (Tex.App.---Corpus Christi 1994, writ denied); *Bunnett/Smallwood & Co. v. Helton Oil Company,* 577 S.W. 2d 291 (Tex.Civ.App.--Amarillo 1978, no writ); *Crispi v. Emmott,* 337 S.W.2d 314 (Tex.Civ.App.--Houston 1960, no writ). This is akin to the idea of the running objection. Still others limit running objections to testimony elicited from the **same witness**. *City of Fort Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.--Fort Worth 1988, writ denied). The Dallas Court of Appeals has loosened that rule in bench trials, and allows running objections to all evidence sought to be excluded, even when elicited from other witnesses. *Commerce, Crowdus & Canton, Ltd. v. DKS Construction, Inc.,* 776 S.W.2d 615, 620 (Tex.App.--Dallas 1989, no writ).

Since the device of running objections appears fraught with peril, they should be avoided if you believe continuing objections will not turn judge and jury against you. If a running objection is the only choice, then certain steps should be followed:

• request a running objection on specific grounds, otherwise the courts may waive error on subsequent admission of testimony. *See, City of Houston v. Riggins,* 568 S.W.2d 188, 190 (Tex.App.--Tyler 1978, writ ref'd n.r.e.)(holding error was waived when counsel did not object to testimony from other witnesses);

• obtain a ruling on the request for a running objection. *See City of Forth Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.--Fort Worth 1988, writ denied) (referring negatively to counsel's failure to gain a ruling on his request for a running objection);

• make a new request for a running objection if similar testimony is sought from another witness; and

• remember to make proper objections to other objectionable testimony elicited while you have a running objection, otherwise face the specter of waiver on untimely or non-specific objection grounds.

E. Partially Admissible Evidence

Specific objections are critical when evidence is admissible in part. A general objection to evidence admissible in part, which does not point out *specifically* the objectionable portions, is properly overruled. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 205 (Tex.App.-Corpus Christi 1990, no writ) *citing Brown & Root, Inc. v. Haddad,* 180 S.W.2d 339, 341 (Tex. 1941). This rule is most often applicable to documentary evidence. *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.,* 779 S.W.2d 474, 477 (Tex.App.--El Paso 1989, writ denied).

1. <u>WHEN COMPLAINT IS MADE OF ADMISSION</u>

A general objection to a unit of evidence as a whole which fails to specify the portion objected to is properly overruled if any portion of the evidence is admissible. *Speier v. Webster College,* 616 S.W.2d 617 (Tex. 1981); *Brown & Root, Inc. v. Haddad,* 180 S.W.2d 339 (Tex. 1944); *Wolfe v. Wolfe,* 918 S.W.2d 533 (Tex.App.--El Paso 1996, writ denied). It is incumbent upon the objecting party to make a specific objection to the inadmissible portion and then request a limiting instruction. *Ramirez v. Wood,* 577 S.W.2d 279 (Tex.Civ.App.--Corpus Christi 1978, no writ). If a specific objection is made, the trial court can strike the objectionable portion. In the absence of a specific objection, error is waived. *Zamora v. Romero,* 581 S.W.2d 742 (Tex.Civ.App.--Corpus Christi 1979, writ ref'd n.r.e.).

2. WHEN COMPLAINT IS MADE OF EXCLUSION

When evidence is tendered, only a portion of which is admissible, and an appropriate and specific objection is sustained, it is the burden of the party offering it to separate the admissible from inadmissible testimony. In *Hurtado v. Texas Employers Insurance Association,* 574 S.W.2d 536 (Tex. 1978), TEIA sought to introduce 280 pages of medical records. Over objection, the trial court admitted the records in their totality. The court of appeals concluded the problem was one of determining which party had the burden of separating the inadmissible portions of the exhibit from the admissible portions. It decided that the trial court had the discretion to determine which party should specifically point out the objectionable portions. In his dissent, the Chief Justice declared that a specific objection had been made concerning the inadmissible nature of the records and that the admission was error. The Supreme Court agreed with the dissent. If that burden is not met by the tendering party, the trial court does not err in excluding it in its entirety, and a point of error challenging the exclusion will not be preserved. *Perry v. Teras Municipal Power Agency,* 667 S.W. 2d 259 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

F. Motions to Strike and Motions for Mistrial

Witnesses often motor on while counsel makes objections to questions and testimony. The jury hears the answer, and the testimony appears in the appellate record. Also, evidence sometimes becomes properly objectionable later in a trial. It is insufficient in these instances to merely object; a motion to strike is required in order to prevent the jury from considering the testimony, and to prevent the appellate court from considering it on a sufficiency review. *Hur v. City of Mesquite,* 893 S.W.2d 227, 231 (Tex.App.--Amarillo 1995, no writ); *Prudential Ins. Co. v. Uribe, 595* S.W.2d 554, 564 (Tex.Civ.App.--San Antonio 1979, writ ref'd n.r.e.); *City of Denton v. Mathes, 528* S.W.2d 625, 634 (Tex.Civ.App.--Fort Worth 1975, writ ref'd n.r.e.).

1. NO RESURRECTION OF ERROR AFTER WAIVER

Basically speaking, since untimely objections are frowned upon, a motion to strike will be of little assistance in preserving error when an objection could have been made at the time the evidence was offered but none was forthcoming. Neither the motion to strike nor the motion for mistrial will prevent waiver of an objection when the grounds for the mistrial or the motion to strike do not clearly indicate the objectionable portion of the testimony. *Top Value Enterprises v. Carlson Marketing,* 703 S.W.2d 806 (Tex.App.--El Paso 1986, writ ref'd n.r.e.).

2. WHEN REQUIRED

When an objection is made and sustained concerning testimony which has been heard by the jury, the testimony is before the jury unless they are instructed to disregard it. *Chavis v. Director, State Worker's Compensation Div.,* 924 S.W.2d 439 (Tex.App.--Beaumont 1996, no writ). If an objection to an answer is made but there is no ruling and no motion to strike is urged, there is no error. *Prudential Insurance Company of America v. Uribe,* 595 S.W.2d 554 (Tex.Civ.App.--San Antonio 1979, writ ref'd n.r.e.). When objection is made to expert testimony after the testimony is admitted, any error in admitting the testimony over the objection is waived if no motion to strike is made. *City of Denton v. Mathes,* 528 S.W.2d 625 (Tex.Civ.App.--Fort Worth 1975, writ ref'd n.r.e.).

Thus, a motion to strike may become necessary in the following instances, as noted by both Jordan, TEXAS TRIAL HANDBOOK 2D, §§243 (Exclusion of Evidence) and Pope and Hampton, *Presenting and Excluding Evidence,* 9 TEX.TECH L. REV. 403 (1978):

• to exclude an answer of a witness made before an objection could be made;

• to exclude volunteer statements of the witness;

• to exclude non-responsive answers;

• to exclude prior testimony admitted conditionally upon counsel's promise to connect up the testimony or to lay a foundation;

• to exclude testimony which later turns out to be improper, such as hearsay, or in violation of the best evidence rule; and

• to exclude testimony of a witness, who by reason of sickness, death, or refusal, fails to submit to cross examination.

IV. PRESERVING EVIDENTIARY ERROR ON APPEAL

Challenges to the erroneous admission or exclusion of evidence require a two-prong approach. First, the trial court's evidentiary ruling must be erroneous. Second, assuming error occurred, was it harmful?

A. Standard of Review

When considering whether the erroneous admission or exclusion of evidence constitutes error, the appropriate standard of review is whether the trial court abused its discretion. What constitutes an abuse of discretion? As pointed out in Wendell Hall's article, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1051 (1993), the term "abuse of discretion" is not easily defined. "[J]udicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective and conclusory." *Id.* at 1051, citing *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 934 (Tex.App.--Austin 1987, no writ). Combining language from various cases, Hall suggests that "[a] mere error of judgment is not an abuse of discretion." *Id.* at 1052.

The Texas Court of Criminal Appeals once said:

> We are cited to many cases of the different states of the Union relative to what is meant by an 'abuse of discretion' and while not lending itself to an absolute measuring stick by which such abuse could be understood, the opinions seem to be in fair agreement that an abuse of discretion usually means doing differently from what the reviewing authority would have felt called upon to do. Such ordinarily finds itself depending upon the facts of the particular case. . . .
>
> From the cases cited to us, the matter of equity would have some weight in finding an abuse of discretion.

Williams v. State, 265 S.W.2d 92, 95 (Tex.Crim.App. 1954).

The Supreme Court gave the following widely-cited test for determining an abuse of discretion by the trial court:

> The test for an abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *Craddock v. Sunshine Buslines,* 133 S.W.2d 124, 126 (Tex.Com.App.--1939, opinion adopted). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Company,* 665 S.W.2d 439, 443 (Tex. 1982); *Landry v. Travelers Insurance Co.,* 458 S.W.2d 649, 651 (Tex. 1970). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Southwestern Bell Telephone Co. v. Johnson,* 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn,* 321 S.W.2d 290, 295 (Tex. 1959).

Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1986), *cert. denied* 476 U.S. 1159 (1986).

B. Reversible Error

As appellate courts are quick to point out, not all error constitutes reversible error. One of the most difficult steps in handling evidentiary issues on appeal is convincing the appellate court that the trial court's error in admitting or excluding error was harmful. The civil harmless error rule is codified in TEX.R.APP.P. RULE 44.1.

Formulations of the harmless error rule vary from time to time; since 1989, however, the Supreme Court has consistently followed the formulation contained in

former TEX.R.APP.P. 81(b)(1). *E.g., Hill v. Winn Dixie Texas, Inc.,* 849 S.W.2d 802, 803-804 (Tex. 1993); *Elbaor v. Smith,* 845 S.W.2d 240, 251 (Tex. 1992); *Alvarado v. Farah Mfg. Co.,* 830 S.W.2d 911, 917 n.8 (Tex. 1992); *McCraw v. Maris,* 828 S.W.2d 756, 757-58 (Tex. 1992); *Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989). Harmful error is shown under this test when the evidence is controlling on a material issue and is not cumulative. *Mentis v. Barnard,* 870 S.W.2d 14, 16 (Tex. 1994). Furthermore, *McCraw* specifically rejected the requirement of a "but for" relationship between the error and an improper judgment. *City of Brownsville v. Alvarado,* 897 S.W.2d 750 (Tex. 1995); *McCraw,* 828 S.W.2d at 758; *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied).

There is some authority in the courts of appeals that a case is reversible on wrongful admission or exclusion of evidence only if the entire case turns on the particular evidence. *Horizon/CMS Healthcare Corporation v. Auld,* 985 S.W.2d 216, 226 (Tex.App. -- Fort Worth 1999, pet. filed); *Litton v. Hanley*, 823 S.W.2d 428, 429-30 (Tex.App.--Houston [1st Dist.] 1992, no writ); *LaCoure v. LaCoure,* 820 S.W.2d 228, 235 (Tex.App.--El Paso 1991, writ denied); *Dudley v. Humana Hosp.,* 817 S.W.2d 124, 126 (Tex.App.-Houston [14th Dist.] 1991, no writ); *Rawhide Oil Co. v. Maxus Exploration Co.,* 766 S.W.2d 264, 279 (Tex.App.--Amarillo 1988, writ denied). Other courts of appeals combine the "entire case turns" language with former Rule 81(b)(1) language. *E.g., Service Lloyds Ins. Co. v. Martin,* 855 S.W.2d 816 (Tex.App.--Dallas 1993, no writ); *Riggs v. Sentry Ins. Co.,* 821 S.W.2d 701, 708-709 (Tex.App.--Houston [14th Dist.] 1991, writ denied). The "entire case turns" language has been questioned in recent opinions. *Durbin v. Dal-Briar Corp.,* 871 S.W.2d 263, 267 (Tex.App.--El Paso 1994, writ denied); *Castro v. Sebesta,* 808 S. W. 2d 189, 192 n. 1 (Tex. App. --Houston [1st Dist.] 1991, no writ). The state of the law with regard to this language is unclear; if it is viewed as a separate standard, the Supreme Court has not developed it in a harmful error analysis in more recent cases, *see, e.g., City of Brownsville v. Alvarado, 897* S.W.2d 750 (Tex. 1995); if it is viewed as a permutation of the "but for" standard, then it should be viewed as disapproved by *McCraw*; if it is a higher standard than "but for," it is most certainly disapproved by *McCraw.* Perhaps the language is only a variation of the other language often present in this area of the law, that the evidence must be controlling on a material issue in the case. *See Gee v. Liberty Mutual Fire Ins. Co.,* 765 S.W.2d 394, 396 (Tex. 1989).

Other factors also play in the harmless error arena. If the evidence complained of is only cumulative of other evidence admitted, then error with regard to admission or exclusion is harmless. *Id.; Hyundai Motor Co. v. Chandler,* 882 S.W.2d 606, 620 (Tex.App.--Corpus Christi 1994, writ denied); *see State v. McKinney,* 886 S.W.2d 302, 305 (Tex.App.--Houston [1st Dist.] 1994, writ denied). Furthermore, the evidence must concern an issue material to the case. *Durbin v. DalBriar Corp.,* 871 S.W.2d 263, 271 (Tex.App.--El Paso 1994, writ denied).

The Supreme Court rejected a variation in this area in *Williams Distributing Co. v. Franklin,* 898 S.W.2d 816 (Tex. 1995). *Williams* involved expert testimony excluded due to a party's failure to supplement its discovery designation of expert witnesses. Another expert had been properly designated by the party to testify on the same issue. Without determining if the exclusion were erroneous, the Dallas Court of Appeals held that harmful error was not shown because there was no showing the party "was unavailable to testify or **would not give controlling evidence** himself."[emphasis added] *Williams Dist. Co. v. Franklin,* 884 S.W.2d 503, 510 (Tex.App.--Dallas 1994), *rev'd,* 898 S.W.2d 816, (Tex. 1995). The Supreme Court attacked the emphasized language, holding that it put a party to an unpleasant election between offering "weaker" testimony and abandoning the exclusion complaint, or disparaging the "weaker" testimony as not controlling. The Court also held that it amounted to an impermissible intrusion into a party's trial strategy regarding whether or not to call a witness and determining what evidence is best to put to the jury.

C. Challenges to the Sufficiency of the Evidence

Many appeals encompass a sufficiency review. In short, sufficiency of the evidence relates to fundamental questions: "is there any evidence? Is it enough?" What follows are the standards used by Texas appellate courts, what those standards mean, how they are used by those courts, and how you should use them in appellate proceedings. Detailed discussion of the review of the sufficiency of the evidence is available in excellent articles. *See* William Powers, Jr. and Jack W. Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX.L.REV. 515 (1991) and Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 TEX.L.REV. 361 (1960).

1. "NO EVIDENCE" POINTS (LEGAL INSUFFICIENCY)

A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. The standard of review requires a determination by the appellate court concerning whether, considering only the evidence and inferences that support a factual finding in favor of the party having the burden of proof in a light most favorable to such findings and disregarding all evidence and inferences to the contrary, there is any probative evidence which supports the finding. *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965); *Dayton Hudson Corp. v. Altus,* 715 S.W.2d 670 (Tex.App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Terminix v. Lucci,* 670 S.W.2d 657 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Southwest Craft Center v. Heilner,* 670 S.W.2d 651 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.);

There are basically two separate "no evidence" claims. When the party having the burden of proof suffers an unfavorable finding, the point of error challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law". When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding". *See Creative Manufacturing, Inc. v. Unik,* 726 S.W.2d 207 (Tex.App.--Fort Worth 1987, no writ).

A "no evidence" point of error may be sustained only when the record discloses:

• a complete absence of evidence of a vital fact;

• the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact;

• the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or

• the evidence establishes conclusively the opposite of a vital fact.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex. 1998).

a. Appellate Remedy

Note that as a general rule, in the event a "no evidence" point of error is sustained, it is the court's duty to reverse and render rather than remand. *Vista Chevrolet, Inc. v. Lewis,* 709 S.W. 2d 176 (Tex. 1986); *National Life Accident Insurance Co. v. Blagg,* 438 S.W.2d 905, 909 (Tex. 1969) . However, to obtain the benefit of a rendered judgment, the appellant must have raised the no evidence issue in a motion for instructed verdict, an objection to the submission of a vital fact issue, a motion for judgment n.o.v., or a motion to disregard the jury's answer. While the no evidence issue may be preserved by motion for new trial, when it is preserved **only** by motion for new trial, the appellate court may only reverse and **remand**. It may not reverse and **render.** *Gillespie v. Silvia,* 496 S.W.2d 234 (Tex.Civ.App.--El Paso 1973, no writ). This distinction is made because the motion for new trial asks for just that -- a new trial. Thus, remand is proper. However, when the motion before the court is styled, "Motion to Modify, Correct or Reform Judgment, Or in the Alternative, Motion for New Trial", rendition is proper. *City of Garland v. Vasquez,* 734 S.W.2d 92 (Tex.App.--Dallas 1987, writ ref'd n.r.e.). In this situation, the city had prayed for rendition of a take nothing judgment on the basis of a no evidence claim while the motion for new trial was merely an alternative plea for relief.

b. The "Scintilla" Standard

The concept of legal sufficiency of the evidence encompasses the common terminology that there is "no evidence" to support a jury finding, or that a proposition is proved "as a matter of law." The concept really relates to the following questions, depending upon one's status as proponent or opponent of a fact in issue: (1) is there any legally recognized evidence in support of a finding? (2) is there any legally recognized evidence opposed to a non-finding? The term "legally recognized" encompasses the idea that certain factual situations, though there is evidence present, are as a matter of law "no evidence" of a fact in issue.

The threshold question in a legal sufficiency review is whether the evidence constitutes *more than a scintilla* of evidence probative of a fact in issue. Zero evidence always fails, of course. Direct evidence of a fact in issue is always more than a scintilla; therefore, if there is some direct evidence of a fact in issue, a jury finding of that fact will be sustained against a legal sufficiency attack. Whether evidence is direct or circumstantial is a critical inquiry. Some circumstantial evidence is

deemed so weak that it is considered no evidence of a fact in issue as a matter of law, i.e. it is a mere scintilla. This is the case when the circumstantial evidence requires multiple inferences to reach a finding of a fact in issue, *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 927 & n.3 (Tex. 1993), or when the inference of a fact in issue from circumstantial evidence is no more likely than an inference of the opposite of a fact in issue. *Walmart v. Gonzalez,* 968 S.W.2d 934, 936 (Tex. 1998); *$57,600 v. State,* 730 S.W.2d 659, 662 (Tex. 1987). Finally, circumstantial evidence falls into the "mere scintilla" category unless the evidence furnishes some reasonable basis for the conclusion by reasonable minds as to the existence of a vital fact. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Orozco v. Sander,* 824 S.W.2d 555, 556 (Tex. 1992). These theories are still alive and well in the jurisprudence of the Supreme Court, and can rescue or hamstring practitioners on appeal. Therefore, analysis of the number of inferential steps required to reach a finding of a fact in issue, and just plain deep thought about other inferences from circumstantial evidence, is worth the time.

2. "INSUFFICIENT EVIDENCE" POINTS (FACTUAL INSUFFICIENCY)

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. The test for factual insufficiency points is set forth in *ln re King's Estate,* 150 Tex. 662, 244 S.W.2d 660 (1951). In reviewing a point of error asserting that a finding is against the great weight and preponderance of the evidence, the appellate court must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. If the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the point should be sustained. This is true even if the finding is supported by more than a scintilla of evidence and even though reasonable minds might differ as to the conclusions to be drawn from the evidence.

The realm of insufficient evidence exists when there is some evidence of a fact in issue, sufficient such that a jury question is warranted, but that evidence won't support a finding in favor of the proponent of that fact in issue. The parlance used by the courts of appeals is that such a finding "shocks the conscience" or that it is "manifestly unjust" limited by such phrases as "the jury's determination is usually regarded as conclusive when the evidence is conflicting," "we cannot substitute our conclusions for those of the jury," and "it is the province of the jury to pass on the weight or credibility of a witness's testimony." *See, e.g., Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 30 (Tex. 1994); *Beall v. Ditmore,* 867 S.W.2d 791, 795 (Tex.App.--El Paso 1993, writ denied).

In drafting the motion for new trial or points of error involving factual insufficiency, the better practice is to attack the jury findings separately. This is generally required because the objection must be specific enough to apprise the trial court of the alleged error. *Security Savings Association v. Clifton*, 755 S.W.2d 925 (Tex.App.--Dallas 1988, no writ). When the jury finds against the objecting party on all questions submitted, then a general objection that all findings are against the great weight and preponderance of the evidence is sufficiently specific.

In constructing points of error, or issues for review, for a factual sufficiency challenge, remember that there are two distinct complaints here as well. When the party having the burden of proof complains of an unfavorable finding, the point of error should allege that the findings "are against the great weight and preponderance of the evidence". The "insufficient evidence" point of error is appropriate only when the party without the burden of proof on an issue complains of the fact findings. *Neily v. Aaron,* 724 S.W.2d 908 (Tex.App.--Fort Worth 1987, no writ).

a. Jury vs. Nonjury Trials

Having established that the standard of review is the same for affirmative jury findings as it is for the jury's failure to make findings, it must also be noted that the test for determining factual sufficiency of the evidence is the same in a jury and nonjury trial. *Escobar v. Escobar,* 728 S.W.2d 474 (Tex.App.--San Antonio 1987, no writ); *State Bar v. Roberts,* 723 S.W.2d 233 (Tex.App.--Houston [1st Dist.] 1986, no writ); *Foreman v. Graham,* 693 S.W.2d 774 (Tex.App.--Fort Worth 1985, no writ).

b. Court of Appeals is Final Arbiter of Factual Sufficiency

Although recent dissents from the Supreme Court of Texas argue otherwise, *see, e.g., Transport Ins. Co. v. Faircloth,* 898 S.W. 2d 269 (Tex. 1995)(Hightower, J.,

concurring and dissenting), a claim of insufficient evidence raises a question of fact rather than law and only the courts of appeals can review the issue. The Supreme Court has no jurisdiction to consider questions of fact, *Vallone v. Vallone,* 644 S.W.2d 655 (Tex. 1983), and it may not consider a point of error challenging factual insufficiency of the evidence. *Dyson v. Olin,* 692 S.W.2d 456 (Tex. 1985). The court does have jurisdiction, however, to determine whether the court of appeals used the correct rules of law in reaching its conclusion on an insufficient evidence point. *Hannon v. Sohio Pipeline Co.,* 623 S.W.2d 314, 315 (Tex. 1981).

c. Findings of Fact and Conclusions of Law Not Required to Raise Sufficiency

A request for findings of fact and conclusions of law is not required in order to raise the issue of sufficiency of the evidence. *Pruet v. Coastal States Trading Company,* 715 S.W.2d 702 (Tex.App.--Houston [1st Dist.] 1986, no writ). However, remember that a complaint of factual insufficiency to support a jury verdict or a complaint that a jury verdict is against the overwhelming weight of the evidence must be presented in a motion for new trial in order to preserve error on appeal. TEX.R.CIV.P. 324(b).

d. Appellate Remedy

If an "insufficient evidence" point is sustained on appeal, the appellate court must reverse and remand for new trial. *Glover v. Texas General Indemnity Co.,* 619 S.W.2d 400, 401 (Tex. 1980). The court of appeals has no jurisdiction to render based on a great weight and preponderance of the evidence point. *Wright-Way Spraying Service v. Butler,* 690 S.W.2d 897 (Tex. 1985).

3. METHOD OF ANALYSIS

The standards by which the sufficiency of the evidence is measured are relatively clear. Use of those standards by practitioners and the courts is another matter. A proper approach to sufficiency review is important in aiding the courts in their job and in presenting your client's case to the court. The use of an improper analysis by a court of appeals can be reversible error. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 632-33 (Tex. 1986).

a. Legal Sufficiency Analysis

The Supreme Court of Texas requires the courts of appeals to examine a legal sufficiency challenge, if made, before a factual sufficiency challenge on the same point. *Glover v. Texas Gen. Indem. Co.,* 619 S.W.2d 400, 401 (Tex. 1981). This preserves the Supreme Court's jurisdiction to review legal sufficiency challenges. It is only logical that briefs in the courts of appeals should follow suit. The analysis of the record for a legal sufficiency challenge requires that the court look only at evidence supporting the finding. *National Union Fire Ins. Co. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994); *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). Therefore, presentation to the appellate court of the legal sufficiency argument should involve presentation of only the evidence supporting a finding; anything extra is wasted paper. Though the concept seems straightforward, many presentations are in the form of a comparison of the evidence, which is a presentation suited for factual sufficiency argument only. If a comparison of the evidence is presented, then an appellate judge's first thought is that the legal sufficiency point of error is without merit. Challenging a finding on legal sufficiency grounds might entail a showing of the absence of direct evidence supporting a finding; a showing that circumstantial evidence supporting a finding is not legally recognized as evidence; a showing that other circumstantial evidence does not support the finding; and undermining an opponent's presentation of evidence in support of a finding. Attacking jury findings on the basis that a fact in issue is conclusively established or established as a matter of law requires the extra step, once it is shown there is legally insufficient evidence supporting a finding, of showing that some other proposition is conclusively established. *Holley v. Watts,* 629 S.W.2d 694, 696 (Tex. 1982). Attacking findings based on legal sufficiency points of error in Texas requires practitioners to prove there is nothing with something. This is often a difficult task, and the Fifth Circuit has rejected the framework used in Texas courts in favor of an examination of all the evidence and a standard of whether reasonable minds could differ as to a finding. *See Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969)(*en banc).* Practitioners in Texas courts, though, are stuck with this task unless the Supreme Court adopts some other standard.

b. Factual Sufficiency Analysis

The factual sufficiency analysis takes place after the legal sufficiency analysis, if any. The method employed requires the reviewing court to look at all of the

evidence, not just the evidence supporting a jury finding. *In re Kings Estate,* 150 Tex. 662, 244 S.W. 2d 660, 661 (1952). For example, in *Ellis County State Bank v. Keever,* 915 S.W.2d 478 (Tex. 1996), the court of appeals affirmed a punitive damage award and the defendant appealed. The Supreme Court noted that the court of appeals had reviewed only the evidence supporting the award. The Court then admonished the lower court that while conducting a factual sufficiency review of the damage award under *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10 (Tex. 1994), it must detail all of the relevant evidence and explain why the evidence supports or does not support the punitive damages award. The Court remanded the case to the court of appeals for a *Moriel* analysis. The converse is equally true. When the court of appeals overturns findings because of factual insufficiency, it must consider all of the evidence and state why the finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust. In *Ortiz v. Jones*, 917 S.W.2d 770 (Tex. 1996), the Supreme Court reversed because the court of appeals did not discuss and apparently did not consider the evidence supporting the finding. Further, the Supreme Court requires the court of appeals to lay out the relevant facts with regard to factual sufficiency challenges sustained to insure that the appellate court applied the correct method of analysis. *Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635-36 (Tex. 1986). This is an opportunity for an advocate to marshal all the facts, showing that the client's position is the righteous one and that the jury was swayed by some adverse force to find as they did.

c. <u>When the Standard of Review Is Abuse of Discretion</u>

Recently some courts have said that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex.App.--Amarillo 1995, writ denied) (when standard of review is abuse of discretion, factual and legal sufficiency are not independent grounds of error); *accord*, *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex.App.--Waco 1995, writ denied); *In re Marriage of Driver*, 895 S.W.2d 875, 877 (Tex.App.--Texarkana 1995, no writ); *Wood v. O'Donnell*, 895 S.W.2d 555, 556 (Tex.App.--Fort Worth 1995, no writ); *In re Pecht*, 874 S.W.2d 797, 800 (Tex.App.--Texarkana 1994, no writ); *but see* *Matthiessen v. Schaefer*, 897 S.W.2d 825, 828 (Tex.App.--San Antonio 1994) (Duncan, J., dissenting) (appellate court should review award of attorney's fees by normal sufficiency of evidence standard, and not subsume sufficiency of evidence into abuse of discretion standard), *rev'd on other grounds*, 915 S.W.2d 479 (Tex. 1995).

The El Paso Court of Appeals has agreed with Justice Duncan's dissenting opinion in *Matthiessen.* In *Lindsey v. Lindsey,* 965 S.W.2d 589 (Tex.App.--El Paso 1998, no pet.), the court addressed the conflict between the traditional sufficiency review and the abuse of discretion standard in the context of a child support modification:

> An order regarding child support will not be disturbed on appeal unless the complaining party can demonstrate a clear abuse of discretion. We are aware of recent opinions holding that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal.
>
> One commentator has suggested that the abuse of discretion standard of review should be standardized. R. Townsend, *State Standards of Review: Cornerstone of the Appeal*, THE UNIVERSITY OF TEXAS SCHOOL OF LAW 6TH ANNUAL CONFERENCE ON STATE AND FEDERAL APPEALS (1996). He recommends that once it has been determined that the abuse of discretion standard applies, an appellate court should engage in a two pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion? We agree with this approach. The traditional sufficiency review comes into play with regard to the first question; however, our inquiry cannot stop there. We must proceed to determine whether, based on the elicited evidence, the trial court made a reasonable decision. Stated inversely, we must conclude that the trial court's decision was neither arbitrary nor unreasonable.

<u>Overlapping Standards in the Family Law</u>

Context

> An appeal directed toward demonstrating an abuse of discretion is one of the tougher appellate propositions. Most of the appealable issues in a family law case are evaluated against an abuse of discretion standard, be it the issue of property division incident to divorce or partition, conservatorship, visitation, or child support. While the appellant may challenge the sufficiency of the evidence to support findings of fact, in most circumstances, that is not enough. If, for example, an appellant is challenging the sufficiency of the evidence to support the court's valuation of a particular asset, (s)he must also contend that the erroneous valuation caused the court to abuse its discretion in the overall division of the community estate. In the child support context, an appellant may challenge the sufficiency of the evidence to support a finding of net resources, a finding of the proven needs of the child, a finding of voluntary unemployment or under-employment, or a finding of a material and substantial change in circumstances. Once we have determined whether sufficient evidence exists, we must then decide whether the trial court appropriately exercised its discretion in applying the child support guidelines to the facts established. Mr. Lindsey has appropriately raised both prongs of this inquiry by designated points of error.

Lindsey, 965 S.W.2d at 592-93 (footnote and most citations omitted).

In *In re Marriage of Chandler*, 914 S.W.2d 252, 253 (Tex.App.--Amarillo 1996, no writ), the court considered an order modifying child custody. Ordinarily, reversal of such a decision will occur only when the trial court abuses its discretion. However, the appellant did not claim abuse of discretion; instead the appellant challenged the legal and factual sufficiency of the evidence to support the findings of fact which supported the judgment. The appellate court said that it therefore would not analyze the case under the abuse of discretion standard, but would use a sufficiency of the evidence standard instead. In footnote 1 the Court notes: "Left for another day is the issue of whether those appealing questions controlled by the abuse of discretion standard actually present basis to secure reversal when they fail to argue, through point of error, that the discretion was indeed abused." *Id.* at n. 1.

d. A Word to the Wise

Don't lose sight of the standards of review for sufficiency of the evidence. Carefully examine your opponents' arguments and the appellate court's opinion to insure that the appropriate method of analysis is employed. If an opponent supports a legal sufficiency challenge by presenting a weight of evidence argument, argue it is a concession of the point by the fact that your opponent is making a factual sufficiency argument. If the court of appeals looks at all the evidence when disposing of a legal sufficiency point, challenge it as error on rehearing to make them look at it the right way. If the court of appeals looks only at the evidence from one side on a factual sufficiency point, challenge it as error on rehearing, and take it up on petition for review that the court of appeals applied the wrong legal standard. Opinions of appellate courts and the arguments of opponents are never perfect, and they can offer opportunities for the practitioner with a firm grasp of sufficiency review.

4. SUFFICIENCY REVIEW OF ENHANCED BURDENS OF PROOF

Enhanced burdens of proof, i.e. clear and convincing evidence, are prevalent in family law, and are repeatedly mentioned as part of tort reform. The burden of proof necessary to recover punitive damages has been elevated from preponderance of the evidence to clear and convincing evidence. TEX.CIV.PRAC.& REM.CODE § 41.003, amended by Acts 1995 Leg., ch. 19, § 1, eff. Sept. 1, 1995. What effect does an enhanced burden of proof have on review of sufficiency of the evidence? There is clearly no effect with regard to legal sufficiency review because the standard is so low -- any evidence. Review of the factual sufficiency of the evidence with regard to an enhanced burden of proof has generated conflicting authority, however.

a. Higher Standard Cases

The El Paso Court of Appeals has adopted an enhanced standard of factual sufficiency review in those cases when the burden of proof at trial was clear and convincing evidence. Citing *Neiswander v. Bailey*, 645 S.W.2d 835, 835-36 (Tex.App.--Dallas 1982, no writ), the court determined it would "consider whether the evidence was sufficient to produce in the mind of the

fact finder a firm belief or conviction as to the truth of the allegation sought to be established." *In Interest of B.R.,* 950 S.W.2d 113, 199 (Tex.App.-- El Paso 1997, no writ). *See also, Lozano v. State,* 958 S.W.2d 925, 928 (Tex.App.--El Paso 1997, no pet.); *In Interest of G.B.R.*, 953 S.W.2d 391, 396 (Tex.App.--El Paso 1997, no writ). The *Neiswander* court had relied on authority from other jurisdictions, and the common sense notion that a higher burden of proof required a stricter standard of review. The standard promulgated in *Neiswander* was "whether the trier of fact could reasonably conclude that the existence of the fact is highly probable." Other courts of appeals adopted this standard. *E.g., Ybarra v. Texas Dept. of Human Servs.,* 869 S.W.2d 574, 580 (Tex.App.--Corpus Christi 1993, no writ); *Neal v. Texas Dept. of Human Servs.,* 814 S.W.2d 216, 222 (Tex.App.--San Antonio 1991, writ denied); *Williams v. Texas Dept. of Human Servs.,* 788 S.W.2d 922, 926 (Tex.App.--Houston [1st Dist.] 1990, no writ); *In re L.R.M.*, 763 S.W.2d 64, 66 (Tex.App.--Fort Worth 1989, no writ); *In re Estate of Glover*, 744 S.W.2d 197, 199 (Tex.App.--Amarillo 1987) (discussing the higher standard of review in dicta), *writ denied per curiam*, 744 S.W.2d 939 (Tex. 1988)(the per curiam opinion did not mention the court of appeals' discussion of the higher standard of review). Another group of opinions from the courts of appeals references the burden of proof at trial with the factual sufficiency standard of review in a fashion that indicated a stricter review than regular factual sufficiency review. *See Doria v. Texas Dept. of Human Resources,* 747 S.W.2d 953, 959 (Tex.App.--Corpus Christi 1988, no writ); *G.M. v. Texas Dept. of Human Resources,* 717 S.W.2d 185, 186 (Tex.App.--Austin 1986, no writ); *Baxter v. Texas Dept. of Human Resources,* 678 S.W.2d 265, 267 (Tex.App.--Austin 1984, no writ).

b. Same Standard Cases

Other courts of appeals have backed away from a higher standard of review for factual sufficiency when the burden of proof at trial was by clear and convincing evidence. This trend seems to begin with *D.O. v. Texas Department of Human Services,* 851 S.W.2d 351, 353 (Tex.App.--Austin 1993, no writ). *See also In the Interest of W.S., R.S., and A.S.,* 899 S.W.2d 772, 776 (Tex.App.--Fort Worth 1995, no writ); *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex.App.--Fort Worth 1995, no writ); *In re A.D.E.,* 880 S.W.2d 241, 245 (Tex.App.--Corpus Christi 1994, no writ); *Oadra v. Stegall*, 871 S.W.2d 882, 892 (Tex.App.--Houston [14th Dist.] 1994, no writ). These decisions rely on *Meadows v. Green,* 524 S.W.2d 509, 510 (Tex. 1975) and *State v. Turner*, 556 S.W.2d 563, 565 (Tex. 1977), which in turn relied on *Omohundro v. Matthews,* 341 S.W.2d 401, 410-11 (Tex. 1960) and *Sanders v. Harder*, 227 S.W.2d 206, 209-10 (Tex. 1950).

Supreme Court authority relied on by the courts of appeals may not be as solid as it has been treated. *Meadows* involved a *legal sufficiency* challenge predicated on a motion for new trial, not a factual sufficiency challenge. 524 S.W.2d at 510; *Green v. Meadows,* 517 S.W.2d 799, 802-803 (Tex.Civ.App.--Houston [1st Dist.] 1974), *rev'd*, 524 S.W.2d 509 (Tex. 1975). The court of appeals in *Meadows* seemed to apply a factual sufficiency review when the language of the opinion is examined in context. It almost appears as if the court of appeals treated "clear and convincing" as a *type* of evidence rather than a burden of proof, in which case they applied a proper standard to an erroneous view of what clear and convincing evidence is, finding there was "no evidence" of a clear and convincing character. The Supreme Court treated the case as if the court of appeals had applied a factual sufficiency review when such was not preserved. *See* 524 S.W.2d at 510. That court clearly stated there are only two standards of review, but the cases relied upon, *Omohundro* and *Sanders* may not say that.

The Supreme Court opinion in *State v. Turner*, also relied on in *D.O. v. Texas Department of Human Resources,* is similarly unclear.

There, the trial court had instructed the jury that the burden of proof was clear and convincing evidence, but the court of appeals reversed on the ground that the appropriate burden was the "beyond a reasonable doubt" burden of criminal prosecutions. The Supreme Court reversed, holding that the burden at trial was by a preponderance of the evidence and again stating there were but two standards of review. The character of the Supreme Court's opinion lends itself more to the proposition that there was no intermediate *burden of proof*, rather than the proposition that there was no intermediate *standard of review* for issues predicated on an intermediate burden of proof.

Meadows and *Turner* both quoted an extensive passage from *Sanders v. Harder,* 148 Tex. 593, 227 S.W.2d 206, 209-10 (1950):

> In certain types of cases courts have frequently pointed out that the facts must be established by clear and convincing evidence. That rule . . . arose at a time when such suits were cognizable only in courts of chancery where matters of fact, as well as of law, were tried by the chancellor. Verdicts of juries in those courts were advisory only. In our blended system the field in which that rule operates is very narrow. In practical effect it is but an admonition to the judge to exercise great caution in weighing the evidence. No doctrine is more firmly established than that the issues of fact are resolved from a preponderance of the evidence, and special issues requiring a higher degree of proof than a preponderance of the evidence may not be submitted to a jury. In ordinary civil cases trial courts and Courts of Civil Appeal may set aside jury verdicts and grant new trials when, in their opinion, those findings, though based upon some evidence, are against the great weight and preponderance of the evidence, but they may not render judgment contrary to such findings. In those cases in which the "clear and convincing" rule is applicable if, in the opinion of the trial judge, the evidence in support of the verdict does not meet the test of that rule, he may set it aside and order a new trial; but he should not render judgment contrary thereto. (citations omitted).

This statement shows that a "clear and convincing" burden of proof affects, if at all, only factual sufficiency review, because the only relief allowed, remand for new trial, is the only available remedy when a factual sufficiency point is sustained. The same passage indicates that there is another standard for review of factual sufficiency when there is a higher burden of proof, because the passage's reference to "that rule" seems to be to the rule of clear and convincing evidence, and thus, the implication that there is some other standard associated with it. The predicate in *Sanders* was a judgment non obstante veredicto rendered by the trial court and affirmed by the court of civil appeals, and improper in the factual sufficiency review context, independent of the standard of that review.

Finally, the *Omohundro* case says nothing about the standard of review. The Supreme Court treated the issue, couched in the terms "the jury's findings to certain special issues are not supported by clear and convincing evidence," as jurisdictional. *Omohundro v.*

Matthews, 161 Tex. 367, 341 S.W.2d 401, 410-11 (Tex. 1960). The Court stated that this contention was an attack on the sufficiency of the evidence, over which it had no jurisdiction. The Court, citing *Sanders*, stated that the clear and convincing test was merely another method of measuring the weight of the evidence, and thus is also a fact question. Worthy of note is that the petitioner's application for writ of error was predicated on a motion for judgment non obstante veredicto, which would not preserve factual sufficiency questions for review, and that it did not attack the court of civil appeals' disposition on the basis of an error of law. Taken literally, the Supreme Court's statement merely acknowledges that the clear and convincing standard is a different burden of proof at trial, and that it affects only factual sufficiency review. The statement provides no foundation for later courts' reliance on it for the proposition that there are only two standards of sufficiency review.

V. CHARGE ERROR

Error in the court's charge, frequently the most likely source of reversible error on appeal, continues to be the center of appellate scrutiny and controversy. Great care must be taken in preparing the charge and preserving error. Any analysis of potential charge error must include attention to previously settled assumptions likely to be questioned by appellate courts.

A. The Continuing Debate on the Supreme Court

A continuing debate is ongoing in the Supreme Court of Texas over what constitutes reversible error in the trial court's charge to the jury. The debate goes to the core of charge practice. At issue are the traditional roles of the courts, as interpreters of the law, and juries, as finders of disputed facts.

The debate is illustrated by two recent Supreme Court decisions -- *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998) and *Crown Life Ins. Co. v. Casteel*, 42 Tex. Sup. Ct. J. 945 (July 1, 1999).

In *Bilotto*, the narrow issue presented was whether the trial court directly or indirectly advised the jury of the effect of its answers by instructing the jury not to answer the damage question unless the plaintiff was 50%, or less, at fault. 985 S.W.2d at 23.

A plurality of three Supreme Court justices, and an assigned justice sitting for Justice Hankinson, affirmed the instruction based on language added to Rule 277, TEX. R. CIV. P. in 1973 and 1988 to promote broad form submissions. That language expressly authorized conditioning damage submissions on affirmative findings of liability. *Id*. Justice Spector's opinion became the majority opinion when it was joined by Justice Gonzalez who concurred in holding that the instruction only indirectly advised the jury of the effect of its answers and, therefore, was not prohibited by Rule 277. *Id*. at 25 (Gonzalez, J., concurring).

By contrast, three dissenting justices also relied on the language of Rule 277 to argue that the rule only permitted damage issues to be conditioned on affirmative findings of liability, not a subsequent question inquiring about percentages of liability. *Id*. at 36 (Baker, J., dissenting).

The underlying issue of the proper roles of juries and courts was joined by Justice Gonzalez' concurring opinion, which argued the time had come to directly advise juries of the effect of their answers, *Id*. at 28 (Gonzalez, J., concurring) and Justice Hecht's dissent, which argued that juries should not be allowed to interpret or disregard the law by deciding which party should win. *Id*. at 35 (Hecht, J., dissenting).

Of course, the true significance of *Bilotto* is unknown since Justices Spector and Raul Gonzalez are no longer on the Court and Justice Hankinson did not participate.

In *Casteel*, a unanimous Court considered whether the inclusion of invalid theories of liability submitted to the jury in a single broad-form question constitutes harmful error. Casteel sold modified vanishing premium policies as an agent for Crown. When several of his clients sued him and Crown, Casteel filed a cross-claim against Crown alleging violations of article 21.21 of the Insurance Code which included claims based on DTPA provisions incorporated in article 21.21. The trial court submitted a single broad-form question on the issue of Crown's liability to Casteel. The question instructed the

jury on thirteen independent grounds for liability including five grounds taken from the DTPA laundry list. The question requested a single answer on Crown's liability which the jury answered affirmatively.

Based on Crowns' motion for judgment notwithstanding the verdict, the trial court rendered judgment that Casteel take nothing against Crown because he lacked standing to bring suit under the statutes. The Court of Appeals held that Casteel had standing under article 21.21 but did not have standing under the incorporated DTPA provisions. The Court of Appeals further held that the erroneous submission of the DTPA-based article 21.21 claims in a single broad-form question was harmless.

The Supreme Court held that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. The Court explained:

> It is fundamental to our system that of justice that parties have the right to be judged by a jury properly instructed in the law. Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence could have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds.

42 Tex. Sup. Ct. J. at 951. The Court further stated that "when questions are submitted in a manner that allows the appellate court to determine that the jury's verdict was actually based on a valid liability theory, the error may be harmless." *Id.* at 952. But the Court cautioned that "when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Id.* at 953. The Court also stated that "it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability." *Id.*

B. Broad Form Submissions Made the Debate Inevitable

The ongoing debate over the proper role of the jury should not have surprised anyone. It was the inevitable result of the court's decision to back away from strictly limiting the jury's role to deciding specific disputed facts.

Prior to 1973, the limitation of the jury's role had been insured by requiring the individual submission of every disputed fact. Harmful jury errors could then be isolated and readily identified on appeal.

The retreat from special issue practice began in 1973, apparently because it produced too many appeals and too many reversals. It was propelled by the 1988 amendments to Rule 277 and the court's subsequent decisions favoring "broad form submission." It had the practical effect of simplifying charge preparation and submission.

The retreat also limited the ability to determine harmful charge error by replacing findings on specific elements with "ultimate issue findings" based on instructions explaining the factors that must be determined to reach an affirmative finding. It became more difficult to show that an improper instruction probably resulted in an improper verdict.

It soon became apparent that rules and case law created to strictly limit the constitutional separation of courts and juries, simply did not work well once the court sought to obtain the efficiency of the general charge while maintaining the control of juries available under special issues. Combining the two necessarily compromises the principals underlying each.

The instructions necessary to permit juries to find ultimate issues in broad form submissions required the court to retreat from hallowed principles restricting the role of courts, as well. Courts could not instruct without "tilting or nudging" juries by indirectly commenting on the weight of the evidence or indirectly revealing the effect of the jury's answers. The Supreme Court was forced to relax the rules designed to separate the roles of the courts and juries, in order for broad form charges to work.

It was time for new rules, yet there could be no new

rules until the court determined what principles control the relative roles of the courts and juries. *Bilotto* indicates the court is fundamentally split on which principles are paramount.

In the interim, we are left to attack and defend the actions of courts and juries at the point where respective roles intersect: The court's charge to the jury.

Multiple opportunities and pitfalls await any practitioner attempting to attack or defend a jury charge. The potential opportunities and traps are multiplied when the law is changing. Now that the Supreme Court appears uncertain of how to proceed in the middle changing the law, the opportunities may be limited only by lack of understanding of what is happening.

C. Conflict Arises Over Broad-Form Submission and Preservation of Error

Although the Court initially embraced broad-form submission, conflicts soon arose between the Court's apparent desire to have questions submitted only on ultimate issues, with constituent elements addressed only by instructions and definitions, and the rules for preserving error, designed under the old separate and distinct system of special issue submission.

The Supreme Court addressed the multiple problems of preserving charge error in *State Dept. of Hwys. & Public Transportation v. Payne,* 838 S.W.2d 235 (Tex. 1992). *Payne* recognizes problems of preserving error noting that "it is not clear whether a request will serve as an objection or an objection as a request." *Id.* at 240. The court recognized that rather than lose appellate rights, cautious counsel frequently choose to both request and object only to learn that error has been waived if the requests and objections have not been kept separate or if the duplication obscures a legitimate complaint. *Id.*

Payne further observed that the multiple instructions contained in a broad form charge have rendered it "impossible to determine which party has responsibility for each part of the charge." *Id.* at 240-41. The court concluded:

> There should be one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.

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

Accordingly, the Supreme Court held that requests for a question inquiring into the single element omitted from the trial court's charge preserved the erroneous submission. The court held that the request brought the error to the attention of the trial court with greater certainty than an objection. Thus, it appeared that practitioners should routinely point out error in the court's charge by submitting substantially correct instructions and questions, per Rule 273.

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

Taken together, *Payne* and *Spencer* make it clear that error in an opponent's submissions and omissions may be preserved by a substantially correct request *or* an objection which brings the error to the attention of the trial court.

Obviously, the rules need to be changed. New rules were, of course, proposed several years ago. They are set forth at the conclusion of this section. The reason they have not been adopted may well be found in *Bilotto*. The court appears to be split on the fundamental issue of whether the benefits of ultimate issue broad form submission is worth the price of investing juries with power formerly reserved to the courts.

It is in that context we explore charge error from the divergent perspectives of the party attacking the verdict and the party defending it.

D. Purpose of the Charge

The jury is charged with deciding the factual disputes necessary to form the basis of a judgment. *Tarter v.*

Metropolitan Sav. & Loan Ass'n., 744 S.W.2d 926, 928 (Tex. 1988). It provides the only guidance the jury will receive in deciding those questions. As a result, error in the charge can be so prejudicial as to require reversal. TEX.R.APP.P. 44.1.

1. PREPARATION

Rule 278 TEX.R.APP.P., restricts the "questions, instructions, and definitions" submitted to the jury, to those "raised by the written pleadings and the evidence."

a. Raised by the Pleadings

Attacking a proposed submission begins with determining whether it is supported by a "written pleading," required by Rule 278. An opponent's submission of an unpleaded theory of recovery or affirmative defense should be the subject of an objection citing cases such as *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450 (Tex. 1995); *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 248, 259 (Tex 1992)(holding that the petition, "fairly read, alleged only a cause of action based upon premises liability" waiving submission of negligence as an independent theory.); *Scott v. Atchison, Topeka and Santa Fe Ry. Co.*, 572 S.W.2d 273 (Tex. 1978)(holding that failure to restrict a jury's consideration to issues raised by the pleadings was reversible error.)

Moreover, the party attacking the submission of an unpleaded theory or defense should note that Rule 301, TEX.R.CIV.P., requires that judgments be supported by the pleadings. An unpleaded cause of action will not support judgment on appeal. *See Boyles v. Kerr*, 855 S.W.2d 593, 600-01 (Tex. 1993); and *Centex Corp. v. Dalton*, 840 S.W.2d 952, 955 (Tex. 1992).

The party defending the submission will argue that the cause of action or defense was sufficiently plead under Texas notice pleadings requirements. Rule 45(b), TEX.R.CIV.P. only requires that notice be given of its causes of action "by the allegations as a whole."

In addition, Rule 90, TEX.R.CIV.P. provides that "every defect, omission or fault in a pleading either in form or of substance" is waived if not specifically identified by written special exception and brought to the attention of the trial court before the charge goes to the jury. The Supreme Court has permitted recovery over objections that an unpleaded theory had been submitted because no special exceptions were filed. *Troutman v. Traeco Building Systems, Inc.,* 724 S.W.2d 385 (Tex. 1987).

Moreover, the defending party should argue that a variance with the pleadings must be substantial to preclude recovery. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183 (Tex. 1977); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 924 (Tex. 1981); *Brown v. American Transfer*, 601 S.W.2d at 937.

Trial amendments are available to conform the pleadings to the evidence. Rule 66, TEX.R.CIV.P.

b. Supported by Sufficient Evidence

Rule 278 also restricts charges to questions and instructions raised by the evidence. The most common objection to a charge is that there is "no evidence" to support inclusion of a question or instruction. The next most common objection is probably that the evidence is factually insufficient to support the submission.

The party attacking the submission will likely include "legal insufficiency" or "no evidence" grounds, even though objection is not required to preserve error on that ground. The last sentence of Rule 279, TEX.R.CIV.P., states that it is not necessary to object to the legal or factual sufficiency of the evidence. The claim "may be made for the first time after the verdict" regardless of whether the questions were requested by the complainant. *Id*. The objection should, nonetheless, be made to preclude submission, and failing that, to prepare the court for a motion for judgment, either disregarding the finding, or notwithstanding the verdict.

By contrast, Rule 324 requires that complaints of factual insufficiency be made by motion for new trial. The trial court must submit issues that are factually insufficient but supported by some evidence. *Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963); *Smith v. Christley*, 755 S.W.2d 525, 528-29 (Tex.App.--Houston [14th Dist.] 1988, writ denied).

The party defending the submission will, of course, argue that the evidence, or reasonable inferences to be drawn from the evidence, would enable a reasonable juror to find the submission in his or her favor.

If objections have been made on the basis of factual insufficiency, the defending party will urge that all objections are merely "stock objections," including some that cannot even be made prior to submission.

The defending party may, therefore, argue that inclusion of factual insufficiency objections violates Rule 274, TEX.R.CIV.P.'s prohibition of obscuring or concealing objections with "voluminous unfounded objections," thereby waiving consideration of any legitimate objections. *Smith v. Christley*, 755 S.W.2d at 528-29; *see also, Clarostat Mfg., Inc. v. Alcor Aviation, Inc.*, 544 S.W.2d 788, 791 (Tex.Civ.App.--San Antonio 1976, writ ref'd n.r.e.).

c. The Materiality Paradox

Whether a question (and its accompanying instructions and definitions) is immaterial should be considered both when the charge is prepared, and after the jury's verdict has been rendered. A jury question is immaterial when it should not have been submitted, or, though properly submitted, has been rendered void of legal significance by answers to other questions. *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.). Put another way, a question is immaterial when its answer can be found elsewhere in the verdict or when its answer cannot effect the verdict. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). Immaterial findings include questions beyond the province of the jury, such as questions of law. *Spencer v. Eagle Star Ins. Co. of America*, 860 S.W.2d at 870.; *Wal-Mart Stores, Inc. v McKenzie*, 1999 WL 645102 (Tex. August 26, 1999). Likewise, undisputed facts do not require the jury's determination. *McSween v. Daniel*, 380 S.W.2d 194 (Tex.Civ.App.--Amarillo 1964, no writ).

It is generally conceded that a trial court can disregard an immaterial finding on its own motion, *Clearlake City Water Athty. v. Winograd*, 695 S.W.2d 632, 639 (Tex.Civ.App.--Houston [1st Dist] 1985, writ ref'd n.r.e.) or on a motion to disregard the finding after verdict. *Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex.App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). *See also, Oliver v. Oliver*, 889 S.W.2d 271, 273-74 and n.3 (Tex. 1994)(disregarding an "immaterial" finding in absence of a proper objection to its inclusion in the charge).

The party attacking the charge should object to immaterial requested findings and supporting instructions. The danger of waiting until after the verdict to complain about a question is threefold. Initially, the inclusion of a question and instructions favoring one party, but of no importance to resolution of the case, can emphasize the weight to be given one party's case, thereby influencing the jury in that direction. *See Acord v. General Motors, Corp.*, 669 S.W.2d at 116.

Second, and paradoxically, an appellate court may hold that inclusion of an immaterial question is harmless error, if in light of the charge as a whole, it does not appear that the immaterial question could have confused or misled the jury. *City of Brownsville v. Alvarado*, 897 S.W.2d at 751.

Third, an otherwise immaterial finding, such as an attempt to submit a question of law, may be construed as a "merely defective" attempt to submit an element of a core cause of action, which requires preservation before the charge is submitted to the jury. *Spencer v. Eagle Star*, 860 S.W.2d at 868, 870.

Parties are presumed to have consented to erroneous submissions in the absence of objection by either party. In *Allen v. American Nat'l. Ins. Co.,* 380 S.W. 2d 604 (Tex. 1964), the trial court improperly submitted the key issue of the defense of procurement of an insurance policy by fraudulent representations. Rather than inquiring whether the insured knew his representations were false, the court inquired whether the insured "knew or should have known" that the answer was false. The Supreme Court held that the parties failure to object rendered the jury's response binding on both litigants. Thus, *Allen* stands for the proposition that the parties can consent to be bound by an erroneous or incomplete submission. *See also Wilgus v. Bond,* 730 S.W.2d 670 (Tex. 1987)*; Cheney v. Parks,* 605 S.W.2d 640, 642 (Tex.Civ.App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.); and *Barfield v. Brogdon,* 560 S.W. 2d 787, 791 (Tex.Civ.App.--Amarillo 1978, writ ref'd n.r.e.). It is important to note the absence of post-verdict motions urging immateriality in *Allen* and *Wilgus. See Wal-Mart Stores, Inc. v McKenzie*, 1999 WL 645102 (Tex. August 26, 1999) (complaint of immaterial jury question was timely if raised in response to motion for judgment on the verdict). Thus, the party defending the charge containing arguably immaterial questions and instructions has a wealth of law available to obscure the question. The court can postpone the determination until after the verdict, to see if the answer is immaterial in light of the answers to the charge as a whole. *Winograd*, 695 S.W.2d at 639; and *Brown v. Armstrong*, 713 S.W.2d at 728. If it is still immaterial, it may not be necessarily prejudicial. *Alvarado*, 897 S.W.2d at 751.

2. REQUESTING THE CHARGE TO PREVAIL AND TO PRESERVE ERROR

Rules of Civil Procedure 271 through 279 govern the manner the charge is submitted to the jury.

As amended, Rule 277 mandates that "the court shall, whenever feasible, submit the charge on broad form questions." Broad form is not defined by the rule. It has encompassed everything from questions with checklists for each element, as in *Scott v. Atchison, Topeka*, 572 S.W.2d at 278, to asking ultimate legal questions of whether parental rights should be extinguished, with the dispositive factual inquiries submitted in an instruction, as in *Texas Dept. of Human Resources v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

The current rules are written to require the party desiring a finding to request it by submitting substantially correct questions and instructions. The move to reserving both elements of causes of action as well as defenses for instructions has, in the view of the Supreme Court, as well as practitioners, made it largely "impossible to determine which party has responsibility for each part of the charge." *Payne*, 838 S.W.2d at 240-41.

Nonetheless, this much is clear: Each party should request the questions, instructions and definitions necessary for it to prevail.

a. Questions

Ordinarily, causes of action or defenses are submitted by one or more questions. A party submitting a cause of action or defense bears the burden of proving his case factually and persuading the jury to find in his favor by the preponderance of the evidence. *See*, *e.g.*, *Ramos v. Frito-Lay, Inc.*, 784 S.W.2d 667, 668 (Tex. 1990) (plaintiff has the "burden to obtain affirmative answers to jury questions as to the necessary elements of his cause of action").

Rule 278 states:

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

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

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

b. Instructions and Definitions

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

> Failure to submit a *definition or instruction* shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Failure to request an instruction or definition should not be taken lightly. Under broad form submission, constituent elements of an opponent's claim or defense will likely be relegated to instructions or definitions. Even if Rule 278 no longer means what it says, a substantially correct definition or instruction tendered by the party complaining of the judgment prevents the error from being waived. *Payne*, 838 S.W.2d at 241.

c. When Requested

Requests must be made before the case is submitted to the jury. They must also be made separate and apart from objections to the charge. Rule 273, TEX.R.CIV.P.; *Templeton v. Unigard Security Ins. Co.,* 550 S.W.2d 267, 269 (Tex. 1976).

d. How to Request

(1) IN WRITING

Requests must be in writing. Rule 278, TEX.R.CIV.P. The rules make no provisions for oral requests.

(2) TENDERED TO COURT

Requests must be tendered to the trial court under Rule 278. In *Peterson v. Dean Witter Reynolds,* 805 S.W.2d 541, 552 (Tex.App.--Dallas 1991, no writ.), an instruction was waived because the proposed charge was filed with the district clerk and never "tendered" to the trial court.

(3) SEPARATE FROM OBJECTIONS

Requests must be made separate and apart from objections to the court's charge. Rule 273, TEX.R.CIV.P.; *Woods v. Crane Carrier Co., Inc.,* 693 S.W.2d 377, 379 (Tex. 1985). Requests are waived even when tendered with written objections which are refused by the court. *T.E.I.A. v. Eskeu,* 574 S.W.2d 814 (Tex.Civ.App.--El Paso 1978, no writ).

(4) SUBSTANTIALLY CORRECT

Requests must be in substantially correct wording. Rule 278, TEX.R.CIV.P. "Substantially correct" means that the request is in a form that would allow its submission as worded. *Yellow Cab Co. v. Smith,* 381 S.W.2d 197, 198 (Tex.App.--Waco 1964, writ ref'd n.r.e.). An often quoted explanation is found in *Placencio v. Allied Indus. Int'l., Inc.,* 724 S.W.2d 20 (Tex. 1987):

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

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

Instructions depend on the substantive law which properly governs the dispute. Compare *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925 (Tex. 1993) ("We rely on the trial judge to instruct the jury on the relevant law . . .") and *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982) ("An appellate court must assume that a jury properly followed the trial court's instructions"). Also, when words used in the charge have a meaning different than their commonly understood meaning, the court's charge is supposed to give a proper definition, which the jurors are bound to apply in lieu of any other definition.

The court may refuse requests lacking necessary definitions and instructions. *Select Ins. Co. v. Boucher,* 561 S.W.2d 474, 479-80 (Tex. 1978). Likewise, requests can be refused when they accompany a defective definition. *Sherwin-Williams Paint Co. v. Card,* 449 S.W.2d 317 (Tex.Civ.App.--San Antonio 1970, no writ).

The importance of proper definitions or instructions can be seen, for example, in *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470 (Tex. 1992). In that tortious interference case, the Supreme Court found reversible error in the trial court's refusal to submit Bell's properly tendered definition of "justification." The Supreme Court succinctly explained why refusal to submit a proper definition or instruction required reversal: "Virtually the entire factual dispute between the parties has been whether Bell's conduct was justified. To ask the jury to resolve this dispute without a proper legal definition to the essential legal issue was reversible error." *Id*., 843 S.W.2d at 472.

(5) NOT "EN MASSE"

The practice of tendering a complete charge, ready for submission, also carries risk. The courts frown upon "en masse" requests. The trial court is justified in refusing to give any question tendered en masse if any one of the questions is improper. *Crisp v. Southwest Bancshares Leasing Co.,* 586 S.W.2d 610 (Tex.Civ.App.--Amarillo 1979, writ ref'd n.r.e.). The appellate courts reason that the trial judge should not be required to sift through voluminous requests in order to submit those that are proper. *Tempo Tanner, Inc. v. Crowe-Houston Four Ltd.,* 715 S.W.2d 658, 666-67 (Tex.App.--Dallas 1986, writ ref'd n.r.e.); *Hoover v. Barker,* 507 S.W.2d 299, 305 (Tex.App. --Austin 1974, writ ref'd n.r.e.). However, in *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995), the Supreme Court held that Rule 273 does not prohibit including a requested jury question in a complete charge as long as it is not obscured). *See also Aetna Casualty & Surety Co. v. Moore,* 361 S.W.2d 183, 187 (Tex. 1962) in which the tender of a request containing a group of nine

questions was held not to mislead or confuse the court, thereby preserving error.

As a practical matter, it is prudent to prepare a complete charge. However, each instruction and question should be on a separate page that can be tendered to the court for inclusion or refusal once the entire charge has been prepared by the trial court.

e. Court's Action

Rule 276 provides that refused or modified questions, instructions or definitions must be endorsed, signed by the court, and filed with the clerk to preserve error. The endorsement should state "refused" or "modified as follows: (stating how the request was modified) and given, and exception allowed." Rule 276, TEX. R.CIV.P. *See Hirsch v. Hirsch,* 770 S.W.2d 924, 926 (Tex.App.--El Paso 1989, no writ).

f. Invited Error

Parties may not request a submission and then object to it. *Daily v. Wheat,* 681 S.W.2d 747 (Tex.Civ.App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.); *City of Amarillo v. Langley,* 651 S.W.2d 906, 914 (Tex.App.--Amarillo 1983, no writ); *Beasley v. Baker,* 333 S.W.2d 212, 214 (Tex.Civ.App.--Amarillo 1960, no writ). Note, however, that Rule 279 permits objection to the factual or legal sufficiency of the evidence after the verdict, regardless of which party requested the submission.

3. PRESERVING ERROR BY OBJECTING

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

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

The point of the objection, therefore, is to advise the trial court of the error in a manner that permits its correction.

a. When to Object

"In every instance," objections must be made before the charge is read to the jury. Rule 272, TEX.R.CIV.P.; *Missouri Pacific RR Co. v. Cross,* 501 S.W.2d 868, 873 (Tex. 1973). Agreements to make objections after the charge has gone to the jury will not be enforced. *Sudderth v. Howard,* 560 S.W.2d 511, 516 (Tex.App.--Amarillo, 1978, writ ref'd n.r.e.). Failure to make objections prior to submission to the jury results in waiver. *T.E.I.A. v. Neuman,* 379 S.W.2d 295 (Tex. 1964). However, unless otherwise noted in the record, it is presumed that objections were made at the proper time. Rule 272, TEX.R.CIV.P.

In *Green Tree Financial Corp. v. Garcia*, 988 S.W.2d 776 (Tex. App. -- San Antonio 1999, no pet.), the Garcias argued that Green Tree"s objection was not proper because it was asserted during the "informal" charge conference discussing the preliminary instructions of the Garcias' proposed charge. The appellate court disagreed, stating that "[g]iven the liberal precedent on preservation that has been established by the Texas Supreme Court, we reject the Garcias' formalistic distinction between an 'informal' charge conference and a 'formal' charge conference. Green Tree's objections were on the record and made the trial aware of its complaint, timely and plainly. Adopting the common sense approach advocated by the Texas Supreme Court in Payne, we find that Green Tree preserved the error in the court's charge...." *Id.* at 782.

Objections may not be required until the charge has been submitted to the parties or their attorneys for inspection. A reasonable time must be given both to examine the charge and to present the objections. TEX. R. CIV. P. 272. It is understandable that the court may not wish to delay getting the case to the jury, but you cannot let the court railroad you into making objections in an unreasonably short time. If you feel you have not been given a "reasonable" time, object on the record, state the time the court gave you the charge and how little time you have been given, state the time you are making your objections, and then state that you object to the court's refusal to allow you a reasonable time in which to inspect the charge and present your objections. Object also that the court's unreasonably short timetable may prevent you from a making a proper record for any appeal. Compare TEX. R. APP. P. 44.1. Then ask for a ruling on these objections, and object to any refusal to rule.

b. How to Object

Objections may be presented to the court in writing or be dictated to the court reporter in the presence of the court and opposing counsel. Rule 272, TEX.R.CIV.P. If written objections are presented, it is best to do so on the record, speaking out to the court reporter the title of the document. Then ask the court for a written ruling on the objections, and immediately object on the record if s/he refuses to give you such a ruling. *See Kirkpatrick v. Memorial Hosp.*, 862 S.W.2d 762, 770 (Tex.App.--Dallas 1993, writ denied). Once the court's ruling has been obtained on written objections, they should be immediately filed with the clerk (*i.e.*, before the charge is read to the jury) for later inclusion in any appellate transcript.

Spoken objections dictated without the court being present are not preserved. *Brantley v. Sprague,* 636 S.W.2d 224 (Tex.App.--Texarkana 1982, writ ref'd n.r.e.). No cases were found in which counsel dictated objections in the presence of the jury or in the absence of opposing counsel.

Most objections do not meet the dual requirements of Rule 274.

A party objecting to a charge must:

(1) point out distinctly the objectionable matter; and

(2) the grounds of the objection.

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

In *Castleberry,* the Supreme Court specifically noted that Rule 274 requires objections "both to clearly designate the error and to explain the grounds for the complaint." Other courts have said that an objection must be phrased with such clarity that the trial court must have been "fully cognizant of the grounds of the complaint" yet chose "deliberately to overrule it." *Bell v. MKT Ry Co. of Texas,* 334 S.W.2d 513 (Tex.Civ.App.--Fort Worth 1960, writ ref'd n.r.e.). *See also Anderson v. Higdon,* 695 S.W.2d 320 (Tex.App.--Waco 1985, writ ref'd n.r.e.); *Citizens State Bank of Dickinson v. Bowles,* 663 S.W.2d 845 (Tex.App.--Houston [14th Dist.] 1983, writ dism'd). Most recently, the Supreme Court applied the requirements in holding an appellate complaint that the trial court erred in submitting issues by separate special issues rather than by broad form questions had not been preserved. *Keetch v. The Kroeger Co.,* 845 S.W.2d 262 (Tex. 1992).

The requirement was continued in *State Dept. of Highways and Public Transportation v. Payne,* 838 S.W.2d 235 (Tex. 1992). The court held that the test should be "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Id.* at 241.

c. Effective Objections

The Supreme Court provided examples of effective objections. In *Crown Life Ins. Co. v. Casteel*, 42 Tex. Sup. Ct. J. 945, trial court submitted a single broad-form liability question which included valid article 21.21 theories and invalid DTPA-based theories. The Court held that Crown preserved error by objecting on the ground that Casteel did not have standing to pursue any DTPA-based claims because he was not a consumer.

In *Payne*, 838 S.W.2d 235, the defendant objected that an instruction was a comment on the weight of the evidence because it limited the jury's consideration to one of two mutually exclusive theories of recovery. The defendant reasoned that the objectionable language amounted to an instruction to the jury to consider only one of the theories. The Supreme Court held that, under the circumstances, the trial court's failure to submit the other, more difficult theory of recovery, could hardly have been an oversight. *Id.* at 239.

In *Stewart Title Guaranty Co. v. Sterling,* 822 S.W.2d 1 (Tex. 1992) the court held that an objection for failure to segregate attorney's fees between settling and non-settling defendants was preserved.

d. Ineffective Objections

Most of the standard objections used by Texas practitioners are insufficient to preserve error on appeal. They are too general to distinctly point out the

error complained of, let alone explain the reasons for the complaint.

Examples of insufficient objections include the following:

1. The instruction or question is a comment on the weight of the evidence. *Baker Material Handling Corp. v. Cummings,* 692 S.W.2d 142, 145 (Tex.App.--Dallas 1985, writ dism'd); *Aetna Casualty & Surety Co. v. Depoistor,* 393 S.W.2d 822, 827-28 (Tex.Civ.App.--Corpus Christi 1965, writ ref'd n.r.e.); *Hickman v. Durrham,* 231 S.W.2d 569 (Tex.Civ.App.--Eastland 1948, writ ref'd n.r.e.).

2. The definition is not the correct legal definition. *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296 (Tex.App.--Amarillo 1983, writ ref'd n.r.e.); *Hayes v. Nichols,* 203 S.W.2d 274 (Tex.Civ.App.--Eastland 1974, no writ).

3. The instruction may confuse the jury. *Castleberry v. Branscum,* 721 S.W.2d 270 (Tex. 1986).

4. The charge may prejudice the jury. *Id.*

5. There is no pleading to warrant the submission of the issue. *Monsanto Co. v. Milam,* 494 S.W. 2d 534 (Tex. 1973).

6. There is a variance between pleadings and proof in a broad issue submission. *Brown v. American Transfer & Storage Co.,* 601 S.W. 2d 931 (Tex. 1980).

7. The instruction omits essential elements. *Ford Motor Co. v. Maddin,* 124 Tex. 131, 76 S.W. 2d 474 (1934).

8. The question does not inquire as to the proper measure of damages. *Whitson Co. v. Bluff Creek Royal Co.,* 293 S.W.2d 488 (Tex. 1956); *Jim Walters Homes, Inc. v. Samuel,* 701 S.W.2d 351, 354 (Tex.App.--Beaumont 1985, no writ).

9. The question is global. *Brown v. American Transfer & Storage Co.,* 601 S.W.2d 931 (Tex. 1980).

10. The issue is too broad. *Mathis v. State,* 258 S.W. 2d 200 (Tex.Civ.App.--Beaumont 1953, writ ref'd n.r.e.).

11. The question puts an improper and onerous burden on the party. *McDonald v. New York Cent. Mut. Fire Ins. Co.,* 380 S.W.2d 545 (Tex. 1964).

12. The question or instruction is "unintelligible," "confusing," "meaningless," "misleading," "indefinite" or "argumentative." *Texas & N.O.R. Co. v. Dingfelder & Balish, Inc.,* 114 S.W. 2d 666 (Tex.Civ.App.--San Antonio 1938), *aff'd,* 134 Tex. 156, 133 S.W. 2d 967 (1939); *Southwest Stone Co. v. Symons,* 237 S.W. 2d 380 (Tex.Civ.App.--Fort Worth 1951, writ ref'd n.r.e.).

e. Comments on the Weight of the Evidence

Whether comments on the weight of the evidence warrant reversal is, at best, problematic. In support of the majority (plurality?) holding in *Bilotto* that Rule 277 only precludes the charge from "directly advis[ing] the jury of the legal effects of its answers," the court apparently found it necessary to apply its reasoning to the rule's prohibition against commenting on the weight of the evidence as well. The court stated:

> To be a direct comment on the weight of the evidence, the issue submitted must suggest to the jury the trial court's opinion on the matter.

Bilotto, 985 S.W.2d at 24.

Parties attacking the charge have relied on the court's insistence that, even under broad form submissions, the trial court could not even imply that certain evidence should be given more, or less, significance. Well after the court encouraged broad form submissions in 1973, it repeatedly held that even the most innocuous instructions were impermissible comments on the evidence.

In *Lemos v. Montez,* 680 S.W.2d at 801, the court held that an unnecessary instruction was an impermissible comment "that tilt or nudge the jury in one way or the other" after encouraging broad form submissions. Likewise, in *Acord v. General Motors Corp.,* 669 S.W.2d at 116, the Supreme Court held that giving a correct but unnecessary instruction amounted to a comment on the weight of the evidence. The same conclusion was reached in *First Int'l. Bank in San Antonio v. Roper Corp.,* 686 S.W.2d at 603-05.

The probable impact of *Bilotto*'s dicta was forecast in *Lone Star Gas Co. v. Lemond*, 897 S.W.2d 755 (Tex. 1995) in which the court rejected a court of appeals' reliance on *Lemos* in holding that any such error was "harmless." *Bilotto* likely signals a continued retrenchment from prohibiting the trial court from saying anything in the charge that would hint at its opinion of the evidence.

Those attacking the charge should raise the failure to separate the court's function from the jury's and the resulting loss of the right to trial by jury.

Those defending the charge should urge that only "direct" comments advising the jury of the court's opinion are objectionable.

f. Advising the Jury of the Effect of Its Answers

Bilotto effectively eliminates the objection that the charge advises the jury of the effect of its answers. The majority opinion of four justices and one assigned justice flatly states that:

> [T]o directly advise the jury of the legal effect of its answers, the issue submitted ***must instruct the jury how to answer each question in order for the plaintiff or defendant to prevail.***

985 S.W.2d at 24 (emphasis added). Justice Gonzalez would go further. He would amend Rule 277 to permit directly advising the jury of the effect of their answers. *Id*. at 25 (Gonzalez, J., concurring).

Obviously, those attacking the charge will object as permitted by Rule 277, to directly advising the jury, based on Justice Hecht's observation that the point of the prohibition is to prevent any juror of ordinary intelligence from adjusting findings to fit the legal effect of an answer. *Id*. at 34 (Hecht, J., dissenting).

Those defending the charge will simply argue that instructions did not instruct the jury how to answer each question in order for [it] to win. *Id.* at 24.

The importance of carefully preserving such error is equally obvious since Justices Spector and Raul Gonzalez, who were part of the plurality in *Bilotto*, are no longer on the Court and Justice Hankinson did not participate. Thus, Justices Hankinson, O'Neill and Alberto Gonzales will likely decide to what extent juries can be advised of the effect of their answers (and the future of error in broad form charges), the next time the Supreme Court visits the issue.

g. Voluminous or Unfounded Objections

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

> When the complaining party's objection, or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable.

The rule can be violated in at least two ways. First, objections can simply be too profuse. *Monsanto Co. v. Milam,* 494 S.W. 2d 534, 536 (Tex. 1973); *Mahan Volkswagen, Inc. v. Hall,* 648 S.W. 2d 324, 330-31 (Tex.App.--Houston [1st Dist.] 1982, writ ref'd n.r.e.). Note however, *Baker Material Handling Corp. v. Cummings,* 692 S.W. 2d 142, 145-46 (Tex.App.--Dallas 1985, writ dism'd by agr.), holding that the mere number of objections alone does not violate Rule 274. The test for voluminous objections is whether the trial court was deprived of a real opportunity to correct errors in the charge. *Northcutt v. Jarrett,* 585 S.W. 2d 874 (Tex.Civ.App.--Amarillo 1979, writ ref'd n.r.e.), *per curiam,* 592 S.W. 2d 930 (Tex. 1979).

Second, as previously noted, the rule can be violated by filling the record with spurious objections which cannot be sustained. In *Smith v. Christley,* 755 S.W. 2d 525, 528-29 (Tex.App.--Houston [14th Dist.] 1988, writ denied) the court properly concluded that objections to the factual insufficiency of the evidence to support submission could not have justified refusal to submit the issue. Questions must be submitted to the jury if there is some evidence to support them even if it is factually insufficient. *See Strauss v. LaMark,* 366 S.W. 2d 555 (Tex. 1963). Accordingly, the court held that objection to 15 questions on the basis of factual insufficiency of the evidence "filled the record with spurious objections." *Id. See also Clarostat Mfg., Inc. v. Alcor Aviation, Inc.,* 544 S.W. 2d 788, 791 (Tex. Civ.App.--San Antonio 1976, writ ref'd n.r.e.).

h. Adoption by Reference

Rule 274 expressly prohibits adoption of objections

made to prior issues or instructions. The trial judge should not be required to recall arguments made earlier in the charge conference in determining whether a party has met the burden of clearly and distinctly setting forth objections and grounds. The goal of Rule 274 is to give all participants, including the trial judge and the appellate courts, an opportunity to know with certainty that all objections have been made at the designated point in the proceedings. Adoption of objections by reference does not advance the purposes of Rule 274.

i. Courts Ignore Their Own Requirements

Appellate courts may raise failure to object to the charge to avoid reaching a troublesome substantive point. By the same token, courts may ignore failure to preserve error in order to reach points that are particularly egregious or timely. The adequacy of an objection can be determined only by reviewing the transcript or statement of facts filed with the clerk of the appellate court.

Examples of arguments reached over minimal appellate predicate include the Supreme Court's attempts to limit the instructions in product liability charges in the mid-1980s. In *Acord v. General Motors Corp.,* 669 S.W. 2d at 116, the court condemned an instruction containing a correct statement of law because it went beyond the basic instruction previously approved in *Turner v. General Motors Corp.,* 584 S.W. 2d 844 (Tex. 1979). *Acord* held that the instruction was unnecessary and, therefore erroneous. The court determined the instruction was harmful because "giving the additional instruction amounted to a comment on the weight of the evidence."

No mention of the parties' objections to the charge was made in the opinion. The underlying record showed that the plaintiff's attorney objected that the prejudicial instruction represented a "comment on" and "unduly emphasized evidence" and went beyond the definition previously approved by the Supreme Court. Although the objection arguably could not pass the requirements of *Castleberry v. Branscum,* it nonetheless preserved the trial court's error in adding surplus, although correct, language to the charge.

Likewise, in *Lemos v. Montez,* 680 S.W.2d at 801, the Supreme Court considered an instruction that was both incorrect and unnecessary. The instruction, added to the definition of unavoidable accident, stated that the mere happening of a collision is not evidence of negligence. After holding the additional language to be unnecessary and incorrect, the court held the instruction to be reversible because such addenda to the charge are "impermissible comments that tilt or nudge the jury in one way or the other." *Id.*

A review of the statement of facts in *Lemos* reveals that the opinion was based on repetitious and ineffective attempts to object to the charge. The plaintiff objected that the instruction was "a comment on the evidence;" "a comment on the weight of the evidence;" "gives more credence to the defensive series;" and is "duplicitous and repetitive because it adds to rather than making any further explanation of an unavoidable accident." The objection preserved error for appellate review.

First Int'l. Bank in San Antonio v. Roper Corp., 686 S.W.2d at 603-05, was reversed for "commenting on the weight of the evidence." The court considered the effect of adding an instruction concerning "sole cause" following the approved definition of "producing cause" in a products case. The sole cause instruction was held to be superfluous and surplusage. Citing *Acord*, the court condemned the additional instructions as "improper comments on the case." *Id*. at 605.

The statement of facts reveals that the plaintiff objected that the additional instruction involved an element of foreseeability and "is contrary to the law of Texas." The objection was apparently sufficient for the court to reach the point of error.

j. Court's Ruling

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

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

k. Before *Payne*: Object and Request

Prior to *Payne*, some courts held that a substantially correct written request for an omitted question, instruction or definition was not enough to preserve error unless accompanied by an objection. *See e.g. Johnson v. State Farm Mutl. Auto. Ins.,* 762 S.W.2d 267, 270 (Tex.App.--San Antonio 1988, writ denied); *Wright Way Constr. Co. v. Harlingen Mall Co.,* 799 S.W.2d 415, 418-19 (Tex.App.--Corpus Christi 1990, writ denied). The courts' basis for requiring an objection in addition to a requested submission was apparently Rule 274's statement that "[a]ny complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections." Even before *Payne*, such reasoning appeared to be contrary to the Supreme Court's holdings in *Morris v. Holt,* 714 S.W. 2d at 312-13 and *American Teachers Life v. Bruggette,* 728 S.W. 2d 763. *See also Clarostat Mfg., Inc. v. Alcor Aviation, Inc.,* 544 S.W. 2d at 794.

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

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

4. PRESERVATION AFTER *PAYNE* AND *SPENCER*

a. *Payne* Permits Preservation by Request

The Supreme Court addressed the multiple problems of preserving charge error in *State Dept. of Hwys. & Public Transportation v. Payne,* 838 S.W.2d 235 (Tex. 1992). *Payne* recognized problems of preserving error, noting that "it is not clear whether a request will serve as an objection or an objection as a request." *Id.* at 240. The court further recognized that rather than lose appellate rights, cautious counsel frequently choose to both request and object only to learn that error has been waived if the requests and objections have not been kept separate or if the duplication obscures a legitimate complaint. *Id.*

Payne further observed that the multiple instructions contained in a broad form charge have rendered it "impossible to determine which party has responsibility for each part of the charge." *Id.* at 240-41. The court concluded:

> There should be one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.

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

Accordingly, the Supreme Court held that requests of a question inquiring into the single element omitted from the trial court's charge preserved the erroneous submission. The court held that the request brought the error to the attention of the trial court with greater certainty than an objection. Thus, prudent practitioners should routinely point out error in the court's charge by submitting substantially correct instructions and questions.

b. *Spencer* Permits Preservation By Objection

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

Taken together, *Payne* and *Spencer* make it clear that error may be preserved by a substantially correct request *or* an objection which brings the error to the

attention of the trial court.

c. Courts of Appeals Interpret *Payne* and *Spencer*

The Supreme Court was generous in clarifying the standards for preserving charge error in *Payne* and *Spencer*. The courts of appeals are another matter.

The Supreme Court has found it necessary to emphasize the impact of *Payne* on several occasions, usually by *per curiam* opinions. Examples include *Alaniz v. Jones & Neuse, Inc.*, 878 S.W.2d 244 (Tex.App.--Corpus Christi 1994), *writ denied per curiam*, 907 S.W.2d 450 (Tex. 1995)(despite a party's noncompliance with the textual requirements of Rule 273, Supreme Court stated in dicta that party preserved his jury charge complaint "[u]nder the reading of Rule 273 *Payne* requires . . .") and *Lester v. Logan*, 893 S.W.2d 570 (Tex.App.--Corpus Christi 1994), *writ denied per curiam*, 907 S.W.2d 452 (Tex. 1995) (without granting writ, Supreme Court again cited *Payne* as authority for rejecting the appeals court's waiver analysis).

The Fort Worth Court of Appeals reads *Payne* as having held that if the trial court became aware of the parties' complaint, the manner by which the court became aware, by objection or request, is immaterial. *Collins v. Beste*, 840 S.W.2d 788, 790 (Tex.App.--Fort Worth 1992, writ denied). By contrast, the Corpus Christi Court of Appeals cited *Payne* for the proposition that "[s]ometimes a request is not sufficient and may not even be appropriate; instead counsel must object." *Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506, 508 (Tex.App.--Corpus Christi 1993, writ denied).

A footnote to the majority opinion in *Borden, Inc. v. Rios*, 850 S.W.2d 821 (Tex.App.--Corpus Christi 1993), *writ granted without reference to merits*, 859 S.W.2d 70 (Tex. 1993), describes the confusion perceived as a result of *Payne*:

> Since this passage is cast as advice rather than as an order ("There should be but one test"), we are uncertain whether this language represents the present state of the law or a yet to be reached ideal. 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 on 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 question 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*.

Borden, 850 S.W.2d at 827 n.3.

The *Borden* footnote describes the dilemma faced by both bench and bar as a result of the Supreme Court's majority and dissenting opinions in *Payne*. The majority in *Payne* went to considerable lengths to explain the difficulties with preserving error under the current rules. Yet, the *Borden* footnote describes the confusion which *Payne* has caused. After the Supreme Court's opinion in *Payne*, it is difficult for a practitioner to know what rules to follow to preserve complaints of error.

Thus, despite *Payne*, *Spencer*, *Alaniz* and *Lester*, the practitioner cannot predict with certainty which standards will be applied by the Texas appellate courts in evaluating the sufficiency of your objections to the charge. Even if a court of appeals erroneously finds procedural waiver, there is no assurance that the Supreme Court will routinely grant review to correct that error. *See* TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 1988) and TEX.R.APP.P. 53.2(i) (Supreme Court now has "discretion" to decide which appeals court errors are sufficiently "important" to Texas

jurisprudence as to require correction).

5. INTERPRETING THE VERDICT

The jury's findings must be interpreted in light of the charge as a whole. *Briseno v. Martin,* 561 S.W. 2d 794, 796 (Tex. 1977). Hopefully, the verdict will be clear.

a. Conflicts

An "apparent conflict" exists only when two findings inquire expressly or by necessary implication into the same material fact resulting in two different results. *Bender v. Southern Pac. Transp. Co.,* 600 S.W.2d 257, 262-63 (Tex. 1980). Care should be taken to spot apparent conflicts before the jury is dismissed. If there is a problem, the parties should consider returning the jury for deliberations.

Conflicts are not waived, however, by failure to object before the jury retires. Objections may be made for the first time in post-verdict motions. *St. Louis Southwestern Ry Co. v. Duke,* 424 S.W. 2d 896 (Tex. 1967); *First Texas Serv. Corp. v. McDonald,* 762 S.W. 2d 935, 939-40 (Tex.App.--Fort Worth 1988, writ denied).

The court has a duty to reconcile apparent conflicts "if reasonably possible in light of the pleadings and evidence, the manner of submission, and the other findings considered as a whole." *Bender v. Southern Pac.,* 600 S.W.2d at 260, *Huber v. Ryan,* 627 S.W.2d 145 (Tex. 1981). The jury is presumed not to have intended to return conflicting findings. *Huber,* 627 S.W.2d at 146.

A jury's answer may be disregarded only when it is legally immaterial. That is, the answer must not affect the judgment to be rendered, should not have been answered because of other findings, or is not supported by legally sufficient evidence. *Fleet v. Fleet,* 711 S.W.2d 1, 2 (Tex. 1986); *Bayliss v. Cernock,* 773 S.W.2d 384 (Tex. App.--Houston [14th Dist.] 1989, writ denied) 3 MCDONALD, TEXAS CIVIL PRACTICE § 1503.1 at 504 (1984); *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978). *See Wal-Mart Stores, Inc. v McKenzie*, 1999 WL 645102 (Tex. August 26, 1999).

A jury's affirmative response is clearly immaterial when it is not controlling. Accordingly, an answer to a predicate issue is immaterial when the jury has refused to find the predicate. *Chitsey v. National Lloyds Ins. Co.,* 738 S.W. 2d 641, 643-44 (Tex. 1987); *Yarbrough v. Helmerich & Payne, Inc.,* 616 S.W. 2d 444, 445 (Tex.Civ.App.--Houston [14th Dist.] 1981, no writ).

Conflicts are irreconcilable and, therefore, fatal to rendition of judgment only when there is no dominant finding and the conflicting responses compel the rendition of two different judgments or no judgment at all. 3 MCDONALD, TEXAS CIVIL PRACTICE § 15.06.7 at 520 (1984). Answers are fatally in conflict if one conflicting answer considered in the light of the verdict while excluding the other conflicting answer, would require judgment in favor of one party if the other answer, similarly considered, would require judgment in favor of the opposite party. *Littlerock Furniture Mfg. Co. v. Dunn,* 222 S.W. 2d 985, 991 (Tex. 1949). The verdict must be set aside when answers are in fatal conflict.

b. Omitted Findings

Under Rule 279, independent grounds of recovery or of defense not conclusively established by the evidence "and no element of which is submitted or requested" are waived. However, one or more elements of a ground of recovery or defense may be submitted and found by the jury while other elements are omitted from the charge without proper request or objection. Under those circumstances, the parties are deemed to have waived a jury determination of the omitted issue. Rule 279 TEX. R. CIV. P.

If the evidence supporting the finding would have been factually sufficient, the trial court may make an express finding at the request of either party after notice and hearing prior to rendering judgment. Otherwise, the finding will be deemed in support of the judgment. *Ramos v. Frito-Lay,* 784 S.W. 2d 667 (Tex. 1990); *Cielo Dorado Dev. v. Certainteed Corp.,* 744 S.W. 2d 10, 11 (Tex. 1988); *Logan v. Mullis,* 686 S.W. 2d 605, 608-09 (Tex. 1985).

6. CHARGE ERROR ON APPEAL

Complaints concerning the charge are viewed in light of the record as a whole. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n.*, 710 S.W. 2d 551, 555 (Tex. 1986); *Geotech Energy Corp. v. Gulf States Telecommunications & Information Sys.,* 788 S.W.2d 386 (Tex.App.--Houston [14th Dist.] 1990, no writ.). Error, if it exists, must be reversible error to warrant

setting aside the trial court's judgment. *Island Rec., supra; Boatland of Houston v. Bailey,* 609 S.W.2d 743, 750 (Tex. 1980); *Rawhide Oil & Gas v. Maxus Expl. Co.,* 766 S.W.2d 264 (Tex.App.--Amarillo 1988, writ denied).

As always, reversible error is in the eye of the beholder. It is clear from *Acord, Lemos,* and *Roper,* that any departure from instructions previously approved by the court may be deemed to have "improperly influenced the jury." Such "nudging" is reversible error. The difference between a presumption of reversible error and actions within the trial court's discretion may be determined by the appellate argument.

a. Standard of Review

The trial court necessarily has great discretion in formulating the jury charge. The standard of review is, therefore, abuse of discretion.

Discretion will be overturned only when it acts without reference to any guiding principle. *Texas Dept. of Human Resources v. E. B.,* 802 S.W.2d at 649. However, the trial court has no discretion in determining or applying the law. *Walker v. Packer,* 827 S.W.2d 833, 840 (Tex. 1992). A clear failure to analyze or apply the law will result in reversal. *Id. See also Hill v. Winn Dixie of Texas, Inc.,* 849 S.W.2d 802, (Tex. 1992) (Hecht, J., dissenting). Furthermore, it is an abuse of discretion to deny the requested submission of a valid theory of recovery or defense raised by the pleadings and the evidence. *Exxon Corp. v. Perez,* 842 S.W.2d 629 (Tex. 1992).

When a trial court refuses to submit an instruction, the question is whether the request was reasonably necessary to enable the jury to render a proper verdict. *Green Tree Financial Corp. v. Garcia*, 988 S.W.2d at 783. Refusal to submit requested instructions will not be overturned unless an abuse of discretion is found. *Margo v. Ragsdale Bros., Inc.,* 721 S.W.2d 832 (Tex. 1986).

b. Broad Form Omissions

Prior to *Payne,* considerable confusion existed concerning the manner in which omitted matters should be requested in broad form submissions. Implicit in Rule 278 is the assumption that independent grounds of recovery or defenses are requested and submitted as questions, rather than instructions. For example, in *Scott v. Atchison, Topeka & Santa Fe Ry. Co.,* 572 S.W.2d at 278, the Supreme Court stated that specific acts or omissions may be listed in a "broad ultimate fact issue", or in a check list issue such as those employed in PJC Volume One.

Thus, the only exception to Rule 278's mandate that unsubmitted questions, definitions or instructions will not be deemed grounds for reversal unless requested in writing, is the provision that questions relied upon by the opposing party be preserved by objection. The provision for preservation of error by objection is not extended to definitions or instructions relied upon by an opponent. Thus, under broad-form submissions, if a ground of recovery or defense relied upon by an opponent should be submitted by instruction but is not, the other party may have the burden of requesting it as an instruction in order to preserve the complaint concerning the incomplete submission on appeal. If so, the dissent in *Island Recreational* correctly observed that this is a dramatic departure from prior case law. 710 S.W.2d at 559.

In *Island Recreational,* both parties requested questions on waiver, which was subsequently omitted from the trial court's charge. *Id.* at 553. Unfortunately, the Supreme Court's decision made it appear that the unsubmitted ground of defense would be impliedly found in a manner consistent with the jury's answers to the questions that were submitted. *Id.* at 554. This conclusion was appropriately criticized by dissenting justices. *Id.* at 558-59, 563. The majority's holding is difficult to square with Rule 279, TEX.R.CIV.P. which provides that all independent grounds of recovery or of defense not conclusively established under the elements "no element of which is submitted or requested" are waived upon appeal.

Subsequent opinions have clarified that error in omitting a cause of action or defense may be preserved by requesting a substantially correct question. *Exxon v. Perez,* 842 S.W.2d 629 (Tex. 1992); *State Dept. of Hwys. v. Payne,* 838 S.W.2d 235 (Tex. 1992). To date, the Supreme Court has not directly confronted the problems created by *Island Recreational* and Rule 278.

Omitted elements of a cause of action or defense also pose unique problems under broad form submissions. Under Rule 279, omitted elements are deemed found so as to support the judgment if the elements were omitted absent "request **or** objection." However, under Rule 278, failure to submit a "definition or instruction" is not deemed a ground for reversal unless a substantially

correct definition or instruction has been requested in writing and tendered to the court. Thus, inclusion of elements in an instruction, rather than a jury question, appears to require that a missing element be requested by substantially correct written instruction under Rule 278 in addition to objecting to its omission of Rules 274 and 279. What remains unclear is whether the requested written definition or instruction must contain only the omitted element or, in order to be "substantially correct" must contain the entire instruction to add the single missing phrase. In *State Dept. of Hwys. v. Payne,* the problem was solved by submitting the missing element as a single question.

c. Identifying Harmful Error

The separate and distinct special issue system permitted the jury to determine the existence or non-existence of each element of a party's cause of action or defense. When the elements of the cause of action and affirmative defenses are lumped into one instruction accompanying the ultimate liability issue, there is no way for the appellate practitioner or court to know the basis of the jury's determination. If the jury answers the ultimate question "yes", courts tend to assume everything was considered. *Island Recreational,* 710 S.W.2d at 555. If the jury answers "no", however, there is no way of knowing basis of the jury's decision.

The appellate practitioner is then faced with the problem of establishing whether the jury's failure to find liability was based on a potentially improperly submitted or factually unsupported affirmative defense or the jury's disbelief of evidence supporting one or more of the elements necessary to establish the cause of action. Likewise, the practitioner attacking a favorable liability finding based on an instruction listing multiple acts, any one of which could support the finding, cannot establish that a single erroneously submitted or factually unsupported factor was the reason the jury answered "yes."

This inability to establish that even properly preserved error actually caused rendition of an improper verdict has caused some to argue that there is no remedy on appeal for error in the charge. *See, e.g., Herbert v. Herbert,* 754 S.W.2d 141, 145 (Tex. 1988) (Phillips, C. J. concurring); *Island Recreational,* 710 S.W.2d at 559 (Spears, J., dissenting).

Recently the Supreme Court partially resolved this problem. In *Crown Life Ins. Co. v. Casteel*, 42 Tex. Sup. Ct. J. 945 (July 1, 1999), a unanimous Court considered whether the inclusion of invalid theories of liability submitted to the jury in a single broad-form question constitutes harmful error. The Supreme Court held that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. The Court explained:

> It is fundamental to our system that of justice that parties have the right to be judged by a jury properly instructed in the law. Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence could have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds.

42 Tex. Sup. Ct. J. at 951. The Court further stated that "when questions are submitted in a manner that allows the appellate court to determine that the jury's verdict was actually based on a valid liability theory, the error may be harmless." *Id.* at 952. But the Court cautioned that "when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Id.* at 953. *See Westgate, LTD. v. State,* 843 S.W.2d 448, 455 n.6 (Tex. 1992) ("[s]ubimitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible").

d. What is Reversible Error?

It is not surprising that under the general charge practice of submitting multiple causes of action or defenses, any material error in the charge on which the verdict could have rested required reversal. *See* 3 R. MCDONALD, TEXAS CIVIL PRACTICE § 12.39 (Rev. 1983).

In *Island Recreational,* the majority held that failure to

include a cause of action or affirmative defense in an instruction accompanying broad-form submission was not reversible error per se. 710 S.W.2d at 555. That holding raised the specter that the harmless error rule would also be applied to the inclusion of an erroneous or factually unsupported cause of action or defense. *Id.* at 559. However, in *Casteel*, the Supreme Court resolved the question of the application of the harmless error rule to the inclusion of an invalid theory of liability in a single broad-form question. 42 Tex. Sup. Ct. J. 945. The Supreme Court held that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. *Id.* at 951.

Casteel does not resolve the question of the application of the harmless error rule to the exclusion of a cause of action or affirmative defense in an instruction accompanying broad-form submission. The result is that Texas appellate courts sometimes find "harmless" error, even when hotly contested elements of a cause of action or defense have been completely omitted from the charge. *See*, *e.g.*, *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 926, (Tex.App.--Corpus Christi 1992), *rev'd*, 881 S.W.2d 288 (Tex. 1994). In *Lieck*, a fractured en banc appeals court cited *Island Recreational* and found that omission of a required element from a malicious prosecution charge was "harmless" error. 845 S.W.2d at 943, 955, 959. In its opinion reversing the court of appeals' judgment, the Supreme Court noted respected commentators' conclusion that "the *Island Recreational* decision . . . would apparently have been a significant one <u>even had it been decided correctly</u> . . ." *See Lieck*, 881 S.W.2d at 293 (citing 34 Gus M. Hodges & T. Ray Guy, *The Jury Charge in Texas Civil Litigation* § 34 at 92-94 (Texas Practice 1988) (emphasis added)). The Supreme Court found it unnecessary, however, to decide whether *Island Recreational* should be overruled. *Id.*

Lurking behind the *Island Recreational* debate is parties' Texas state constitutional right of trial by jury. Ben Taylor, *Court's Charge Update*, State Bar of Texas ADVANCED PERSONAL. INJURY LAW COURSE, AA-6 (1995). The Supreme Court indicated in *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504 (Tex. 1995), that the constitutional right of jury trial may be violated if any "key issue" is removed from the jury's decision-making power. *Id.* at 529. Compare *Millhouse v. Wiesenthal*, 775 S.W.2d 626, 628 (Tex. 1989) (parties are "entitled to a jury trial only on the factual elements of the case"). If the appellate court decides that (1) a party's "constitutional right to trial by jury" has been violated, and (2) the complaining party preserved error, that party should be entitled to a reversal, without having to prove specific harm on appeal. *McDaniel v. Yarbrough*, 898 S.W.2d 251 (Tex. 1995); *see also Texas & Pacific Railway Co. v. Van Zandt*, 317 S.W.2d 528, 531-32 (Tex. 1958) (principles reaffirmed in *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989)).

In *Exxon Corp. v. Perez,* the Supreme Court held that omission of a properly requested cause of action or affirmative defense always means that the "judgment cannot be permitted to stand." Curiously, the *Perez* court cited *Island Recreational* in support of its holding. It remains to be seen if the same reversible error analysis will be applied to omissions of individual elements within limiting instructions.

e. <u>Rendition or Remand?</u>

Spencer v. Eagle Star also raised the question of whether a complaining party may be entitled to rendition of judgment as opposed to a new trial. Clearly Rule 301 motions seek only rendition of judgment in spite of adverse jury responses. In its original opinion, the court's holding that use of a jury question and instruction that are "merely defective" entitled the complaining party "only to a new trial," *Id.* at 868, appeared to conflict with its prior holding in *W. O. Bankston Nissan, Inc. v. Walters,* 754 S.W.2d 127, 128 (Tex. 1988). In *Bankston,* the Supreme Court held that the plaintiff "had the burden of requesting jury issues on the proper measure of damages." The damages found by the jury were based on an erroneous damage submission. Defendant both objected to the charge and moved for judgment n.o.v. The Supreme Court held that having failed to properly submit the damage issue, the plaintiff's "cause of action must fail." *Id.* at 128. The trial court's granting of the judgment n.o.v. was, therefore, affirmed.

In its opinion on rehearing, *Spencer* responded to *amicus curiae* briefs raising the apparent conflict with its prior holdings. It distinguished prior cases involving a complete failure to request findings on controlling issues. *Bankston* was distinguished as involving a complete failure of proof necessary to support a

recovery of damages, let alone submission. *Id.* *Spencer* did not, however, foreclose rendition, when the requested submission is "so defective that a new trial would not be warranted." *Id.*

7. PROPOSED RULE CHANGES

Following are the drafts of proposed jury charge rules changes, as suggested to the Supreme Court.

a. Rule 271. Charge of The Jury

The court shall prepare a written charge to the jury. The court shall provide the parties written copies of the proposed charge and a reasonable opportunity to prepare their requests and objections and present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After requests and objections are made and ruled upon and any modifications to the charge are made, and before argument, the judge shall read the charge to the jury in open court precisely as written. The court shall deliver a copy of the written charge to each member of the jury. The charge shall be signed by the judge and filed with the clerk.

b. Rule 272. Standards for the Jury Charge

a. General Standards. A party is not entitled to the submission of a question, instruction or definition regarding a matter that is not affirmatively raised by the written pleading and raised by the evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of its answers, but an otherwise proper question, instruction or definition shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of its answers.

b. Questions. The court shall submit questions about the disputed material factual issues raised by the pleading and the evidence. The court shall, whenever feasible, submit the case by broad form questions. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depend. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential rebuttal submission. However, inferential rebuttal questions shall not be submitted.

c. Instructions and Definitions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instructions or by inclusion in the question.

c. Rule 274. Preservation of Appellate Complaints

a. Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this rule shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b).

b. Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

c. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate

complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

d. Rulings. The court shall announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

e. Evidentiary Sufficiency Complaints. A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

Notes and Comments

Comment to 1996 change: Paragraph (a) provides that "failure to comply with this rule shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)," but the court may sanction a party who fails to comply with the rule.

d. Rule 279. Omissions From the Charge

a. Omission of Entire Ground. Any independent ground of recovery or defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

b. Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the court, at the request of either party, may after notice and hearing and at any time before judgment is rendered, make and file written findings on such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in non-jury cases.

e. Purposes Behind the New Rules

These changes are meant to accomplish two principal purposes: (1) clarifying who has the burden to request a charge submission, and (2) making preservation easier, under the teachings of *State Dept. of Hwys & Pub. Transp. v. Payne*.

First, under the new rules, the party required to submit a question, instruction, or definition is clarified. The party with the burden to *plead* the claim or defense must request that theory's submission in the charge. Thus, under new Rule 274(a) "a party" must request "any contention that party was required to plead," or the error is waived, unless a proper objection is made.

Second, preservation will become less troublesome for practitioners and more malleable for the courts. Under the new rules, the amorphous "substantially correct" concept is replaced by a determination of whether the request provided "reasonable guidance" to the court. Moreover, complaints may be preserved by either an objection or request, so long as an objection "enable[s] the trial court to make an informal ruling on the objection."

F. Conclusion

The development of preserving error in the charge is in a state of flux. Some could argue that the new teachings of *Payne* and *Spencer* substitute new uncertainty about preservation for the old complexity. Until the new rules are adopted, promulgated, and interpreted by appellate courts, we must live with both uncertainty about whether *Payne* or the old rules control.

VI. PRESERVING ERROR POST-TRIAL

A. Motion for Directed Verdict, JNOV or to Disregard Jury Findings

A motion for directed verdict, judgment *non obstante veredicto,* or to disregard jury findings will preserve for appeal a contention that the evidence is legally insufficient to support the verdict of the jury. TEX.R.CIV.P. 301; *Aero Energy Corp. v. Circle C Drilling Co.,* 699 S.W.2d 821, 822 (Tex. 1985). These motions will not preserve a factual sufficiency point, which must be preserved in a motion for new trial. TEX.R.CIV.P. 324(b)(2)-(3).

B. Motions to Modify, Correct or Reform the Judgment

One method of complaining of error in rendition of judgment is to file a motion to modify the judgment. This method would be appropriate when the relief you want is a modified or new judgment, as opposed to a new trial. Preserving error by motion to modify judgment was approved by the San Antonio Court of Appeals in *Bulgerin v. Bulgerin,* 724 S.W.2d 943 (Tex.App.--San Antonio 1987, no writ). The appellee urged by cross-point that she was entitled to prejudgment interest. She had prepared a judgment including it which the trial court denied by deleting the provision from the order. The appellee then filed a motion to modify the judgment specifically including a request for prejudgment interest. Her motion was denied. The appellate court held that the right to recover was waived if not asserted in the trial court, but the filing of the motion to modify was sufficient to preserve error for review.

If the trial court signs a modified judgment within its plenary power, the appellate timetable is restarted. *Check v. Mitchell,* 758 S.W.2d 755, 756 (Tex. 1988); *Pursley v. Ussery,* 982 S.W.2d 596, 598 (Tex.App.--San Antonio 1998, pet. denied).

C. Motion for New Trial

1. PRESERVATION OF ERROR

TEX.R.CIV.P. 325(a) provides that a motion for new trial is not required in either a jury or nonjury case except as provided in subsection (b) which provides:

• a complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;

• a complaint of factual insufficiency of the evidence to support a jury finding;

• a complaint that a jury finding is against the overwhelming weight of the evidence;

• a complaint of inadequacy or excessiveness of the damages found by the jury; or

• a complaint of incurable jury argument if not otherwise ruled on by the trial court.

Former TEX.R.APP.P. 52(d) told us unequivocally that a motion for new trial is not required in order to complain of legal or factual insufficiency in a nonjury trial. This provision was originally added in 1990 and removed when the rules were amended in 1997. *See,* TEX.R.APP.P. 33.1, nts. and cmts. ("Former Rule 52(d), regarding motions for new trial, is omitted as unnecessary. *See* TEX.R.CIV.P. 324(a)&(b)."). To understand where we are, we need to look at where we were. We turn to the developments in Supreme Court cases pre-dating the expansion of former Rule 52(d).

In *Aero Energy, Inc. v. Circle C. Drilling Company,* 699 S.W.2d 821 (Tex. 1985), the court determined that as a prerequisite to a no evidence point of error on appeal, the appellant must have presented the no evidence point to the trial court by motion for instructed verdict, objection to the submission of the special issue, motion for judgment n.o.v., motion to disregard the contested jury findings or motion for new trial. *Aero* did involve a jury trial, but Rule 324(b) does not require a motion for new trial to raise legal insufficiency questions. While it would certainly be hoped that competent counsel would raise the issue at some point prior to judgment, either in a motion for instructed verdict, objection to the submission of the issue, or in a motion for judgment n.o.v., if counsel has failed to do so, a motion for new trial is evidently required.

The issue was raised again in *Salinas v. Fort Worth Cab & Baggage Co.,* 725 S.W.2d 701 (Tex. 1987). Mrs. Salinas was sexually assaulted by one of the defendant's cab drivers and was awarded judgment of $2,000,000 in actual damages and $500,000 in punitive damages because the cab company had failed to

exercise a high degree of care and was grossly negligent in allowing the driver to operate one of its cabs. In its application for writ of error, the cab company complained that there was no evidence of impairment of the familial relationships and no evidence of negligence or violation of a duty to the plaintiff. The court relied upon its holding in *Aero Energy* citing Rule 324(b), and noted that the cab company had done none of the above. While it had objected to the submission of the special issue on other grounds, it had not specifically objected on a no evidence ground. Thus, error was waived.

After *Aero* and *Salinas,* motions for new trial were required in the specified instances contained in Rule 324(b), and in all other instances if the specific complaint or objection had not previously been called to the trial court's attention by some other means. This generally recognized theory was rebuked in *Wilson v. Dunn*, 800 S.W.2d 833 (Tex. 1990), which involved a default judgment. The defendant timely filed a motion for new trial, which did not complain of any defects in service of citation. On appeal, the defendant/appellant raised those complaints and the appellee argued that error had been waived because the issue of defective service had not been raised in the trial court. In holding that error had been preserved, the Court noted by way of footnote:

> Rule 324 states that no complaints other than those specified in the rule need be raised in a motion for new trial as a prerequisite to appeal. The rule was amended in 1978 and 1981 to limit the use of motions for new trial to preserve error. However, Texas Rule of Appellate Procedure 52(a) provides that a complaint is not preserved for appellate review unless it is presented to the trial court and a ruling obtained. This rule serves the salient purpose of requiring that all complaints to be urged on appeal first be presented to the trial court so that any error can be corrected without appeal, if possible. How Rule 52(a) applies to complaints which cannot be raised prior to judgment but are not specifically required by Rule 324 to be raised in a motion for new trial, is unclear. On the one hand, if Rule 52(a) required that such complaints be raised by some means tantamount to a motion for new trial but simply not called by that name, then Rule 324 would be deceptive and its policy impaired. On the other hand, if Rule 52(a) does not apply to such complaints, then its language is overly broad and its policy undermined. The problems should be considered in future amendments to the rules.

Logically, the hearing giving rise to the default judgment in *Wilson* was a bench trial. The ruling is interesting in light of a prior Supreme Court decision which is unmentioned in *Wilson* and which offered an intelligent means to harmonize the requirements of the rules of civil procedure and the rules of appellate procedure. In *Luna v. Southern Pacific*, 724 S.W.2d 383 (Tex. 1987), the respondent urged cross points on the apportionment of damages. The Court concluded that these points had been waived because they had not been referenced in the motion for new trial:

> "[T]he purpose of the amendment is to make more liberal the prerequisites of appeal **once a point of error has been preserved**. . " *Western Construction Co. v. Valero Transmission Co.*, 655 S.W.2d 251 (Tex.App.--Corpus Christi 1983, no writ). Southern

> Pacific did not otherwise preserve error. Therefore, a motion for new trial incorporating the apportionment complaint was required.

Rule 52 has now been deleted. We are left then with TEX.R.CIV.P. 324, which has already been set forth, and TEX.R.APP.P. 33.1, which provides:

> (a) *In General.* As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection or motion that:
>
> > (A) stated the grounds for the ruling . . . and
> >
> > (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure . . .

Subsection (B) was designed to eliminate conflict between the Rules of Civil Procedure and the Rules of Appellate Procedure. If you complied with other rules for preservation of error, you could raise your complaint on appeal. It seems, though, that the new rule requires that the objection comply with the appropriate rules, i.e. TEX.R.CIV.P. 324, **AND** that it have been presented to the trial court, even if the other appropriate rules do not require presentation. So what was really accomplished? If you are faced with a preservation problem, *Wilson* is your best bet. Remember, however, that there is case law to the effect that comments contained within footnotes are mere dicta and not useful precedent. *Lopez v. State,* 928 S.W.2d 528 (Tex.Crim.App. 1996)(Keller, J., dissenting); *Young v. State,* 826 S.W.2d 141, 144 n.5 (Tex.Crim.App. 1991).

2. ERRORS MADE IN RENDERING JUDGMENT

An appellant should be especially careful about errors occurring for the first time in rendition of judgment. TEX.R.APP.P. 33.1 requires that complaints on appeal must have been presented to the trial court. The trial court may err in rendering judgment and the motion for new trial may be used to raise such error. However, as explained above, a motion to modify judgment may be the more appropriate vehicle.

3. TIMETABLE FOR FILING: TEX.R.CIV.P. 329(b)

The motion for new trial shall be filed within 30 days after judgment is signed by the court. If the motion is not determined by written order, it shall be deemed overruled by operation of law 75 days after judgment is entered. *Balazik v. Balazik,* 632 S.W.2d 939 (Tex.App.--Fort Worth 1982, no writ). Mere reference in an order that a hearing was held on the motion for new trial without specifically granting the motion will not suffice. The overruling by operation of law of a motion for new trial preserves error unless the taking of evidence was necessary to present the complaint in the trial court. TEX.R.APP.P. 33.1(b). *See Stovall v. Avalon Hair, Inc.*, 1998 WL 849398 (Tex. App. -- Austin 1998, no pet.). The automatic overruling of a motion for new trial on which there has been no trial court hearing is constitutional. *Texaco, Inc. v. Pennzoil Company,* 729 S.W.2d 768 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.).

a. Plenary Power of Trial Court

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after judgment is signed, regardless of whether an appeal has been perfected. This power is extended when a motion for new trial is filed, such that the court may alter its original judgment at any point until 30 days after all motions have been overruled, either by written order or operation of law, whichever

occurs first. After such time, the order may not be set aside except by bill of review. The filing of a request for findings of fact and conclusions of law will not extend the trial court's plenary power. *Pursley v. Ussery,* 982 S.W.2d 596, 599 (Tex.App.--San Antonio 1998, pet. denied). The court may, however, correct a clerical error in the judgment by a nunc pro tunc order entered under TEX.R.CIV.P. 316 and 317. The nunc pro tunc order will extend the appellate timetable provided it does not appear that the second order was signed solely to provide the extension. *Mackie v. McKenzie,* 890 S.W.2d 807 (Tex. 1994).

TEX.R.CIV.P. 329b(g) provides that a motion to correct, reform or modify a judgment has the same effect upon the court's plenary power and the appellate timetable as a motion for new trial. That rule seems simple enough, yet two decisions involve the construction of the rule, and they come to different conclusions.

In *First Freeport National Bank v. Brazoswood National Bank,* 712 S.W.2d 168 (Tex.App.--Houston [14th Dist.] 1986, no writ), the appellant filed a motion for a modified judgment after rendition of the trial court's judgment. The appellate court concluded that the motion was really a motion for judgment n.o.v. and that such a motion is not one which will extend the appellate timetable pursuant to Rule 329 b(g). It dismissed the appeal for want of jurisdiction.

In *Brazos Electric Power Co-Op v. Callejo, 734* S.W.2d 126 (Tex.App.--Dallas 1987, no writ), the appellant filed a motion to modify judgment n.o.v. The appellee, relying on *First Freeport,* claimed that the motion did not operate to extend the appellate timetable. The Dallas court expressly declined to follow the Houston case and concluded that any post-judgment motion is effective in extending the time to perfect the appeal.

The Dallas court raised another issue in *A.G. Solar & Co., Inc. v. Nordyke*, 744 S.W.2d 647 (Tex.App.--Dallas 1988, no writ). Here a motion for new trial was filed as to the first judgment of the court. That motion was overruled by operation of law. Afterwards, but while still having plenary power, the trial court entered a reformed judgment dated June 30. The cost bond was filed on September 22. Was it timely filed? The appellant argued that it was, because a motion for new trial had been filed. But the court held that the second judgment was a separate and new judgment. Since no motion for new trial was filed with regard to the second judgment, the cost bond was required to be filed 30 days later, i.e., by July 30. The filing on September 22 was untimely and the appeal was dismissed.

The subject was revisited by the Supreme Court in *L.M. Healthcare, Inc. v. Childs,* 920 S.W.2d 286 (Tex. 1996). Judgment was rendered against the plaintiff on January 28, 1994 and on February 7, 1994 the plaintiff filed a motion for new trial. At a March 3rd hearing, the trial court signed a judgment on the January 28th pronouncement and an order denying the motion for new trial. On April 4th, the plaintiff filed a motion to modify judgment, requesting that the court include in its judgment a recitation that the dismissal was without prejudice to the plaintiff refiling its suit. Hearing on this motion was held on May 11th and on May 17th, the trial court granted the relief requested and signed a modified judgment. The defendant alleged that the trial court signed the modified judgment after the expiration of its plenary power. The court of appeals concluded that a motion to modify judgment, although filed timely, cannot extend plenary power if it is filed after the trial court overrules a motion for new trial. As a result, the appellate court held that the trial court lacked jurisdiction to modify the judgment. The Supreme Court disagreed. The rules provide that a motion to modify judgment shall be filed within the same time constraints as a motion for new trial, which must be filed no later than the 30th day after judgment is signed. TEX.R.CIV.P. 329b(b) and (g). "That the trial court overruled Longmeadow's motion for new trial does not shorten the trial court's plenary power to resolve a motion to modify judgment." *L.M. Healthcare, Inc. v. Childs,* 920 S.W.2d 286, 287 (Tex. 1996). The Court concluded that the rules provide that a timely filed motion to modify judgment extends plenary power separate and apart from a motion for new trial.

b. Amended or Supplemental Motions

An amended motion for new trial may be filed without leave of court, provided it is filed within the 30-day period and before the original motion is overruled. The Dallas Court of Appeals has considered the distinction between an amended motion and a supplemental motion. In Sifuentes v. Texas Employers' Insurance Association, 754 S.W.2d 784 (Tex.App.--Dallas 1988, no writ),

the appellant filed a motion for new trial on May 29, 1987 and a "Plaintiff's Second Motion for New Trial" on June 4, 1987. While the initial motion complained of factual insufficiency of the evidence, the second did not. Claiming waiver, TEIA urged that the second motion was in fact an amended motion that superseded the original motion, so that there was no "live" motion for new trial raising factual insufficiency of the evidence as required by the rules. The court of appeals disagreed, noting that the title of the motion gave no indication that it should be considered an amended motion. Instead, the language indicated that the second motion had been filed shortly after the trial court had conducted a hearing and orally overruled the first motion. No written order was signed. Because there was no written order overruling the original motion for new trial, the court chose to treat the second motion as a supplemental motion. The factual insufficiency points were accordingly preserved. Although this case involves a complaint of factual sufficiency in an appeal from a jury trial, the construction of an amended versus supplemental motion for new trial may be equally applied in nonjury appeals.

c. Citation by Publication

When the respondent has been served by publication, the time for filing a motion for new trial is extended by TEX.R.CIV.P. 329. The court may grant a new trial upon petition showing good cause and supported by affidavit, filed within two years after the judgment was signed. The appellate timetable is computed as if the judgment were signed 30 days before the date the motion was filed. [Query: Can the respondent request findings of fact and conclusions of law, which normally must be done by the 20th day?]

4. GROUNDS FOR NEW TRIAL

Motions for new trial may be granted by the trial court so long as it comes within the umbrella of "good cause". TEX.R.CIV.P. 320. While certain matters have been raised in this state in virtual perpetuity, the laundry list is by no means exclusive.

a. Errors In the Charge

Included here would be language of the special issues selected, the refusal to submit certain issues, and errors in definitions or instructions. Remember that to preserve error for appeal, you must make specific objections to the charge as prepared, either in writing, or by dictating them to the court reporter. TEX.R.CIV.P. 272, 274. Issues, definitions or instructions which are requested to be submitted but refused must be reduced to writing and must be endorsed by the judge "Refused". TEX.R.CIV.P. 276.

b. Jury Misconduct

(1) REQUIREMENTS

The movant for new trial must prove that:

• misconduct occurred;

• the misconduct was material; and

• based on the record as a whole, the misconduct probably resulted in harm to the movant.

Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); *Perry v. Safeco Ins. Co.,* 821 S.W.2d 279, 280 (Tex.App.--Houston [1st Dist.] 1991, writ denied); *Snyder v. Byrne,* 770 S.W.2d 65, 68 (Tex.App.--Corpus Christi 1989, no writ). Additionally, Rule 327 requires the motion in this instance be accompanied by affidavit. It requires an evidentiary hearing demonstrating that the misconduct was material and that from a review of the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party. *Rodarte v. Cox,* 828 S.W.2d 65 (Tex.App.--Tyler 1991. writ denied); *Terminix v. Lucci,* 670 S.W.2d 657 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Gulf Coast Sailboats, Inc. v. McGuire,* 616 S.W.2d 385 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref d n.r.e.).

TEX.R.EVID. Rule 606(b) likewise deals with juror misconduct:

(b) Inquiry Into Validity of Verdict.

> Upon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Jury misconduct includes outside influence on jurors and incorrect answers by jurors during voir dire examination. TEX.R.CIV.P. 327. To preserve error regarding jury misconduct, the complaining party must present evidence proving the misconduct at a hearing on a motion for new trial. *See id.;* TEX.R.CIV.P. 324(b)(1). Although this evidence may generally include testimony from any person with knowledge of the misconduct, jurors may not testify about their deliberations or their mental processes during deliberations, but only about any outside influence that was improperly brought to bear on any juror. TEX.R.CIV.P. 327; TEX.R.EVID. 606(b); *Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23, 24 (Tex. 1987). As was noted in *Wooten v. Southern Pacific Trans. Co..* 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ), this approach represents a departure from prior law:

> Under former Rule 327(b), effective until April 1, 1984, a juror was permitted to testify as to matters and statements, or 'overt acts,' which occurred during deliberations. Under the former rule, only the actual mental processes of the jurors were excluded from consideration. Now, however, under the new rule a party can only inquire into whether an 'outside influence' affected the deliberations, and all testimony, affidavits, and evidence are limited to this issue. *Robinson Elec. Supply v. Cadillac Cable Corp.,* 706 S.W.2d 130, 132 (Tex.App.--Houston [14th Dist.] 1986, writ ref d n.r.e.).

When juror misconduct is attributable to a juror who voted favorably for the complaining party, there is no harmful error.

(2) OUTSIDE INFLUENCE

All testimony in a motion for new trial hearing founded upon juror misconduct is excluded unless it can be shown that outside influence was brought to bear. *Texaco, Inc. v. Penzoil Co.,* 729 S.W.2d 768 (Tex.-App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.). Thus, the juror may not testify as to the effect of anything or anyone upon his/her mental processes unless "outside influence" is shown. When a juror on a panel was a registered nurse who informed the other jurors during deliberation that certain medications the plaintiff was taking at the time of her injury could have made her dizzy and cause her to fall, no outside influence was demonstrated. The comments of the nurse were "inside" influence. *Baker v. Wal-Mart Stores,* 727 S.W.2d 53 (Tex.App.--Beaumont 1987, no writ). Likewise, in *Kendall v. Whataburger, Inc.,* 759 S.W.2d 751 (Tex.App.--Houston [1st Dist.] 1988, no writ), comments by one of the jurors who happened to be a paralegal did not amount to juror misconduct. In this instance, the paralegal had told the jurors that the plaintiff would recover damages even though the jury answered "no" to the negligence and proximate cause issues. Outside influence must not only arise from information and expertise not in evidence, but it must also emanate from outside the jury and its deliberations. Thus, jury misconduct may only be proved by evidence of overt acts which are open to the knowledge of all the jury, and not alone within the personal conscience of one. *Compton v. Henrie,* 364 S.W.2d 179 (Tex. 1963). The mental processes of a juror are indicated when jurors use such words as "I thought", "I understood", "I wanted", "I felt", "I was concerned", "The impression I got", or "I considered". *In re Marriage of Yarbrough,* 719 S.W.2d 412 (Tex.App.--Amarillo 1986, no writ).

One court has even determined that outside influence requires a showing that the source of the information must be one who is outside the jury, i.e. a **non-juror**, who introduces the information to affect the verdict. In *Baley v. W/W Interests, Inc.,* 754 S.W.2d 313 (Tex.App.--Houston [14th Dist.] 1988, writ denied), a civil action was brought against the owner of a nightclub arising out of the murder of a patron. The appellants complained that two of the jurors went to the scene of the murder and related to the other jurors the personal experience and special knowledge which was obtained from the visit. They also complained of jurors discussing a newspaper article which was not in evidence and which was brought into the jury room. The court concluded that the post-trial testimony of the

jurors was inadmissible because outside influence was not demonstrated:

> 'Outside influence' is not defined by the rules, but the term has been construed by the courts. An 'outside influence' must emanate from outside the jury and its deliberations. . . . It does not include all information not in evidence unknown to the jurors prior to trial, acquired by a juror and communicated to one or more other jurors between the time the jurors received their instructions from the court and the rendition of the verdict. . . . Information gathered by a juror and introduced to other jurors by that juror -- even if it were introduced specifically to prejudice the vote -- does not constitute outside influence.

Similarly, in *Wooten v. Southern Pacific Trans. Co.,* 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ), the Wootens complained that the trial court erred in denying their motion for new trial because a juror, James Brau, told the other jurors during deliberations that, based on his past experiences and observations, he thought the intersection in which the accident occurred was safe. They also contended that, during trial, Brau told a non-juror that he felt the tracks were safe. These actions were alleged to be harmful because Brau acted, in effect, as a secret witness influencing the jury regarding the crossing's safety. The Wootens argued for a departure from *Baley*, suggesting that the term "outside influence" should be construed to mean any influence emanating from outside the evidence, and not be limited to situations when a non-juror influences the jury. The appellate court declined to do so, noting that in amending Rule 327(b) to its current version, the Texas Supreme Court expressly deleted a proposal that would have also allowed testimony on whether "extraneous prejudicial information was improperly brought to the jury's attention." *See* former TEX.R.CIV.EVID. 606(b) (1982 liaison committee proposal); *Robinson,* 706 S.W.2d at 132-33. It thus concluded that, to constitute outside influence, information must come from outside the jury, i.e., from a non-juror who introduces information to affect the verdict, and not from within the jury's deliberations or as part of the jury's mental process. The comments Brau made to other jurors regarding the intersection relate to the jury's mental processes and deliberations; although these comments violated the trial court's instructions and were clearly improper, they emanated from inside the jury, and did not constitute an outside influence. As to Brau's communications with the non-juror, the relevant evidence indicated only that Brau expressed his opinion to the non-juror, and not that the non-juror conveyed any information or opinions to Brau or any other juror. Therefore, this communication did not amount to an outside influence either.

(3) "DURING THE COURSE OF DELIBERATIONS"

Both the rules of procedure and the rules of evidence speak in terms of conduct occurring during the course of the jury's deliberations. In *Baley,* 754 S.W.2d at 313, the appellants contended that the testimony of the jurors was admissible because the alleged misconduct had not occurred during the course of deliberations. Instead, they argued, it occurred (1) before the charge was read and before the formal deliberations had begun and (2) on lunch and coffee breaks which are not a part of the "deliberations". The court of appeals determined that this was not a valid distinction. Any conversation concerning the case which occurs among jurors is part of the deliberations, regardless of the time and place where it occurs.

(4) MISCONSTRUCTION OF CHARGE

A juror is not guilty of misconduct and the verdict need not be set aside when one or more jurors simply misconstrue a portion of the court's charge and state the erroneous interpretation to the other members of the jury. *Compton v. Henrie,* 364 S.W.2d 179 (Tex. 1963).

(5) CONCEALMENT OF INFORMATION

The issue of juror misconduct also arises when it becomes evident that a juror concealed vital information during voir dire. However, it must be demonstrated that the juror concealed the information and that his concealment resulted in probable injury. *Wooten v. Southern Pacific Trans. Co.,* 928 S.W.2d 76 (Tex.App.--Houston [14th Dist.] 1995, no writ); *T.A.B. v. W.L.B.,* 598 S.W.2d 936 (Tex.Civ.App.--El Paso 1980, writ ref'd n.r.e.). Before there can be concealment through erroneous or false answers given on voir dire, the questions asked must have called for disclosure and must have been direct and specific. *Texaco, Inc. v. Penzoil Co.,* 729 S.W.2d 768 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.).

(6) INFORMATION OVERHEARD

In some instances, juror misconduct may occur during the course of the trial and in the courtroom itself. In those circumstances, an objection is required. In *Rodarte v. Cox,* 828 S.W.2d 65 (Tex.App.--Tyler 1991, writ denied), Rodarte's status as an illegal alien became an issue in a termination case. The attorney ad litem expressed concern to the judge in a conference before the bench, and sought to introduce testimony which had previously been subject to an order *in limine.* The jury was in the box when the bench conference was held and a few of the jurors overheard the discussion. Misconduct was alleged on appeal. The appellate court determined there had been no error because no objection had been timely lodged. The purported misconduct had occurred at the bench in the full presence of counsel, who had even warned the ad litem to keep his voice down. A timely objection, had it been made, could have resulted in an instruction which would have cured the error. *See also, Texas & N.O.R. Co. v. Foster,* 266 S.W.2d 206 (Tex.Civ.App.--Beaumont 1954, writ ref'd n.r.e.) (failure to object to side bar comments overheard by the jury waives complaints of juror misconduct).

(7) STANDARD OF REVIEW

Whether jury misconduct has occurred is a question of fact to be determined by the trial court; absent an abuse of discretion, an appellate court will not overturn the court's ruling. TEX.R.CIV.P. 327; *Ortiz v. Ford Motor Credit Co.,* 859 S.W.2d 73 (Tex.App.--Corpus Christi 1993, writ denied); *Texas Gen. Indem. Co. v. Watson,* 656 S.W.2d 612, 615 (Tex.App.--Fort Worth 1983, writ ref'd n.r.e.); *McAllen Coca Cola Bottling Co., Inc. v. Alvarez,* 581 S.W.2d 201, 204 (Tex.Civ.App.--Corpus Christi 1979, no writ).

c. <u>Newly Discovered Evidence</u>

Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless:

• admissible competent evidence is introduced showing the existence of the newly discovered evidence relied upon;

• the party seeking the new trial demonstrates that there was no knowledge of the evidence prior to trial;

• that due diligence had been used to procure the evidence prior to trial;

• that the evidence is not cumulative to that already given and does not tend to impeach the testimony of the adversary; and

• that the evidence would probably produce a different result if a new trial were granted.

Keever v. Finlan, 988 S.W.2d 300, 315 (Tex.App. --Dallas 1999, pet. filed); *Wilkins v. Royal Indemnity Company,* 592 S.W.2d 64 (Tex.App.--Tyler 1979, no writ).

Whether to grant a motion for new trial on the basis of newly discovered evidence lies within the sound discretion of the trial court. *Keever*, 988 S.W.2d at 315. The trial court must consider the weight and the importance of the new evidence and its bearing in connection with other evidence elicited at trial. *Id.* "The inquiry [is] not whether, upon the evidence in the record, it apparently might have been proper to grant the application in the particular case, but whether the refusal of it has involved the violation of a clear legal right or a manifest abuse of judicial discretion." *Id., citing Jackson v. Van Winkle,* 660 S.W.2d 807, 809 (Tex. 1983).

Courts may be more inclined to accept the theory of newly discovered evidence in cases involving child custody because of the welfare and well being of the children in issue. *See Gaines v. Baldwin,* 629 S.W.2d 81 (Tex.App.--Dallas 1981, no writ)(evidence presented must demonstrate that the original custody order would have a serious adverse effect on the welfare of the child and that presentment of that evidence would probably alter the outcome); *C. v. C.,* 534 S.W.2d 359 (Tex.Civ.App.--Dallas 1976, no writ)(in an extreme case in which the evidence is sufficiently strong, failure to grant the motion for new trial may well be an abuse of discretion).

d. <u>Default Judgments</u>

New trials are routinely granted and default judgments set aside upon demonstration that the failure of the respondent to appear before judgment was not intentional or the result of conscious indifference but was due instead to mistake or accident. The motion for new trial must also raise a meritorious defense and there must be no delay or injury to the opposing party.

Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939). Although in *Craddock* the default judgment was taken because the defendant failed to answer, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins,* 724 S.W.2d 778, 779 (Tex. 1987), *Grissom v. Watson,* 704 S.W.2d 325, 326 (Tex. 1986). When there is defective service of process, however, there is no requirement that a litigant establish a meritorious defense. Such a requirement violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez,* 757 S.W.2d 751 (Tex. 1988).

What happens if an attorney makes a conscious decision not to file an answer, perhaps mistakenly believing that the court does not have jurisdiction? If s/he determines that s/he has erred in interpreting the law, can s/he successfully bring a motion for new trial claiming mistake? The Corpus Christi Court of Appeals has answered the question in the negative. In *Carey Crutcher, Inc. v. Mid-Coast Diesel Services, Inc.,* 725 S.W.2d 500 (Tex.App.--Corpus Christi 1987, no writ), the attorney for the defendant represented Crutcher Equipment Corp. and Carey Crutcher, Inc., two distinct entities. Crutcher Equipment was in bankruptcy while Carey Crutcher, Inc. was not. A lawsuit filed against the former was received by the attorney, who believed that the action was covered by the automatic bankruptcy stay. Thus, he did not file an answer. A default judgment was taken. On appeal, it was claimed that through a mistaken belief about the law, the attorney did not think that an answer was necessary and did not file one. The appellate court determined that the attorney had made a conscious decision not to file an answer and that this was not the type of mistake that negates conscious indifference.

It is also important to recognize that default judgments in family law proceedings are quite different from civil cases generally. In *Considine v. Considine,* 726 S.W.2d 253 (Tex.App.--Austin 1987, no writ), a default judgment was taken on a motion to modify managing conservatorship. The court noted the distinction:

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. *Stoner v. Thompson,* 578 S.W.2d 679 (Tex. 1979). In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. TEX.FAM.CODE ANN. §3.53. Even if the respondent fails to file an answer, the petitioner must adduce proof to support the material allegations in the petition. Accordingly, the judgment of divorce is subject to an evidentiary attack on motion for new trial and appeal.
>
> This Court knows of no Family Code provision relating to modification of prior orders that is comparable to §3.53. Reason suggests, nonetheless, that the same policy considerations underlying §3.53, applicable to original divorce judgments appointing conservators and setting support for and access to children, should also obtain in §14.08 proceedings to modify like provisions in prior orders. . . As a result, in a case of default by the respondent, the movant must prove up the required allegations of the motion to modify.

The court treats the issue as if it were one of first impression and makes no reference to *Armstrong v. Armstrong,* 601 S.W.2d 724 (Tex.Civ.App.--Beaumont 1980, no writ), which is directly on point and comes to the same conclusion.

Quite recently, the Fourteenth Court of Appeals has questioned the wisdom of applying the *Craddock* principles, which spring from traditional civil litigation, to the peculiarities of family law. In *Lowe v. Lowe,* 971 S.W.2d 720, 725-27 (Tex.App.--Houston [14th Dist.] 1998, pet. denied), the mother appealed a default judgment which had appointed her husband as managing conservator of two young children. Although finding that Mrs. Lowe had indeed satisfied the *Craddock* elements, the court noted that it did not find *Craddock* to be an appropriate test for suits involving the parent-child relationship. Discussing several reasons why that premise is true, the court noted that

although the Texas Family Code provides that the paramount inquiry shall be the best interest of the child, the *Craddock* test omits the child's interests and looks only to the actions of whichever parent happens to be the defaulting party. The opinion concludes by inviting the Supreme Court to fashion a more workable rule and urging the family bar to propose a more appropriate rule.

e. Mistakes Made at Trial

This area includes the improper admission or rejection of certain evidentiary materials. If it can be demonstrated that a correct ruling would have probably altered the outcome of the trial, a new trial may be granted.

f. No Reporter's Record Available

Under the former rules of appellate procedure, an inability to obtain the statement of facts would automatically entitle the complaining party to a new trial provided the appellant made a timely request and provided the appellant was not at fault for the loss or destruction of the court reporter's notes. Former TEX.R.APP.P. 50(e); *Goodman v. Goodman,* 611 S.W.2d 738 (Tex.Civ.App.--San Antonio 1981, no writ). *See also, Labiche* v. *Krawiec*, 692 S.W.2d 167 (Tex.App.--Dallas 1985, no writ) (holding that findings of fact and conclusions of law made by the trial court would not substitute for the statement of facts when the court reporter's equipment had malfunctioned and the statement of facts could not be prepared).

Under new TEX.R.APP.P. 34.6(f), if part of the reporter's record is missing, without appellant's fault, then a new trial will be ordered, but only if a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This really falls under Preserving Error Post Trial, but to insert it as "C" in that category simply dilutes its importance. Remember that this is Number One on Letterman's list. So, in fervent hope that this stylistic approach grabs your attention, a level one heading is devoted to the topic. Make no mistake about it -- more appeals from nonjury trials are lost here than anywhere else. Are you listening?

Findings of fact and conclusions of law reflect the factual and legal basis for the trial court's judgment after a nonjury trial. If there is only one theory of liability or defense, the basis of the court's judgment can be inferred from the judgment itself, even without findings and conclusions. However, if more than one legal theory, or more than one set of factual determinations, could serve as the basis for the trial court's judgment, then it can be very difficult to brief the appellate attack on the judgment, since you must handle several different approaches to the case in 50 pages. Because the party wishing to appeal the trial court's judgment must request findings of fact and conclusions of law within 20 days of the date the judgment is signed, the trial attorney must be conscientious about requesting findings and conclusions in a timely way. It sometimes happens that a trial lawyer does not bring an appellate lawyer into the case until just before the motion for new trial is due, or until after the motion for new trial has been overruled. In such a situation, if the trial lawyer has not timely requested findings of fact and conclusions of law, and if the trial court does not permit a late request, or elects not to give findings and conclusions because there is no obligation to do so, then the ability to successfully pursue an appeal could already be impaired. And the appeal has not even yet commenced.

Apart from findings of fact and conclusions of law under TEX.R.CIV.P. 296, courts have started giving findings of fact in the area of discovery sanctions. Also, the Family Code contains a procedure for obtaining findings in child support orders [TEX.FAM. CODE ANN. §154.130 (Vernon 1996)] and findings in visitation orders [TEX.FAM.CODE ANN. §153.258 (Vernon 1996)].

A. TEX.R.CIV.P. 296 Findings and Conclusions

Requesting findings of fact and conclusions of law is one of the most frequently overlooked steps in preparing the nonjury case for appeal. It is the first step you should take after an adverse judgment is signed by the trial court.

1. <u>ENTITLEMENT</u>

Findings of fact and conclusions of law as a general rule are not available after a jury trial. TEX.R.CIV.P. 296 provides that findings and conclusions are available in any case tried in the district or county court without a jury. In *Baley v. W/W Interests, Inc.,* 754 S.W.2d 313, (Tex.App.--Dallas 1988, no writ), the appellate court concluded that it is not reversible error for the trial court to refuse a request for findings after a jury trial where the complaining party suffers no injury. *See also, Cravens v. Transport Indem. Co.,* 738 S.W.2d 364 (Tex.App.--Fort Worth 1987, writ denied).

In a jury trial, the answers to the questions posed contain the findings on disputed factual issues. When a case is tried to the court, however, there is no ready instrument by which one can determine how the trial court resolved the disputed fact issues. Nor can the appellate court determine upon which of the alternate theories of recovery or defense the trial court rested the judgment.

This is particularly true in family law cases where many different factual and legal issues are resolved by the trial court. In the division of property, for example, the court may consider a number of factors in making a disproportionate division, such as age, health, income disparity, future business opportunity, levels of education, fault in breaking up the marriage, waste of community assets, and needs of children. Where the decree reflects the property division, but not the reasons for the property division, it is difficult to determine which facts were considered and whether the evidence supports the disproportionate division. In these situations it is important to require the trial court to make specific findings of fact and conclusions of law. Keep in mind that where findings and conclusions are not filed, the appellate court will attempt to find any legal theory raised in the pleadings which would support the judgment. If there is one, then the higher court will presume that the trial court found all facts which would be necessary to support that judgment. The advantage, then, is in requiring the court to specify upon what findings and conclusions its decision was grounded. Note, however, that the courts of appeals take divergent paths as to what findings an appellant may be entitled in a divorce case.

Given the assumption that findings and conclusions are appropriate in a bench trial but not in a jury trial, what happens when the two are combined? Perhaps the suit involves domestic torts and the jury will determine the personal injury or fraud issues while the judge will decide the ultimate division of property. Also, it is not unusual for the court to permit separate trials on the issues of property and custody, with a jury deciding issues of conservatorship and the judge deciding issues of characterization, valuation and division of property. If one party chooses to appeal from the property division, is it entitled to findings and conclusions? If the jury and nonjury portions of the case are conducted via separate trials, findings and conclusions are available in the nonjury trial. *Operation Rescue - National v. Planned Parenthood of Houston and Southeast Texas, Inc.,* 937 S.W.2d 60 (Tex.App. --Houston [14th Dist.] 1996), *aff'd. as modified*, 975 S.W.2d 546 (Tex. 1998); *Shenandoah Associates v. J & K Properties, Inc.* 741 S.W.2d 470, 484 (Tex.App.--Dallas 1987, writ denied). *See Heafner & Associates v. Koecher, 851* S.W.2d 309, 312-13 (Tex.App.--Houston [1st Dist.] 1992, no writ).

In *Roberts v. Roberts*, 1999 WL 442147 (Tex. App. --El Paso 1999, no pet.), a divorce case, the entire case was submitted to the jury including the grounds for divorce and the validity of a deed plus the percentage distribution of the community estate. After a judgment was signed by the court, the husband filed his request for findings of fact and conclusions of law. The trial court declined and advised the parties that it would be inappropriate for him to enter findings of fact because the case had been tried to a jury. The El Paso Court of Appeals disagreed, stating that "[i]n this case, the jury findings on the grounds for divorce and the validity of deed were binding on the court while the percentage distribution of the community estate was merely advisory. We conclude that Husband was entitled to findings of fact relating to the property division." Id. at *6.

When the judgment of the court differs substantially from or exceeds the scope of the jury verdict, findings are also available. *See Rothwell v. Rothwell,* 775 S.W.2d 888 (Tex.App.--El Paso 1989, no writ).

In the event the trial court does give findings of fact in a jury case, those findings will be considered by the court of appeals only for the purpose of determining whether facts recited are conclusively established and support the decree as a matter of law. *Holloway v. Holloway,* 671 S.W.2d 51 (Tex.App.--Dallas 1984, writ dism'd). Thus, if the evidence does not support the jury verdict, the judgment cannot be supported merely by

the findings of fact and conclusions of law submitted by the trial court.

Findings and conclusions are not authorized in some nonjury cases. Courts have held that findings are **not** authorized in the following circumstances:

• when the cause is dismissed without a trial. *Eichelberger v. Balette,* 841 S.W.2d 508, 510 (Tex.App.--Houston [14th Dist.] 1992, writ denied); *Timmons v. Luce,* 840 S.W.2d 582, 586 (Tex.App.--Tyler 1992, no writ); *Kendrick v. Lynaugh,* 804 S.W.2d 153 (Tex.App.--Houston [14th Dist.] 1990, no writ);

• when the cause is withdrawn from the jury by directed verdict due to the general rule that the trial court can grant an instructed verdict only where there are no fact issues to be resolved by the jury. *Yarbrough v. Phillips Petroleum Co.,* 670 S.W.2d 270 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Spiller v. Spiller*. 535 S.W.2d 683 (Tex.Civ.App.--Tyler 1976, writ dism'd).

• when a judgment notwithstanding the jury verdict is entered. *Fancher v. Cadwell,* 159 Tex. 8, 314 S.W.2d 820 (1958);

• when a summary judgment is granted. *Linwood v. NCNB Texas,* 885 S.W.2d 102, 103 (Tex. 1994); *Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex.App.--El Paso 1995, writ denied); *Chopin v. Interfirst Bank,* 694 S.W.2d 79 (Tex.App.--Dallas 1985, writ ref'd n.r.e.); *City of Houston v. Morgan Guaranty International Bank,* 666 S.W.2d 524 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.);

• in an appeal to district court from an administrative agency. *Valentino v. City of Houston,* 674 S.W.2d 813 (Tex.App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.);

• when a default judgment is granted. *Wilemon v. Wilemon,* 930 S.W.2d 295 (Tex.App.--Waco 1996, no writ); *Harmon v. Harmon,* 879 S.W.2d 213 (Tex.App.--Houston [14th Dist] 1994, writ denied); and

• when a case is dismissed for want of subject matter jurisdiction, without an evidentiary hearing. *Zimmerman v. Robison,* 862 S.W.2d 162 (Tex.App.--Amarillo 1993, no writ).

TEX.R.APP.P. 28.1 provides for an option on the part of the trial judge in appeals from interlocutory orders. The court is not required to file findings and conclusions, but may do so within thirty days after the judgment is signed. *Smith Barney Shearson, Inc. v. Finstad,* 888 S.W.2d 111 (Tex.App.--Houston [1st Dist.] 1994, no writ) (involving interlocutory appeal of denial of motion for arbitration). One court of appeals has admonished trial courts to give findings and conclusions to aid the appellate court in reviewing class certification decisions. *Franklin v. Donoho, 774* S.W.2d 308, 311 (Tex.App.--Austin 1989, no writ).

2. <u>IMPORTANCE OF OBTAINING</u>

Many practitioners fail to obtain findings of fact and conclusions of law. In the absence of findings and conclusions, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that finds support in the evidence. *Point Lookout West, Inc. v. Whorton,* 742 S.W.2d 277 (Tex. 1987), *In re W.E.R.,* 669 S.W.2d 716 (Tex. 1984); *Lassiter v. Bliss,* 559 S.W.2d 353 (Tex. 1977); *Temperature Systems, Inc. v. Bill Pepper, Inc., 854* S.W.2d 669 (Tex.App.--Dallas 1993, no writ). Absent findings of fact, it doesn't make any difference whether the trial court selected the right approach or theory. If the appellate court determines the evidence supports a theory raised by the pleadings or tried by consent, then it is presumed that the trial court made the necessary findings and conclusions to support a recovery on that theory. *Lemons v. EMW Mfg. Co.,* 747 S.W.2d 372 (Tex. 1988). These presumptions are tantamount to implied findings. These implied findings can be challenged by legal and factual insufficiency points, provided a reporter's record is brought forward. Further, presumptions will not be imposed if findings are properly requested but are not given.

It is far better to tie the judge to a specific theory and to challenge the evidentiary support for that theory, than it is to engage in guesswork about implied findings.

3. <u>IMPACT OF FILING REQUEST ON APPELLATE DEADLINES</u>

The timely filing of a request for findings of fact and conclusions of law extends the time for perfecting appeal from 30 days to 90 days after the judgment is signed by the court. TEX.R.APP.P. 26.1(a)(4). The timely filing of a request for findings and conclusions also extends the deadline for filing the record from the 60th to the 120th day after judgment was signed. TEX.R.APP.P. 35.1(a). A timely request for findings and conclusions does **not** extend the trial court's period

of plenary power. *See* TEX.R.CIV.P. 329b (no provision is made for an extension of plenary power due to the filing of such a request).

The foregoing rules regarding the extension of appellate deadlines by filing a timely request for findings and conclusions **do not apply** when findings and conclusions cannot properly be requested. For example, findings of fact are not available on appeal from a summary judgment. Where a party appeals from the granting of a summary judgment, files a request for findings of fact and conclusions of law, but files no motion for new trial, the filing of the request for findings will not extend the appellate timetable. *Linwood v. NCNB of Texas,* 885 S.W.2d 102, 103 (Tex. 1994) ("[T]he language 'tried without a jury' in rule 41(a)(1) does not include a summary judgment proceeding."). *See also, Chavez v. El Paso Housing Authority,* 897 S.W.2d 523 (Tex.App.--El Paso 1995, writ denied). Another case holds that a matter which is dismissed for lack of subject matter jurisdiction, or in which there has been no evidentiary hearing, has not been "tried without a jury" as used in the rule, so that a request for findings does not extend the 30-day deadline for perfecting appeal. *Zimmerman v. Robinson,* 862 S.W.2d 162 (Tex.App.--Amarillo 1993, no writ). *Accord, O'Donnell v. McDaniel,* 914 S.W.2d 209 (Tex.App.--Fort Worth 1995, writ denied) (when appeal is from dismissal rendered without evidentiary hearing, a request for findings of fact and conclusions of law does not extend any applicable deadlines); *Smith v. Smith,* 835 S.W.2d 187, 190 (Tex.App.--Tyler 1992, no writ) (in divorce case tried to jury, request for findings of fact and conclusions of law did not extend appellate timetable even though the trial judge was not bound by some of the jury's answers).

4. SEQUENCE FOR OBTAINING FINDINGS

a. Initial Request

Rule 296 requires that the request for findings and conclusions be filed within twenty days after the judgment is signed. **FILING A MOTION FOR NEW TRIAL DOES NOT EXTEND THE TIME PERIOD FOR FILING A REQUEST FOR FINDINGS AND CONCLUSIONS.** Often, the decision to appeal is made after the motion for new trial is filed and often after it is presented to the court or overruled by operation of law. Frequently, appellate counsel is employed to handle the appeal after the overruling of the motion for new trial. At that point, it is too late for appellate counsel to file the initial request for findings of fact and conclusions of law. A basic rule of thumb should be that if the client is the slightest bit unhappy with a portion of the judgment, submit the request for findings within the required time period. If an appeal is later perfected, you have preserved the right to findings. If no appeal is taken, the request can always be withdrawn or ignored.

Note that under TEX.R.CIV.P. 296, the request must be specifically entitled "Request for Findings of Fact and Conclusions of Law". The request should be a separate instrument and not coupled with a motion for new trial or a motion to correct or reform the judgment.

If you miss the deadline, you will have waived your right to complain of the trial court's failure to prepare the findings. Keep in mind, however, that you can still make the request, even if it is untimely. The trial court can give you findings and conclusions even though it is not obligated to do so. The timetables set out by TEX.R.CIV.P. 296 and 297 are flexible if there is no gross violation of the filing dates and no party is prejudiced by the late filing. *Wagner v. GMAC Mortg. Corp. of Iowa*, 775 S.W.2d 71 (Tex.App.--Houston [1st Dist.] 1989, no writ). Also, TEX.R.CIV.P. 5, "Enlargement of Time," appears to permit the trial court to enlarge the time for requesting findings and conclusions.

b. Presentment Not Necessary

Older case law required that the request for findings of fact and conclusions of law be actually presented to the judge. However, the Supreme Court, in *Cherne Industries, Inc. v. Magallanes,* 763 S.W.2d 768 (Tex. 1989), abandoned the requirement of presentment to the trial judge.

TEX.R.CIV.P. 296 now provides that the request shall be filed with the clerk of the court "who shall immediately call such request to the attention of the judge who tried the case". Notice to the opposing party of the filing of the request is still required under the rule. Presentment to the trial judge is no longer required.

c. Response by Court

TEX.R.CIV.P. 297 provides that, upon timely demand, the court shall prepare its findings of fact and conclusions of law and file them within 20 days after a timely request is filed. The court is required to mail a copy of

its findings and conclusions to each party to the suit. Deadlines for requesting additional or amended findings run from the date the original findings and conclusions are filed, as noted below.

d. Untimely Filing by Court

The procedural time limits in the rules do not prevent the trial court from issuing belated findings. *Robles v. Robles*, 965 S.W.2d 605 (Tex.App.--Houston [1st Dist.] 1998, pet. denied); *Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Authority,* 876 S.W.2d 940 (Tex.App.--Beaumont 1994, writ denied); *Morrison v. Morrison*, 713 S.W.2d 377 (Tex.App.--Dallas 1986, no writ). Unless injury is demonstrated, litigants have no remedy for the untimely filing of findings. *Jefferson County,* 876 S.W.2d at 960; *Morrison*, 713 S.W.2d at 381. Injury may be shown if the litigant was unable to request additional findings or if the litigant has been prevented from properly presenting the appeal. *Id.*

In *Robles,* the appellant made both a timely original and reminder request for findings, but the trial court had not filed them by the time the appellant filed his original appellate brief. Thereafter, a supplemental transcript was filed containing the findings and the appellant was given the opportunity to file an amended brief. Claiming the trial court's untimely filing deprived him of the ability to request additional findings and caused him economic harm due to the added expense of filing an amended brief, the appellant sought a reversal and remand. The appellate court concluded that he had suffered no injury as he had made no request for additional findings nor had he requested the appellate court to abate the appeal in order to secure additional findings.

Similarly, in *Morrison*, the husband appealed the property division in a divorce and requested findings and conclusions. In the original findings, the court stated that the marriage had become insupportable. The wife requested additional findings on the issues of cruelty, adultery and desertion. The judge made the additional findings, noting that the husband was at fault in the breakup of the lengthy marriage due to his drinking, adultery and spending community assets on other women. The husband attempted to have the additional findings disregarded because they were filed untimely. The appellate court determined that the only issue raised by the late filing was that of injury to the appellant, not the trial court's jurisdiction to make the findings. The court also noted that the husband had not demonstrated any harm which he suffered because of the late filing.

From the standpoint of preservation of error, note that to complain of the untimely filing, the appellant may be required to file a motion to strike. *See*, *Narisi v. Legend Diversified Investments*, 715 S.W.2d 49 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), which contains the following footnote at page 50:

> Although not made a point of error, Narisi complains about when the supplemental findings and conclusions were filed. Even if they were filed late, which we do not decide here, we may consider them because appellant neither filed a motion to strike, *City of Roma v. Gonzales*, 397 S.W.2d 943, 944 (Tex.Civ.App.--San Antonio 1965, writ ref'd n.r.e.), nor has she shown that she was harmed by the delay in the filing. *Fonseca v. County of Hidalgo*, 527 S.W.2d 474, 480 (Tex.Civ.App.--Corpus Christi 1975, writ ref'd n.r.e.).

See also, *Summit Bank v. The Creative Cook*, 730 S.W.2d 343 (Tex.App.--San Antonio 1987, no writ), where the court specifically stated that a reviewing court will consider late filed findings of facts and conclusions of law where there has been no motion to strike. Thus, if the appellant has been prejudiced in his/her appeal because of the late filing, s/he should consider filing a motion to strike, but s/he must also be prepared to demonstrate injury.

Note also that if the findings and conclusions are filed too far past the deadline, the appellate court may disregard them. *Stefek v. Helvey,* 601 S.W.2d 168 (Tex.Civ.App.--Corpus Christi 1980, writ ref'd n.r.e.). In *Labar v. Cox*, 635 S.W.2d 801 (Tex.App.--Corpus Christi 1982, writ ref'd n.r.e.), the court determined a late filing to be reversible error because it prevented the appellant from requesting additional findings. The court declined to permit the trial court to correct its procedural errors because other errors existed which required a reversal.

e. Reminder Notice

TEX.R.CIV.P. 297 provides that if the trial court fails to submit the findings and conclusions within the 20 day period, the requesting party must call the omission to

the attention of the judge **within 30 days after filing the original request**. Failure to submit a timely reminder waives the right to complain of the court's failure to make findings. *Averyt v. Grande, Inc*., 717 S.W.2d 891 (Tex. 1986); *Employees Mutual Casualty Co. v. Walker,* 811 S.W.2d 27 (Tex.App.--Houston [14th Dist.] 1991, writ denied); *Saldana v. Saldana,* 791 S.W.2d (Tex.App.--Corpus Christi 1990, no writ).

The rules require that the reminder be specifically entitled "Notice of Past Due Findings of Fact and Conclusions of Law". The current version of TEX.R.CIV.P. 297 specifically provides that the filing of the reminder notice "shall be immediately called to the attention of the court by the clerk." Thus, it appears that presentment is no longer required for the reminder.

When the reminder is filed, the time for the filing of the court's response is extended to 40 days from the date the original request was filed.

f. Additional or Amended Findings

If the court files findings and conclusions, either party has a period of ten days in which to request specified additional or amended findings or conclusions. The court shall file any additional or amended findings and conclusions within ten days after the request, and again, cause a copy to be mailed to each party. No findings or conclusions shall be deemed or presumed by any failure of the court to make any additional findings or conclusions. TEX.R.CIV.P. 298.

(1) FAILURE TO REQUEST

When a party fails to timely request additional findings of fact and conclusions of law, it is deemed to have waived the right to complain on appeal of the court's failure to enter additional findings. *Briargrove Park Property Owners, Inc. v. Riner,* 867 S.W.2d 58, 62 (Tex.App.--Texarkana 1993, writ denied); *Cities Services Co. v. Ellison*. 698 S.W.2d 387, 390 (Tex.App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). Further, where the original findings omit a finding of a specific ground of recovery which is crucial to the appeal, failure to request an additional finding will constitute a waiver of the issue. *Poulter v. Poulter,* 565 S.W.2d 107 (Tex.Civ.App.--Tyler 1978, no writ)(the failure to request a specific finding on reimbursement waived any reimbursement complaints on appeal). In *Keith v. Keith,* 763 S.W.2d 950 (Tex.App.--Fort Worth 1989, no writ), the trial court refused to set aside the good will of a community partnership business as the husband's separate property. The findings of fact and conclusions of law found the value of the businesses to be $262,400. The husband made no request for additional findings as to whether the partnership had any good will or whether any such good will was professional good will attributable to him personally. He challenged the failure to make those findings on appeal. The court of appeals affirmed, noting that the failure to request additional findings constitutes a waiver on appeal.

(2) COURT'S FAILURE TO RESPOND

A trial court's failure to make additional findings upon request is not reversible error if the requested finding is covered by and directly contrary to the original findings filed. *Asai v. Vanco Insulation Abatement, Inc.,* 932 S.W.2d 118 (Tex.App.--El Paso 1996, no writ); *San Antonio Villa Del Sol Homeowners Association v. Miller,* 761 S.W.2d 460 (Tex.App.--San Antonio 1988, no writ).

(3) BILL OF EXCEPTIONS

Under the current version of TEX.R.CIV.P. 297 and after *Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989), a file-stamped copy of the original request should be sufficient to show that it was timely filed in the clerk's office. Under the current rule, a file-stamped copy of the past due notice should be sufficient to preserve any error if the trial court fails to file findings and conclusions. See Price, *Just the Facts, Judge: Findings of Fact and Conclusions of Law,* THE APPELLATE ADVOCATE Vol. III, No. IV (Summer, 1990).

g. Effect of Premature Request

TEX.R.CIV.P. 306(c) provides that no motion for new trial or request for findings of fact and conclusions of law will be held ineffective because of premature filing. Instead, every such request shall be deemed to have been filed on the date of but subsequent to the signing of the judgment. *Fleming v. Taylor,* 814 S.W.2d 89 (Tex.App.--Corpus Christi 1991, no writ).

5. WHAT FORM IS REQUIRED?

Findings of fact and conclusions of law need not be in

any particular form as long as they are in writing and are filed of record. *Hamlet v. Silliman,* 605 S.W.2d 663 (Tex.App.--Houston [1st Dist.] 1980, no writ). It is permissible for the trial court to list its findings in a letter to the respective attorneys, as long as the letter is filed of record. *Villa Nova Resort, Inc. v. State,* 711 S.W.2d 120 (Tex.App.--Corpus Christi 1986, no writ). Remember, however, that oral statements as to findings made by the judge on the record will not be accepted as findings of fact and conclusions of law. *In re W.E.R.,* 669 S.W.2d 716 (Tex. 1984); *Stevens v. Snyder,* 874 S.W.2d 241 (Tex.App.--Dallas 1994, writ denied); *Giangrosso v. Crosley,* 840 S.W.2d 765, 769 (Tex.App.--Houston [1st Dist.] 1992, no writ); *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ). Nor may the court have those statements prepared as a reporter's record and filed as findings of fact and conclusions of law. *Nagy, v. First National Gun Banque Corporation,* 684 S.W.2d 114 (Tex.App.--Dallas 1984, writ refd n.r.e.). The Supreme Court ruled in one case, however, that appellate courts must give effect to **intended** findings of the trial court, even where the specific findings made do not quite get the job done, provided they are supported by the evidence, the record and the judgment. See *Black v. Dallas County Child Welfare,* 835 S.W.2d 626 (Tex. 1992).

a. Predecessor Rules

Formerly it was common practice to insert various "findings" into the court's order. The Texas Family Code requires visitation and child support orders to contain certain findings of fact. *See* TEX. FAM.CODE §§ 153.258, 154.130. Contempt orders must contain specific findings as to the exact violations which have occurred and what actions, if any, will permit the contemnor to purge. Orders granting injunctions are required to set forth the reasons for issuance. Decrees make specific findings in matters of military retirement benefits to comply with the Soldiers and Sailors Relief Act and still other findings in order to qualify as a Qualified Domestic Relations Order. There was a divergence of opinions as to whether specific findings of fact and conclusions of law which were contained within a decree, such as specific factors considered with regard to a disproportionate division of the estate or specific findings as to values, qualified as formal findings of fact and conclusions of law. *See Cottle v. Knapper,* 571 S.W.2d 59 (Tex.Civ.App.--Tyler 1978, no writ)(holding that findings contained within the decree are valid, despite the fact that they are not contained in a separate document). The inclusion of the findings in the order did not preclude a request for separate findings and conclusions. *See also, A-- v. Dallas County Child Welfare,* 726 S.W.2d 241 (Tex.App.--Dallas 1986, no writ)(where findings and conclusions are incorporated into a judgment, even when no request has been made, they are treated as findings of fact and conclusions of law filed in accordance with Rule 296).

For a contrary result, *see City of Houston v. Houston Chronicle,* 673 S.W.2d 316 (Tex.App.--Houston [1st Dist.] 1984, no writ); *Jones v. Jones,* 641 S.W.2d 342 (Tex.App.--Corpus Christi 1982, no writ) and *Gonzales v. Cavazos,* 601 S.W.2d 202 (Tex.Civ.App.--Corpus Christi 1980, no writ)(all holding that recitations in the judgment cannot be considered as a substitute for separately filed findings and conclusions). Thus, they provide no basis for attack by a losing party on appeal.

b. TEX.R.CIV.P. 299a

In 1990, the Supreme Court promulgated TEX.R.CIV.P. 299a which provides:

RULE 299a. FINDINGS OF FACT TO BE SEPARATELY FILED AND NOT RECITED IN A JUDGMENT

> Findings of fact shall not be recited in a judgment. If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.
>
> Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.

As a result of the rule change, findings of fact that are recited in a judgment cannot form the basis of a claim on appeal. *Frommer v. Frommer,* 981 S.W.2d 811, 814 (Tex.App.--Houston [1st Dist.] 1998, no pet.).

6. WHAT FINDINGS ARE AVAILABLE?

As indicated above, the courts of appeals are not consistent in their discussions of what findings are available to an appellant, particularly in the divorce context. Without question, the court must make findings on each material issue raised by the pleadings and

evidence, but not on evidentiary issues. Findings are required only when they relate to ultimate or controlling issues. *Dura-Stilts v. Zachry,* 697 S.W.2d 658 (Tex.App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Loomis International v. Rathburn,* 698 S.W.2d 465 (Tex.App.--Corpus Christi 1985, no writ); *Lettieri v. Lettieri,* 654 S.W.2d 554 (Tex.App.--Fort Worth 1983, writ dism'd).

Special problems can arise in divorce appeals. In a divorce case, the ultimate issue is whether the property has been divided in a just and right manner. *Id.* However, any question that can properly be submitted to a jury should be worthy of a finding by the judge in a bench trial. Since jury findings as to both characterization and valuation of property are binding upon the trial court, *see Archambault v. Archambault,* 763 S.W.2d 50 (Tex.App.--Beaumont 1988, no writ); *Lawson v. Lawson,* 828 S.W.2d 158 (Tex.App.--Texarkana 1992, writ denied), findings should be available on characterization and valuation of property. In *Jones v. Jones,* 699 S.W.2d 583 (Tex.App.--Texarkana 1985, no writ), the court determined that it was Mr. Jones' burden to request additional findings of fact to establish the specific valuation of the various community property assets and liabilities used by the trial court. The underlying assumption is, of course, that Jones was entitled to obtain findings on the value of assets. However, in *Wallace v. Wallace.* 623 S.W.2d 723 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ dism'd), the court determined that the trial court does not have to make findings listing the value of each item. Nor does it have to list the factors which were considered in dividing the property because the factors to be considered are not issues of fact to be determined by the trier of fact. (Here, too, however, the court was quite verbal about the appellant's responsibility to request additional findings as to values, which the appellant had not done.)

It is difficult to see just how a court of appeals can determine the fairness of the division without findings as to the values of the assets. *Wallace* states that it is the burden of the parties to introduce evidence as to the values of the assets whereby a range of value can be determined by the trial court. But if wife introduces a value of $250,000 while husband values an asset at $50,000, it is difficult if not impossible to determine overall fairness without knowing what value the trial court assigned. Further, there is no way to determine that the court assigned a value within that range at all. Secondly, if the trial court is not required to state what factors were considered in dividing the property, the appellant is left in a posture of challenging the sufficiency of the evidence as to every conceivable factor which **might** have been considered, a process that unduly and unnecessarily complicates the appeal. This ladder may be virtually impossible to climb, and any error in the court's failure to identify the proper rungs is in all likelihood not reversible error. In *Tenery v. Tenery,* 932 S.W.2d 29 (Tex. 1996), the trial court awarded the wife a disproportionate division of the community estate. Despite a request for specific findings, the court declined to list the factors considered. The court of appeals determined that Mr. Tenery was not harmed by the trial court's failure to make the requested findings because there was sufficient evidence to support the division. The Supreme Court agreed, noting that the record reflected that Mr. Tenery had greater earning capacity than his wife, that he was at fault in the breakup of the marriage, and that Mrs. Tenery would have benefited from a continuation of the marriage. Thus, the record affirmatively established that Mr. Tenery had suffered no injury.

Joseph v. Joseph, 731 S.W.2d 597 (Tex.App.--Houston [14th Dist.] 1987, no writ) gave many divorce/appellate lawyers hope. There, the appellant/ husband appealed from the property division and timely requested findings of fact and conclusions of law. The trial court failed to file any. This omission was properly called to the court's attention, but still none were filed. While the opinion turns on the question of failure to file properly requested findings rather than whether the appellant was entitled to findings on value, the conclusion is unmistakably clear: the appellant was jeopardized by the trial court's failure to make findings on value. The values of three properties were in dispute and the value of each property differed depending on the appraisal method utilized. The evidence indicated that one asset could be appraised at $246,000 value-in-place or at $40,000 fair market value. The court concluded that the appellant had been placed in an unjust position of guessing at the valuation methods used when attacking the property division as an abuse of discretion. It further noted that he would have to presume a value when he attacked the valuation method as improper. Thus, he had suffered harm in the presentation of his appeal. The cause was reversed and remanded for a new trial.

The First District Court of Appeals in Houston remains unpersuaded by the *Joseph* philosophy, and has adhered to the *Wallace* decision. In *Finch v. Finch,* 825 S.W.2d

218 (Tex.App.--Houston [1st Dist.] 1992, no writ), the court reiterated that the values of the properties are evidentiary to the ultimate issue of whether the trial court divided the properties in a just and right manner and that it is the responsibility of the parties to provide the trial judge with a basis upon which to make the division. Note, however, that Justice Michol O'Connor has determined that the *Finch* decision was erroneous. *See Rafferty v. Finstad,* 903 S.W.2d 374, 379 (Tex.App.--Houston [1st Dist.] 1995, writ denied) (O'Connor, J., dissenting) ("Even though I was a member of that panel, I now believe that decision is wrong. In a case like this, with complicated assets and claims of reimbursement, it is not possible to show error without specific findings.").

In *Roberts v. Roberts*, 1999 WL 442147 at *8 (Tex. App. -- El Paso 1999, no pet.), the El Paso Court of Appeals disagreed with *Finch*:

> Because we believe that an appellant cannot demonstrate that a trial court abused its discretion in making a just and right division of the community estate without being able to quantify the size of the community pie or just how large a slice each spouse was served, we conclude that an appellant is entitled to findings on characterization and valuation when error is preserved.

7. CONFLICTING FINDINGS AND FINDINGS AT VARIANCE WITH THE JUDGMENT

When the findings of fact appear to conflict with each other, they will be reconciled if reconciliation is possible. If they are not reconcilable, they will not support the judgment. *Yates Ford, Inc. v. Benevides,* 684 S.W.2d 736 (Tex.App.--Corpus Christi 1984, writ ref'd n.r.e.). When Rule 296 findings appear to conflict with findings recited in the judgment, the Rule 296 findings control for purposes of appeal. TEX.R.CIV.P. 299a. This rule was in accord with the practice of the appellate courts, even before TEX.R.CIV.P. 299a was adopted. *See Southwest Craft Center v. Heilner,* 670 S.W.2d 651 (Tex.App.--San Antonio 1984, writ ref'd n.r.e.); *Law v. Law,* 517 S.W.2d 379, 383 (Tex.Civ.App.--Austin 1974, writ dism'd); *Keith v. Keith,* 763 S.W.2d 950 (Tex.App.--Fort Worth 1989, no writ).

A problem can arise if an amended judgment is signed after findings and conclusions have been given. In *White v. Commissioner's Court of Kimble County,* 705 S.W.2d 322 (Tex.App.--San Antonio 1986, no writ), judgment was entered on November 12, 1984. Findings of fact and conclusions of law were requested and filed. An amended judgment was entered on January 25, 1985, in response to a motion to correct. The appellate court ruled that the findings could not be relied upon to support the corrected judgment because they pertained only to the November 12 judgment.

Note also that if there are conflicts between statements made by the trial judge on the record and findings of fact and conclusions of law actually prepared, the formal findings will be deemed controlling. *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ).

8. CONFLICT BETWEEN FINDINGS AND ADMISSIONS

The Supreme Court has considered whether a reviewing court is bound by admissions of parties as to matters of fact when the record shows that the admissions were not truthful and that the opposite of the admissions was in fact true. In *Marshall v. Vise,* 767 S.W.2d 699 (Tex. 1989), the plaintiff submitted requests for admissions which were never answered. Prior to the nonjury trial, the court granted the plaintiff's motion that his requests for admissions be deemed admitted. Nevertheless, the defendant presented testimony in direct contravention of the deemed admissions. Plaintiff, who had filed no motion for summary judgment, failed to urge a motion *in limine*, failed to object to the evidence when offered and failed to request a directed verdict. The court rendered judgment contrary to the facts deemed admitted and made findings of fact and conclusions of law contrary to the facts deemed admitted. The court of appeals concluded that the trial court's findings were directly contrary to the deemed admissions and were so against the great weight and preponderance of the evidence as to be manifestly erroneous. The Supreme Court concluded that unanswered requests for admission are in fact automatically deemed admitted unless the court permits them to be withdrawn or amended. An admission, once admitted, is a judicial admission such that a party may not introduce testimony to contradict it. Here, however, the plaintiff had failed to object -- in fact he elicited much of the controverting testimony himself. Thus, he was found to have waived his right to rely on the admissions which were controverted by testimony admitted at trial without objection.

9. WHICH JUDGE MAKES THE FINDINGS?

Suppose a trial judge hears the evidence in a case and enters judgment but before s/he is able to make his/her findings of fact and conclusions of law, s/he dies, or is disabled, or fails to win re-election? In *Ikard v. Ikard,* 819 S.W.2d 644 (Tex.App.--El Paso 1991, no writ), the family court master heard the evidence by referral with regard to a requested increase in child support. The master prepared a written report and the order was signed by the judge of the referring court. In the intervening time between trial and entry of the order, the court master won the November election to a district court bench, and left the master's bench. Findings of fact and conclusions of law were prepared following a timely request. Due to the absence of the court master who had heard the evidence, the findings were approved by another court master and signed by the referring judge, neither of whom had heard the evidence. On appeal, Mr. Ikard claimed this procedure was reversible error. The appellate court disagreed, noting that a successor judge has full authority to sign the findings, which in most cases, have been prepared by counsel for the prevailing party and not by the trier of fact. The findings then become those of the trial court, regardless of who prepared them. *See also, Lykes Bros. Steamship Co., Inc. v. Benben,* 601 S.W.2d 418 (Tex.Civ.App.--Houston [14th Dist.] 1980, writ ref'd n.r.e.)*; Horizon Properties Corp. v. Martinez,* 513 S.W.2d 264 (Tex.Civ.App.--El Paso 1974, writ ref'd n.r.e.).

Other courts have taken a different approach where the trial judge is no longer available. In *FDIC v. Morris,* 782 S.W.2d 521 (Tex.App.--Dallas 1989, no writ), the appellate court noted that the trial judge was no longer on the bench and was unavailable to respond to the order to prepare findings. Citing *Anzaldua v. Anzaldua,* 742 S.W.2d 782, 783 (Tex.App.--Corpus Christi 1987, writ denied), the court reversed the judgment.

10. EFFECT OF COURT'S FAILURE TO FILE

a. Must Complain In Brief

Where findings and conclusions were properly requested, but none were filed by the trial court, and the trial court was properly reminded of its failure to file the findings and conclusions, the injured party must then complain about the failure to file by point of error in the brief, or else the complaint is waived. *Seaman v. Seaman,* 425 S.W.2d 339, 341 (Tex. 1968); *In Interest of Hidalgo*, 938 S.W.2d 492 (Tex.App.--Texarkana 1996, no writ); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805 (Tex.App.--San Antonio 1994, writ denied); *Owens v. Travelers Ins. Co.,* 607 S.W.2d 634, 637 (Tex.Civ.App.--Amarillo 1980, writ refd n.r.e.).

b. When Does the Failure to File Cause Harmful Error?

The general rule is that the failure of the trial court to file findings of fact constitutes error where the complaining party has complied with the requisite rules to preserve error. *Wagner v. Riske,* 178 S.W.2d 117, 199 (Tex. 1944); *FDIC v. Morris, 782* S.W.2d at 523. There is a presumption of harmful error unless the contrary appears on the face of the record. *In the Matter of the Marriage of Combs,* 958 S.W.2d 848, 851 (Tex.App.--Amarillo 1997, no writ); *City of Los Fresnos v. Gonzalez,* 830 S.W. 2d 627 (Tex.App.--Corpus Christi 1992, no writ). Thus, the failure to make findings does not compel reversal if the record before the appellate court affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County,* 682 S.W.2d 254, 256 (Tex. 1984). Where there is only one theory of recovery or defense pled or raised by the evidence, there is no demonstration of injury. *Guzman v. Guzman,* 827 S.W.2d 445 (Tex.App.--Corpus Christi 1992, writ denied); *Vickery v. Texas Carpet Co., Inc.,* 792 S.W.2d 759 (Tex.App.--Houston [14th Dist.] 1990, writ denied). *Accord, Landbase, Inc. v. T.E.C.,* 885 S.W. 2d 499, 501-02 (Tex.App.--San Antonio 1994, writ denied) (failure to file findings and conclusions harmless where the basis for the court's ruling was apparent from the record).

The test for determining whether the complainant has suffered harm is whether the circumstances of the case would require an appellant to guess the reason or reasons that the judge has ruled against it. *Elizondo v. Gomez,* 957 S.W.2d 862 (Tex.App.--San Antonio 1997, no writ); *Martinez v. Molinar,* 953 S.W.2d 399 (Tex.App.--El Paso 1997, no writ); *Sheldon Pollack Corp. v. Pioneer Concrete,* 765 S.W.2d 843, 845 (Tex.App.--Dallas 1989, writ denied); *Fraser v. Goldberg,* 552 S.W.2d 592, 594 (Tex.Civ.App.---Beaumont 1977, writ ref'd n.r.e.). The issue is whether there are disputed facts to be resolved. *FDIC v. Morris,* 782 S.W.2d at 523.

c. Remedy: Remand vs. Abatement

A debate has raged over the appropriate remedy when a trial court fails to file timely requested findings of fact and conclusions of law. The choice is whether to reverse and remand for a new trial or to abate proceedings and order the trial judge to file findings and conclusions. Earlier cases tended to reverse and remand for a new trial. *See, e.g., Joseph v. Joseph*, 731 S.W.2d 597 (Tex. App. -- Houston [14th Dist.] 1987, no writ). However, more recent cases have abated the appeal and ordered the trial judge to file findings of fact and conclusions of law. *See Cherne Industries, Inc. v. Magallanes*, 763 S.W.2d 768 (Tex. 1989); *Brooks v. Housing Authority of the City of El Paso*, 926 S.W.2d 316 (Tex. App. -- El Paso 1996, no writ); 928 S.W.2d 782 (Tex. App. -- Houston [14th Dist.] 1996, no writ). In *Brooks v. Housing Authority of the City of El Paso*, the court held that

> whenever possible, appellate courts should attempt to remedy the absence of findings and conclusions by abating the appeal and remanding to the trial judge for entry of findings and conclusions, so that the appeal can be handled in a normal manner. If the trial court cannot forward findings and conclusions to the court of appeals due to loss of the record, problems with memory, passage of time, or other inescapable difficulties, reversal and remand for a new trial is a proper remedy.

926 S.W.2d at 321.

New TEX.R.APP.P. 44.4(b) provides that if the trial court's failure to act prevents a proper presentation of the case on appeal and if the trial court can correct its failure, the court of appeals must direct the trial court to correct the error and then proceed as if the failure to act had not occurred. Abatement is now required by the rules.

d. Failure to Make Additional Findings

With regard to additional findings, the case should not be reversed if most of the additional findings were disposed of directly or indirectly by the original findings and the failure to make the additional findings was not prejudicial to the appellant. *Landscape Design & Const., Inc. v. Harold Thomas Excavating, Inc.,* 604 S.W.2d 374 (Tex.Civ.App.--Dallas 1980, writ ref'd n.r.e.). Refusal of the court to make a requested finding is reviewable on appeal if error has been preserved. TEX.R.CIV.P. 299.

11. EFFECT OF COURT'S FILING

TEX.R.CIV.P. 299 provides that where findings of fact are filed by the trial court, they shall form the basis of the judgment upon all grounds of recovery. The judgment may not be supported on appeal by a presumption or finding upon any ground of recovery no element of which has been found by the trial court. When one or more of the elements have been found by the court, however, any omitted unrequested elements, if supported by the evidence, will be supplied by presumption in support of the judgment. This presumption does not apply when the omitted finding was requested by the party and refused by the trial court. *Chapa v. Reilly*, 733 S.W.2d 236 (Tex.App.--Corpus Christi 1987, writ ref'd n.r.e.).

Findings of fact are accorded the same force and dignity as a jury verdict. *McPherren v. McPherren*, 967 S.W.2d 485 (Tex.App.--El Paso 1998, no pet.) When they are supported by competent evidence, they are generally binding on the appellate court. When a reporter's record is available, challenged findings are not binding and conclusive if manifestly wrong. The same is true of patently erroneous conclusions of law. *Reddell v. Jasper Federal Savings & Loan Association*, 722 S.W.2d 551 (Tex.App.--Beaumont 1987) *rev'd on other grounds* 730 S.W.2d 672 (1987); *De La Fuenta v. Home Savings Association*, 669 S.W.2d 137 (Tex.App.--Corpus Christi 1984, no writ). When no reporter's record is presented, the court of appeals must presume that competent evidence supported not only the express findings made by the court, but any omitted findings as well. *D&B, Inc. v. Hempstead*, 715 S.W.2d 857 (Tex.App.--Beaumont 1986, no writ); *Mens' Wearhouse v. Helms*, 682 S.W.2d 429 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 804, 106 S.Ct. 38 (1985).

12. DEEMED FINDINGS

When the trial court gives express findings on at least one element of a claim or affirmative defense, but omits other elements, implied findings on the omitted unrequested elements are deemed to have been made in support of the judgment. In other words, if a party secures an express finding on at least one element of an affirmative defense, then deemed findings arise as to the balance of the elements. *Linder v. Hill,* 691 S.W.2d 590 (Tex. 1985); *Dunn v. Southern Farm Bureau*

Casualty Insurance Co., 991 S.W.2d 467, 476-77 (Tex.App. -- Tyler 1998, pet. filed); *Sears, Roebuck & Co. v. Nichols,* 819 S.W.2d 900 (Tex.App.--Houston [14th Dist.] 1991, writ denied). When deemed findings arise, it is not an appellee's burden to request further findings or to complain of other findings made. It is the appellant's duty to attack **both the express and implied findings.**

13. PECULIARITIES OF CONCLUSIONS OF LAW

Conclusions of law are generally lumped in with all discussions of findings of fact but, in reality, they are rather unimportant to the appellate process. The primary purpose is to demonstrate the theory on which the case was decided. A conclusion of law can be attacked on the ground that the trial court did not properly apply the law to the facts. *Foster v. Estate of Foster,* 884 S.W.2d 497 (Tex.App.--Dallas 1994, no writ). However, erroneous conclusions of law are not binding on the appellate court and if the controlling findings of fact will support a correct legal theory, are supported by the evidence and are sufficient to support the judgment, then the adoption of erroneous legal conclusions will not mandate reversal. *Leon v. Albuquerque Commons Partnership,* 862 S.W.2d 693 (Tex.App.--El Paso 1993, no writ); *Westech Engineering, Inc. v. Clearwater Constructors, Inc.,* 835 S.W.2d 190, 196 (Tex.App.--Austin 1992, no writ); *Bellaire Kirkpatrick Joint Venture v. Loots,* 826 S.W.2d 205, 210 (Tex.App.--Fort Worth 1992, writ denied); *Sears, Roebuck & Co. v. Nichols,* 819 S.W.2d 900, 903 (Tex.App.--Houston [14th Dist.] 1991, writ denied); *Matter of Estate of Crawford,* 795 S.W.2d 835, 838 (Tex.App.--Amarillo 1990, no writ); *Valencia v. Garza,* 765 S.W.2d 893, 898 (Tex.App.--San Antonio 1989, no writ). "If an appellate court determines a conclusion of law is erroneous, but the judgment rendered was proper, the erroneous conclusion of law does not require reversal."*Town of Sunnvale v. Mayhew*, 905 S.W.2d 234, 243 (Tex. App..--Dallas 1994), *rev'd on other grounds*, 964 S.W.2d 922 (Tex. 1998). The standard of review for legal conclusions is whether they are correct, *Zieben v. Platt,* 786 S.W.2d 797, 801-02 (Tex.App.--Houston [14th Dist.] 1990, no writ), and they are reviewable *de novo* as a question of law. *State v. Evangelical Lutheran Good Samaritan Society,* 981 S.W.2d 509, 511 (Tex.App.--Austin 1998, no pet.); *Nelkin v. Panzer*, 833 S.W.2d 267, 268 (Tex.App.--Houston [1st Dist.] 1992, writ dism'd w.o.j.). In other words, the appellate court must independently evaluate conclusions of law to determine their correctness when they are attacked as a matter of law. *U.S. Postal Serv. v. Dallas Cty. App. D.*, 857 S.W.2d 892, 895-96 (Tex.App.--Dallas 1993, writ dism'd).

14. CHALLENGES ON APPEAL

a. Challenging the Trial Court's Failure to Make Findings of Fact

The trial court's failure to make findings upon a timely request must be attacked by point of error on appeal or the complaint is waived. *In Interest of Hidalgo,* 938 S.W.2d 492 (Tex.App.--Texarkana 1996, no writ); *Perry v. Brooks,* 808 S.W.2d 227, 229-30 (Tex.App.---Houston [14th Dist.] 1991, no writ); *Belcher v. Belcher,* 808 S.W.2d 202, 206 (Tex.App.--El Paso 1991, no writ).

b. Challenging Findings and Conclusions on Appeal

Unless the trial court's findings of fact are challenged by point of error in the brief, the findings are binding on the appellate court. *S&L Restaurant Corp. v. Leal,* 883 S.W.2d 221, 225 (Tex.App.--San Antonio 1994), *rev'd on other grounds,* 892 S.W.2d 855 (Tex. 1995) *(per curiam); Wade v. Anderson,* 602 S.W.2d 347, 349 (Tex.Civ.App.--Beaumont 1980, writ ref'd n.r.e.).

Frequently, trial courts include disclaimers to the effect that "any finding of fact may be considered a conclusion of law, if applicable" and vice-versa. There is a difference, however, in the standard of review. Findings of fact are the equivalent of a jury answer and should be attacked on the basis of legal or factual sufficiency of the evidence. *Associated Telephone Directory Publishers, Inc. v. Five D's Publishing Co.,* 849 S.W.2d 894, 897 (Tex.App.--Austin 1993, no writ); *Lorensen v. Weaber,* 840 S.W. 2d 644 (Tex.App.--Dallas 1992) *rev'd on other grounds sub nom.; Exxon Corp. v. Tidwell,* 816 S.W.2d 455, 459 (Tex.App.--Dallas 1991, no writ); *A-ABC Appliance of Texas, Inc. v. Southwestern Bell Tel. Co.,* 670 S.W.2d 733, 736 (Tex.App.--Austin 1984, writ ref'd n.r.e.). Conclusions of law should be attacked on the ground that the law was incorrectly applied.

Sometimes, however, findings of fact are mislabeled as conclusions of law, as in *Posner v. Dallas County Child Welfare,* 784 S.W.2d 585 (Tex.App.--Eastland 1990, writ denied). There, the ultimate and controlling findings of fact were erroneously labeled as conclusions

of law, and instead of challenging these, the appellant challenged the immaterial evidentiary matters which were included in the findings of fact. The appellate court found that the appellant was bound by the unchallenged findings which constituted undisputed facts.

B. Findings In Sanction Orders

1. TEX.R.CIV.P. 13 SANCTIONS

The imposition of Rule 13 sanctions lies within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Stewart v. Transit Mix Concrete & Materials Co.,* 988 S.W.2d 252, 257-58 (Tex.App. -- Texarkana 1998, pet. denied). Rule 13 provides:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both. . .
>
> . . . **No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order.** 'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law . . . [Emphasis added]

Several recent appellate decisions have considered the language of the Rule and determined that its requirements are mandatory. *Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex.App. -- Dallas 1999, pet. filed); *Thomas v. Thomas,* 917 S.W.2d 425 (Tex.App.--Waco 1996, no writ). Requiring a trial court to enunciate its reasons in the sanction order serves two purposes. First, it invites the trial court to reflect on the order before sanctions are imposed. Second, it informs the party of the offensive conduct in order to prevent its recurrence. *Id.*

In *GTE Communications Systems Corp. v. Curry,* 819 S.W.2d 652 (Tex.App.--San Antonio 1991, orig. proceeding), the appellate court determined that a rule of civil procedure is to be interpreted by the same rules that govern statutes. When a rule is clear and unambiguous, the language must be construed according to its literal meaning. *Id.* at 653; *RepublicBank Dallas, N.A. v. Interkal, Inc.,* 691 S.W.2d 605, 607 (Tex. 1985); *Hidalgo, Chambers & Co. v. FDIC,* 790 S.W.2d 700, 702 (Tex.App.--Waco 1990, writ denied). The court in *GTE* found the language of Rule 13 to be clear and unambiguous in its provisions that no sanctions may be imposed except for good cause shown. The court further noted that the trial court must enumerate the particulars of the good cause in the sanction order and that this requirement of the rule is mandatory. Even more striking is the appellate court's description of the sanction order against GTE:

> The order in this case is defective in that it fails to comply with the mandatory requirements of rule 13. The order merely imposes sanctions. It does not find that good cause exists for such impositions; it does not find that the motion for summary judgment and affidavits were groundless and filed for the purpose of delay or harassment, or were made in bad faith; and, more fatally, it does not state any facts or particulars of the good cause.

Id. at 654.

A similar result occurred in *Kahn v. Garcia,* 816 S.W.2d 131, 133 (Tex.App.--Houston [1st Dist.] 1991, orig. proceeding) in which the appellate court noted:

> Rule 13 imposes a duty on the trial court to point out with particularity the acts or omissions on which sanctions are based. *Watkins v. Pearson,* 816 S.W.2d 131 (Tex.App.--Houston [14th Dist.] 1990, writ denied). Thus, an order imposing sanctions for pleadings, motions, and other papers under rule 13 differs markedly from an order imposing sanctions for discovery abuse under rule 215. Rule 215 does not require a court to designate the particulars amounting to 'good cause'. While respondent's order states that the motions for sanctions are 'meritorious', the order contains no specific mention of what conduct on the part of relator was good cause for

> imposition of sanctions. *Id.* at 133.

See also Zarsky v. Zurich Management, Inc., 829 S.W.2d 398, 400 (Tex.App.--Houston [14th Dist.] 1992, writ dism'd by agr.), in which the appellate court compares the various sanction orders in these cases.

> The sanction orders in both *Kahn* and *Watkins* were held to be in violation of this [Rule 13] requirement. In *Kahn,* the order recited that the motions for sanctions were 'meritorious'. *Kahn,* 816 S.W.2d at 132. In *Watkins,* the order merely stated that 'for good cause being shown, monetary sanctions are hereby imposed . . . pursuant to Rule 13.' *Watkins,* 795 S.W.2d at 259. Similarly, the order signed by the trial judge states that 'the Court finds substantial evidence that this Third Party lawsuit . . . was frivolous and of no merit.' The recitation here fails to satisfy the particularity requirements of Rule 13. There is no statement or description of what was done in bad faith, or a description of how Mr. George acted to bring about the improper purpose. The trial court failed to show with particularity its reason for finding the third party lawsuit frivolous and meritless. Thus the trial judge abused his discretion in entering the sanctions order.

Thus, the findings must be fact-based and not merely conclusions of law. *Compare Keever v. Finlan,* 988 S.W.2d 300, 312 (Tex.App. -- Dallas 1999, pet. filed) (sanctions order finding that an attorney of record had "made false statements in an affidavit executed by him and filed with the Court" specifically identified the attorney's conduct and constituted good cause for imposition of sanctions) *with Schexnider v. Scott & White Memorial Hospital,* 953 S.W.2d 439, 441 (Tex.App.--Austin, 1997, no writ)(sanctions order based on "good cause" for filing a "groundless petition" brought in "bad faith" and "brought for the purpose of harassment" is erroneous on its face for omitting the particulars underlying the conclusions).

Some courts of appeals have held that the complaining parties may waive the particularity requirement of Rule 13 if they fail to make a timely complaint and that the trial court's failure to make particular findings in the order may constitute harmless error. *Alexander v. Alexander,* 956 S.W.2d 712, 714 (Tex.App.--Houston [14th Dist.] 1997, pet. denied); *Bloom v. Graham,* 825 S.W.2d 244, 247 (Tex.App.--Fort Worth 1992, writ denied); *Powers v. Palacios, 771* S.W.2d 716, 719 (Tex.App.--Corpus Christi 1989, writ denied). The El Paso Court of Appeals has determined that error may indeed be waived but a legitimate effort at obtaining findings will require an abatement similar to that utilized in the area of traditional findings of fact. *Campos v. Ysleta General Hospital, Inc. et al,* 879 S.W.2d 67 (Tex.App.--El Paso 1994, writ denied).

2. TEX.R.CIV.P. 215 SANCTIONS

Tex. R. Civ. P. 215.2 provides:

> *b. Sanctions by Court In Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rules 199.2(b)(1) or 200.1(b) to testify on behalf of a party fails to comply with proper discovery requests or to obey an order to provide or permit discovery, including an order made under Rules 204 or 215.1, the court in which the action is pending may, after notice and hearing, make such orders in regard to the failure as are just, and among others the following.
>
> * * * * *
>
> (8) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him, or both, to pay, at such time as ordered by the court, the reasonable expenses, including attorney fees, caused by the failure, **unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.** Such an order shall be subject to review on appeal from the final judgment. [Emphasis added].

It is also important to note that there is no requirement that the complaining party have requested or obtained formal findings of fact and conclusions of law with regard to the sanctions order. The Supreme Court has ruled that formal findings are unnecessary. In *Otis Elevator Company v. Parmelee,* 850 S.W.2d 179 (Tex. 1993), the Court stated:

> The court of appeals held that absent a statement of facts from the hearing on Maurine's

motion for sanctions, or findings of fact or conclusions of law, the trial court must be presumed to have made all findings necessary to support its judgment. 817 S.W.2d at 735. This is incorrect. The court of appeals relied upon *Roberson v. Robinson,* 768 S.W.2d 280 (Tex. 1989), and *Lane v. Fair Stores, Inc.,* 243 S.W.2d 683 (Tex. 1951), both of which involved judgments after trial, not sanctions. Here, the trial court heard no evidence but expressly based its decision on the papers filed and the argument of counsel. Under these circumstances, there are no factual resolutions to presume in the trial court's favor.

Otis was determined on the basis of the Court's decision in *Transamerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913 (Tex. 1991), which was a discovery abuse case under TEX.R.CIV.P. 215. Rule 215 does not require any specific findings to be included within the body of the sanctions order. Nevertheless, the Supreme Court has construed that formal findings of fact are not necessary. *See IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). However, the trial court may issue them if it so chooses. *Chrysler Corp. v. Blackmon,* 841 S.W.2d 844, 852 (Tex. 1992); *Hartford Accident & Indemnity Co., v. Abasal,* 831 S.W.2d 559, 560 (Tex.App.--San Antonio 1992, orig. proceeding).

Because findings filed in a sanctions context are not accorded the same weight as findings made under TEX.R.CIV.P. 296 and 297, the appellate court is not limited to a review of the sufficiency of the evidence to support the findings made. These findings, unlike formal findings, are not binding on the reviewing court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d at 442; *Jefa Company, Inc. v. Mustang Tractor and Equipment Company,* 868 S.W.2d 905 (Tex.App.--Houston [14th Dist.] 1994, writ denied). Instead, the appellate court will conduct an independent inquiry to determine if the court abused its discretion in imposing the sanction. *USF&G v. Rossa,* 830 S.W.2d 668 (Tex.App.--Waco 1992, writ denied). In so doing, the appellate court will review the entire record, including the evidence, arguments of counsel, the written discovery on file and the circumstances surrounding the party's alleged discovery abuse to determine if the trial court abused its discretion in imposing the sanctions. *Jefa Company, Inc.*, 868 S.W.2d at 910; *USF&G v. Rossa,* 830 S.W.2d at 672. *See also Shook v. Gilmore & Tatge Mfg. Co.,* 851 S.W.2d 887, 893-94 (Tex.App.--Waco 1993, no writ). The purpose of findings of fact to support the imposition of discovery sanctions is to aid in the appellate review through a guided analysis; to assure judicial deliberation; and to enhance the deterrent effect of the sanctions order.

3. TEX.CIV.PRAC. & REM.CODE SANCTIONS

Chapters 9 and 10 of the Texas Civil Practices and Remedies Code deal with frivolous pleadings and claims and sanctions for frivolous pleadings and claims respectively. Sections 9.012 and 10.004 provide what the trial court shall consider and what sanctions are available. Significantly, §10.005 provides:

> A court shall describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed.

This language requires that findings be included in the sanctions order. In *University of Texas at Arlington v. Bishop*, ___ S.W.2d ____, 1999 WL 510981 (Tex. App. -- Fort Worth July 15, 1999) (not yet reported), the Fort Worth Court of Appeals recognized that the requirement for particularity in the sanction order was mandatory and concluded that "it was error for the trial court to enter the ... sanctions order without describing and explaining the conduct of UTA it relied upon in assessing sanctions." ___ S.W.2d at ____. In determining whether the error was reversible, the appellate court stated:

> In evaluating whether the trial court's omission constitutes reversible error, we note that the trial court did make findings of fact and conclusions of law which describe and explain the sanctionable conduct.
>
> * * * * *
>
> While we do not condone the practice of using findings of fact and conclusions of law to satisfy section 10.005, we conclude that the findings and conclusions supplied the particulars lacking in the sanctions order and, thus, the trial court's failure to identify the sanctioned conduct with specificity in its ... order did not affect UTA's substantial rights or hinder its presentation of this appeal.

C. Findings In Child Support Orders

Section 154.130 of the Family Code provides that, without regard to TEX.R.CIV.P. 296 through 299, in all cases in which child support is contested and the

amount of child support ordered by the court varies from statutory guidelines, the trial court shall make findings in the child support order. TEX.FAM.CODE ANN. § 154.130 (Vernon 1996).

1. REQUEST

The provision requires that a written request may be made or filed with the court no later than 10 days after *the date of the hearing.* **THIS REQUIREMENT MEANS THE REQUEST MUST BE MADE WITHIN 10 DAYS AFTER THE HEARING, NOT WITHIN 10 DAYS AFTER THE DATE THE ORDER IS SIGNED.** An oral request is sufficient if made in open court during the hearing. Clearly, an oral request should be made on the record.

The importance of making the request for findings in child support cases is quite simple -- a court's order of child support will not be reversed on appeal unless the appellant can show a clear abuse of discretion. *Worford v. Stamper,* 801 S.W.2d 108 (Tex. 1990). The test for abuse of discretion is whether the trial court acted in an arbitrary or unreasonable manner. In *Worford*, the parties were divorced in 1975, when their son Trey was only 5 years old. Stamper was ordered to pay $180 per month in support plus one-half of medical expenses incurred on behalf of Trey's medical disabilities. In 1986, a modification was filed, requesting the support be increased and that it be ordered to continue past Trey's 18th birthday. It was undisputed by the parties that Trey would never be able to support himself because of physical and mental handicaps. His developmental levels were between three and five years of age when he was 15 years old. His speech was unintelligible and he suffered from deformities which made it difficult for him to chew his food. He would require some maxillofacial surgery which would not be covered by insurance. The trial court increased the support to $1350 per month, required Stamper to carry medical insurance and to pay for one-half of all expenses not covered by the insurance. Stamper appealed. The court of appeals reversed, noting that the trial court abused its discretion because there was insufficient evidence to support the amount of child support awarded.

The Supreme Court reversed the court of appeals, noting that under Rule 5 of the Texas Supreme Court Child Support Guidelines in effect in 1987, the amount of child support for one child ranged from 19-23% of the first $4,000 of the obligor's net resources, but beyond that, the court may order additional amounts of child support as appropriate, and may consider the income of the parties and the needs of the child. The court also found that either party could have requested findings by the trial court concerning the amount of net resources available and the reasons that the amount ordered by the court varied from the amount computed by applying the percentage in the rules, but neither party requested and the trial court did not file any such findings. The Court then determined that Stamper's net income [some $6,000 to $7,000 per month] and the special needs of the child justified the increase. The court then, without oral argument, reversed the court of appeals and affirmed the trial court.

2. PURPOSE

The purpose of the provision appears to be an attempt to facilitate appeals from child support orders, and to establish in the decree a point-of-reference for a later modification action. If utilized properly, the formal findings and conclusions contemplated by TEX.R.CIV.P. 296 are not needed.

3. TRIAL COURT'S DUTY

The trial court is required to include the findings in the child support order if such findings are properly requested. Although this requirement conflicts with TEX.R.CIV.P. 299a, the Texas Family Code provides that the requirement applies notwithstanding Rules 296 through 299. This rule does not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly when issues other than child support are involved. However, where child support is the only issue, what then?

• The findings required by the Family Code could be repeated as Rule 296 findings.

• Other factors which do not neatly fit into the §154.130 findings may be included in general findings and conclusions.

• If the request under §154.130 is not timely made, findings may still be requested under Rules 296 and 297.

• If the trial court fails to include the §154.130 findings in the child support order itself, despite a timely request, it may still be required to make the findings if the proper elements are requested under Rule 296. In

this instance, two separate findings may be filed. It also appears that if the specific elements of §154.130 are included in the general findings, the error in failing to include findings in child support orders would be harmless.

One court has held that when a trial court does not strictly comply with the statutory requirement that the findings be enumerated in the support order itself, substantial compliance may be demonstrated if the findings are reduced to writing and filed among the papers of the cause. *Zajac v. Penkava,* 924 S.W.2d 405 (Tex.App.--San Antonio 1996, no writ). However, insertion of the findings into the support order will be helpful down the road if a modification is necessary. These findings establish what the circumstances of the parties were at the time of the divorce and whether the support ordered was in compliance with the guidelines.

Yet another court has concluded that the statutory requirements for findings in child support orders do not apply to retroactive support under Section 160.005(c). *In the Interest of Valdez,* 980 S.W.2d 910, 913 (Tex.App.--Corpus Christi 1998, pet. denied).

4. REQUIREMENTS

Section 154.130 requires the following findings:

• the monthly net resources of the obligor per month are $___________________;

• the monthly net resources of the obligee per month are $___________________;

• the percentage applied to the obligor's net resources for child support by the actual order rendered by the court is _____%;

• the amount of child support if the percentage guidelines are applied to the first $6,000 of the obligor's net resources is $_____ ;

• if applicable, the specific reasons that the amount of child support per month ordered by the court varies from the amount due under the guidelines are: ____________; and

• if applicable, the obligor is obligated to support children in more than one household, and:

(A) the number of children before the court is _________;

(B) the number of children not before the court residing in the same household with the obligor is _________;

(C) the number of children not before the court for whom the obligor is obligated by a court order to pay support, without regard to whether the obligor is delinquent in child support payments, and who are not counted under Paragraph (A) or (B) is_______.

If you represent the obligee and are trying to sustain the trial court's award of sizeable child support, consider adding the following:

• Without further reference to the percentages recommended by the guidelines, the Court finds that additional amounts of child support are required, based upon the demonstrated needs of the child.

In *Hatteberg v. Hatteberg,* 933 S.W.2d 522 (Tex.App. --Houston [1st Dist.] 1994, no writ.), the trial court awarded $1000 in child support against an obligor with net monthly income in excess of $4000. Believing additional support was justified, Wife made an untimely request for statutory findings. The trial court did file findings of fact pursuant to Rules 296 and 297, but did not make all of the specific findings as required by former §14.057. While the court did not specify the precise amount of Husband's net income, it did find that the net income exceeded $4000 per month, that it had applied the guidelines to arrive at a presumptive award of $800, and that it had based the additional $200 in support on the proven needs of the child. Wife appealed on the basis that the trial court was required by statute to detail the precise net income and the reasons given for a variance from the guidelines. The appellate court rejected the argument, noting first that the request for statutory findings was untimely. Secondly, with regard to wife's argument that the trial court nevertheless had a statutory duty to make findings to justify the variance, the court found that there was no variance since the trial court had indeed awarded support in accordance with the presumptive award required under the guidelines. Whether the court would have made as broad a statement had the obligor objected to the variance is unclear. The court further held that former §14.057 does not require a trial court to make findings regarding its basis for the presumptive award unless requested, and as a result, the provisions

requiring findings when there is a variance from the guidelines did not apply. *See also, Roosth v. Roosth,* 889 S.W.2d 445 (Tex.App.--Houston [14th Dist.] 1994, writ denied) (for child support set at $3,000 per month, it was not error for trial court to include findings that appellant's net resources were not capable of determination, but that they exceeded $ 4,000 per month, and that appellant was intentionally underemployed at time of divorce).

Arguably, the obligor could request specific findings under Rule 296 *et seq.* as to what the demonstrated needs of the children were. If you represent the obligor, don't accept merely the §154.130 findings. Try to pin the trial court down as to what specific factors were considered and what the total monthly needs of the child are, in actual dollars. Utilize your right to follow up with formalized findings and conclusions. It may also be necessary to tie the court down to a formula if there are children born of different marriages. Courts (and opposing counsel) tend to make the findings as vague as possible. Be sure to follow through.

5. WHAT'S YOUR REMEDY?

The intermediate appellate courts are not consistent in their remedies for the failure of the trial court to make the statutory findings when properly requested. In *Hanna v. Hanna,* 813 S.W.2d 626 (Tex.App.--Houston [1st Dist.] 1991, no writ), the court found that the failure to make findings in a child support order upon proper request is reversible error, and the appellate court reversed and remanded. *See also Morris v. Morris.* 757 S.W.2d 466 (Tex.App.--Houston [14th Dist.] 1988, writ denied) (in which trial court failed to make required child support findings, case was reversed). *Contra Chamberlain v. Chamberlain,* 788 S.W.2d 455 (Tex.App.--Houston [1st Dist.] 1990, writ denied) (in which the appellate court abated the appeal and directed the trial court to make the necessary findings).

The Supreme Court has recently visited the issue. In *Tenery v. Tenery,* 932 S.W.2d 29 (Tex. 1996), the record reflected that at the time of trial, the father's net resources were limited to $980 per month. Applying the child support guidelines to the net resources would have resulted in a child support order of $196 per month, for one child ($980 x 20%). The trial court instead set child support at $550 per month, and despite a request for additional findings concerning the reason the court varied from the guidelines, the court failed to comply. The court of appeals determined that Mr. Tenery had not been harmed by the court's failure to make additional findings. The Supreme Court disagreed, noting that when findings are timely requested but not filed, harm to the complaining party is presumed unless the contrary appears on the face of the record. Error is harmful if it prevents an appellant from properly presenting a case to the appellate court. The Court concluded that the trial court's refusal to abide by the child support guidelines and its failure to make the necessary findings concerning the reasons for its deviation prevented Mr. Tenery from effectively contesting the child support order on appeal. In a *per curiam* opinion, the Court reversed and remanded the cause to the court of appeals with instructions for it to direct the trial court to correct its error under former TEX.R.APP.P. 81(a) (now TRAP 44.4). Thus, it appears that the Supreme Court opted for abatement *a la Chamberlain v. Chamberlain,* 788 S.W.2d 455 (Tex.App.--Houston [1st Dist.] 1990, writ denied).

D. Findings In Visitation Orders

Section 153.258 of the Family Code provides that without regard to Rules 296 through 299 of the Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, the trial court shall state in the order the specific reasons for the variance from the standard order. TEX.FAM.CODE ANN. § 153.258 (Vernon 1997). The court has this obligation only if a written request is filed within 10 days after the hearing or upon oral request in open court during the hearing.

1. REQUEST

The provision clearly requires that a written request may be made or filed with the court no later than 10 days after the *date of the hearing.* **THIS REQUIREMENT MEANS THAT THE REQUEST MUST BE MADE WITHIN 10 DAYS OF THE HEARING, NOT WITHIN 10 DAYS OF THE DATE THE ORDER IS SIGNED.** An oral request is sufficient if made in open court during the hearing. Clearly, an oral request should be made on the record.

2. TRIAL COURT'S DUTY

Under the provision, the trial court is required to insert the required findings **within the body of the visitation**

order. Although this requirement conflicts with TEX.R.CIV.P. 299a, the disclaimer that the provision be applied notwithstanding Rules 296 through 299 applies. Thus it appears that the requested findings must be specified in the order, be it a decree of divorce or modification order. It also would appear that compliance with this rule would not preclude the court from making other findings and conclusions in compliance with the Rules of Civil Procedure, particularly where issues other than visitation are involved.

3. REQUIREMENTS

In contrast to the child support findings, the Family Code does not specify any particular findings or recitations.