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THE COURT'S CHARGE

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I. Introduction

In 1992, the Texas Supreme Court acknowledged that preserving charge error was confusingly difficult and that Texas Rules 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:

- Gunn and Pfeiffer, *Preserving Error and Crafting the Jury Charge*, State Bar of Texas, Advanced Personal Injury Course (2013).

- 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).

- Heidler, *Where the Pattern Jury Charge is Wrong*, State Bar of Texas, Advanced Civil Appellate Practice Course (2018).

- Busby and Y. Ho, *Crafting and Preserving Challenges to the Jury Charge*, State Bar of Texas, Advanced Civil Appellate Practice Course (2018) (originally written by Warren Harris, Jeffrey Oldom and Yvonne Ho).

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 us keep things straight.

1. Object or request?

Question	Defective	Omitted
Your burden	Request/Object	Request
Opponent's burden	Object	Object

Instruction/Definition	Defective	Omitted
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 (emphasis added).

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) (emphasis added).

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 modeled after the PJC was "not entirely correct.").

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

Rule 274 cautions, "[w]hen 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.

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