



# **GETTING THE CHARGE RIGHT & CHARGE ERROR PRESERVATION**

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Trials and Appeals in Civil Cases

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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 The statute was repealed in 1939.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.

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