GETTING THE CHARGE RIGHT & CHARGE ERROR PRESERVATION

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Getting the Charge Right & Charge Error Preservation

Prologue – A bit of history

The tension between submitting simplified jury charges and submitting correct charges is not new. Consider this Supreme Court holding:

> A question was submitted to the jury that included multiple legal theories. The court found that one of the theories was legally defective, and it was impossible to say that the jury did not find for the plaintiff on the flawed theory. The Court held that the judgment could not be affirmed because of the flawed theory.

Sounds like *Casteel*? It's not. The case is *Lancaster v. Fitch*, 246 S.W. 1015 (Tex. 1923).

Broad form was the way to go in the 19th century in Texas practice. Special issues became popular because any defect in a general charge would result in a reversal of the case entirely for a new trial. By the end of the nineteenth century, the use of special issues was mandatory if a party so requested. The Legislature got into the act, passing the Special Issues Act (Act of March 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Gen. Laws 113.) The statute required submission of special issues distinctly and separately, in an apparent attempt to get away from general charges accompanied by a myriad of instructions. The statute was repealed in 1939.

In 1973, in order to address an overload of "granulated issues" (where each separate factual allegation of negligence or contributory negligence was asked distinctly), the Supreme Court amended Rule 277. The amendment gave trial courts the discretion to submit questions in broad form. The Supreme Court noted its preference for broad form and overruled the pre-1973 cases in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). Then, in 1988, the Court again amended Rule 277 to make use of broad-form mandatory "whenever feasible." The Supreme Court Advisory Committee discussion sheds little light on that last phrase. Some said there should be a good cause exception; others noted the case law was very strict. No one wanted to discuss what "whenever feasible" meant. Now that phrase has become the exception that threatens to swallow the rule. For a thorough and scholarly treatment of the history and implications of broad form submission see Dorsaneo, William V. III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601 (1992).

I. Preservation of Charge Error

The rules of procedure governing preparation of and complaints about the jury charge are set forth in Rules 271-279 of the Texas Rules of Civil Procedure. In *State Department of Highways & Public Transportation v. Payne*, the Supreme Court acknowledged that these rules were partly to blame for the "flaws" in Texas's charge procedures and that the process "ought to be simpler." 838 S.W.2d 235, 240, 241 (Tex. 1992). The court concluded:

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

Id. at 241; *see Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43-44 (Tex. 2007). Although *Payne* appears to have relaxed the procedure for preserving error, the court later made clear that it did not revise the rules of procedure or the requirements they set forth. *See Alaniz v. Jones & Neuse, Inc*., 907 S.W.2d 450, 451-52 (Tex. 1995). Instead, *Payne* mandates that those requirements "be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Id*. at 452. For a recent application of *Payne* where an appellee claimed something less than strict compliance with preservation rules, *see Hiles v. Arnie & Co., P.C.*, -- S.W.3d --, No. 14-12-00088-CV, 2013 WL 2120658 at *8 (Tex. App.—Houston [14th Dist.] Apr. 25, 2013, no pet. h.). The careful lawyer should continue to follow the strict requirements of the rules on jury charges, and rely on *Payne* only as a backup.

The traditional rules for preserving error have focused primarily on (1) whether the complaining party is attacking a missing element of the charge or a defective element of the charge, and (2) which party has the burden of proof on the charge element of which it complains.

The general rules on preserving charge error have not changed. Practitioners and courts, however, continue to struggle with how to apply those rules in practice. This section discusses the basic requirements of preservation and recent decisions construing those provisions.

A. Fundamental error does not eliminate the burden to preserve error

In a series of termination of parental rights cases, parties argued that broad-form issues did not require ten-juror agreement on the same grounds of termination and thus denied constitutional due process guarantees. In that set of cases the parties argued that such error was so fundamental as to not require preservation. The Supreme Court rejected that fundamental error argument and held unpreserved charge error (including alleged error as to broad-form issues) will not be reviewed on appeal. *In re B.L.D.*, 113 S.W.3d 340, 351 (Tex. 2003). Instead, traditional rules of preservation apply even in the constitutional context. *Id.*

B. Preserving complaints about the content of the charge

1. The Rules of Procedure

The Texas Rules of Civil Procedure set forth the following seemingly simple rules of preservation:

a. *Defective* Question, Definition, or Instruction:	Object
b. *Omitted* Definition or Instruction:	Request
c. *Omitted* Question—	
Party's Burden:	Request
Opponent's Burden:	Object

TEX. R. CIV. P. 274, 278, 279; *see Lyles v. TEIA*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e) (explaining requirements of rules); *see also Mason v. S. Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (written request serves same purpose as objection and thus in case of omitted question on which party does not hold the burden, request suffices).

Prior to *Payne*, some courts held that the Rules require that a party request *and* object, at least in certain situations. *See, e.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (party who would benefit from addition of limiting instruction to damage question must object to deficiency as submitted and request limiting instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, writ denied) (party who requests question, definition or instruction on which that party relies must also object).

Those courts generally relied on two rules to require an objection and a request: (1) Rule 274 provides that "[a]ny complaint . . . on account of an omission . . . is waived unless specifically included in the objections," and (2) Rule 278 requires a party relying on a question to submit a request. *See, e.g.*, *Wright Way*, 799 S.W.2d at 418. Moreover, when a party will benefit from a question, instruction or definition, courts have generally required the relying or benefiting party to make the trial court aware of the complaint by an articulated objection to avoid building error in the record with unexplained requests. *See id.*

As a result, knowing when to object and/or request (particularly in a broad-form context) was historically a difficult task. Some practitioners chose to always do both—object and request. Although *Payne* sought to eliminate some of the procedural difficulty associated with preservation, even under *Payne*, parties may want to continue to object and request, at least in some circumstances.

2. Preservation by request

a. Separate from objections

"A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge." TEX. R. CIV. P. 273; *see Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379-80 (Tex. 1985) (request dictated into record during objections did not preserve complaint).

b. Tendered to the court in writing

All requests must be tendered to the court in writing. TEX. R. CIV. P. 278; *see Woods*, 693 S.W.2d at 379-80 (request dictated into record did not preserve complaint).

c. In substantially correct wording

All written requests must be tendered to the trial court in substantially correct wording. TEX. R. CIV. P. 278; *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) ("[Substantially correct] means one that in substance and in the main is