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Jury Charge Update

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I. Introduction

In 1992, the Texas Supreme Court acknowledged that preserving charge error was difficult and that Texas Rule of Civil Procedure 271-279 were partly to blame for a system that “ought to be simpler.” *State Dep’t. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240-41 (Tex. 1992).

As a result, the Court suggested there should be but one test for determining whether a party preserved error and that is “whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.” *Id.* at 241.

There is no doubt that *Payne* is an important case, but the retention of the same rules of which the *Payne* court complained means that the strict requirements are still in force. This paper is an attempt to navigate through the jury charge rules.

II. Thanks

As with most CLE papers, this paper stands on the shoulders of previous papers drafted by selfless volunteer lawyers who gave their time to enhance continuing legal education. I am particularly indebted to the following articles from which I borrowed shamelessly:

- Wright, Hollenbeck, Taylor, and Tindall, *Jury Charges*, State Bar of Texas, Advanced Civil Appellate Practice Course (2014).
- Daryl L. Moore, *Jury Charge*, State Bar of Texas, Advanced Civil Appellate Practice 101 (2014).
- Gunn and Pfeiffer, *Preserving Error and Crafting the Jury Charge*, State Bar of Texas, Advanced Personal Injury Course (2013).

III. Preservation Under Rules 274, 278, and 279

The type of request necessary to preserve error depends on (1) whether the complaint is aimed at a question *or* an instruction or definition, and (2) who had the burden on the question or instruction. The following table helps me keep things straight.

1. Object or request

<u>Question</u>	<u>Defective</u>	<u>Omitted</u>
Your burden	Request/Object	Request
Opponent’s burden	Object	Object

<u>Instruction/Definition</u>	<u>Defective</u>	<u>Omitted</u>
Your burden	Request/Object	Request
Opponent’s burden	Object	Request

2. Preservation by request

a. Separate from objections

“A request . . . 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.

b. Tendered to the court in writing

All requests must be tendered to the court in writing. *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 379–80 (Tex. 1985) (holding that requests dictated into record during objections 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. Substantially correct form was defined as:

“Substantially correct . . . does not mean that it must be absolutely correct . . . it means one that in substance and in the main is correct, and is *not affirmatively incorrect*.”

Placencio v. Allied Indus. Int’l, Inc., 724 S.W.2d 20, 21 (Tex. 1987).

Relying on the Pattern Jury Charge submission is generally safe. The Supreme Court, however, has notoriously disapproved PJC submissions. *See Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (noting that tortious interference submissions model after the PJC was “not entirely correct.”)

d. Not obscured or concealed with minute variations and numerous unnecessary requests

Rule 274 cautions, “When the complaining party’s . . . requested question, definition or instruction is, in the opinion of the appellate court, obscured or concealed by minute differences or numerous unnecessary requests, such . . . shall be untenable.” Tex. R. Civ. P. 274.

Rule 274’s caution was adopted in response to objections made to granulated charges. For the most part, the need for this Rule has disappeared. Nonetheless, it is still in the book.

The key to avoiding a nullified objection request or instruction is to make sure that the matter is brought squarely to the trial court’s attention. A good example is *Hoffmann-La Roche, Inc. v. Zeltwanger*, 69 S.W.3d 634, 652 (Tex. App.—Corpus Christi 2002), *rev’d on other grounds*, 144 S.W.3d 438 (Tex. 2004) (holding limitations defense filed with numerous other instructions and questions was insufficient to preserve error when it was not brought to the attention of the trial judge). Additionally, the Supreme Court reached a similar conclusion in *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012) (holding that pretrial submission of questions not brought to the trial court’s attention in the formal charge conference did not preserve error).

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