

Presented:

The University of Texas School of Law
29th Annual Conference on State and Federal Appeals

June 20, 2019

THE COURT'S CHARGE

David Keltner
Joe Greenhill
Kelly Hart & Hallman LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
david.keltner@kellyhart.com
joe.greenhill@kellyhart.com
(817) 878-3560
(817) 878-3594

TABLE OF CONTENTS

	Page
I. Introduction	1
II. Thanks	1
III. Preservation Under Rules 274, 278, and 279	1
1. Object or request?	2
2. Preservation by request	2
a. Separate from objections.....	2
b. Tendered to the court in writing.....	2
c. In substantially correct wording.....	2
d. Not obscured or concealed with minute variations and numerous unnecessary requests	2
e. Signed as refused	3
3. Preservation by objection.....	3
a. Separate from requests	3
b. In writing or on the record	3
c. Pointing out the objectionable matter	3
d. Stating the grounds	4
e. Must not incorporate an objection from one part of charge to another	4
f. Must not be obscured or concealed by voluminous or unfounded objections.....	4
g. Ruled upon by the Court.....	4
4. <i>Payne</i> : Making the court aware of the complaint	5
a. Repetition is good	5
1. <i>Tichacek</i>	5
2. <i>Wackenhut</i>	5
3. Compare to <i>Cruz</i>	6
4. <i>Venture v. UTSW DVA Healthcare, LLP</i> , No. 16-0006 2019 WL 1873428 (Tex. April 26, 2019).....	6
b. Objection only.....	7
c. Request with objection.....	7
d. Request only.....	8
IV. The Bottom Line	8
1. Preservation trends.....	8
a. <i>Hernandez, Island Recreational and E.B.</i>	8
b. <i>Payne</i>	9
c. <i>Tichacek</i>	9
d. <i>Cruz</i>	9
e. <i>Wackenhut</i>	9
2. <i>Awareness at the appropriate time</i> is the key	10
V. The Limits of Broad Form Submission After <i>Casteel</i>	10
1. Broad form required “whenever feasible”	10
2. The high water mark of broad form.....	10
3. The water goes down: <i>Casteel</i> and <i>Harris County</i>	11
4. Subsequent cases.....	11
a. <i>Romero v. KPH Consol., Inc.</i>	11
b. <i>Bed, Bath & Beyond v. Urista</i>	12
c. <i>Columbia Rio Grande Healthcare v. Hawley</i>	12
d. The unanswered question: multiple factual theories—some not supported by the	

	evidence	13
	e. Preservation of <i>Casteel</i> complaints.....	13
VI.	Sufficiency of the Evidence Complaints on Legal Theories That Differ From the Submission	14
	1. Sufficiency measured against the defective charge	14
	2. <i>Brady v. Klentzman</i> , 515 S.W.3d 878, 885-86 (Tex. 2017).....	14
VII.	Omitted elements.....	14
	1. Conflict on how to review.....	14
	2. <i>Green v. Dallas Cty. Sch.</i> , 537 S.W.3d 501 (Tex. 2017).....	15
	3. <i>Longview Energy Co. v. Huff Energy Fund LP</i> , 533 S.W.3d 866, 875 (Tex. 2017) ..	16
VIII.	Preserving Complaints About Immaterial Findings	16
IX.	When No Objection is Needed	17
	1. <i>United Scaffolding, Inc. v. Levine</i> , 537 S.W.3d 463 (Tex. 2017).....	17
	2. <i>BP Am. Prod. Co. v. Red Deer Res., LLC</i> , 526 S.W.3d 389 (Tex. 2017).....	18
	3. <i>BP Am. Prod. Co. v. Laddex, Ltd.</i> , 513 S.W.3d 476, 486-487 (Tex. 2017).....	19
	4. <i>Longview Energy Co. v. Huff Energy Fund LP</i> , 533 S.W.3d 866, 875 (Tex. 2017) ..	20
X.	The Vexing Unavoidable Accident Submission	20
	1. Inferential rebuttal instruction.....	20
	2. Improper inclusion of an “unavoidable accident” instruction does not raise <i>Casteel</i> error.....	20
	3. Failure to give an “unavoidable accident” instruction, even where proper is not reversible error	21
XI.	Objection Checklist	21
	1. Omits a controlling issue or submits an issue not raised by pleadings and the evidence	21
	2. Misstates the law	22
	3. Fails to track statutory language	22
	4. Fails to properly place burden of proof.....	22
	5. Assumes the truth of a controverted fact	22
	6. Submits inferential rebuttal issues	22
	7. Direct comments on the weight of the evidence.....	22
	8. Informs the jury of the legal effect of their answers.....	23
	9. Improperly conditions one question on another (and denies claim or defense)	23
	10. Legal Insufficiency (“No Evidence”)	23
	11. Submission not supported by the pleading	23
	12. <i>Casteel</i> Error	24
XII.	Communications with the Jury After Submission.....	24
	1. Additional instructions.....	24
XIII.	Responding to the Jury’s Verdict	25
	1. Incomplete answers.....	25
	2. Conflicts: “Apparent and Fatal”.....	25
XIV.	Rule 11 Agreements Regarding the Charge	27

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>Acord v. Gen. Motors Corp.</i> , 669 S.W.2d 111 (Tex. 1984).....	5, 8
<i>Arvizu v. State of Puckett</i> , 369 S.W.3d 273-236 (Tex. 2012)	25
<i>Bed, Bath & Beyond v. Urista</i> , 211 S.W.3d 753 (Tex. 2006).....	12, 21, 22
<i>Benge v. Williams</i> , 548 S.W.3d 466 (Tex. 2018).....	13
<i>Borneman v. Steak & Ale of Tex., Inc.</i> , 22 S.W.3d 411 (Tex. 2000).....	22
<i>BP Am. Prod. Co. v. Laddex, Ltd.</i> , 513 S.W.3d 476 (Tex. 2017).....	19
<i>BP Am. Prod. Co. v. Red Deer Res., LLC</i> , 526 S.W.3d 389 (Tex. 2017).....	17, 18
<i>Brady v. Klentzman</i> , 515 S.W.3d 878 (Tex. 2017).....	14
<i>Burbage v. Burbage</i> , 447 S.W.3d 249 (Tex. 2014).....	24
<i>Byrne v. Harris Adacom Network Servs., Inc.</i> , 11 S.W.3d 244 (Tex. App.—Texarkana 1999, pet. denied)	23
<i>Carlton v. Cobank, Inc.</i> , No. 07-02-0258-CV, 2003 WL 1728493 (Tex. App.—Amarillo 2003, pet. denied) (mem. op.).....	3
<i>Carr v. Weiss</i> , 984 S.W.2d 753 (Tex. App.—Amarillo 1999, pet. denied).....	8
<i>Castleberry v. Branscum</i> , 721 S.W.2d 270 (Tex. 1986).....	3
<i>Celanese Ltd. v. Chem. Waste Mgmt., Inc.</i> , 75 S.W.3d 593 (Tex. App.—Texarkana 2002, pet. denied)	4

<i>City of Brenham v. Honerkamp</i> , 1950 S.W.2d 760 (Tex. App.—Austin 1997, writ denied)	4
<i>Cleveland Reg. Med. Ctr., L.P. v. Celtic Props. L.C.</i> , 323 S.W.3d 322 (Tex. App.—Beaumont 2010, pet. denied).....	8
<i>Clifton v. Koontz</i> , 160 Tex. 82, 325 S.W.2d 684 (1959).....	19
<i>Columbia Med. Ctr. of Las Colinas v. Bush</i> , 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. denied)	13
<i>Columbia Rio Grande Healthcare, L.P. v. Hawley</i> , 284 S.W.3d 851 (Tex. 2009).....	12
<i>Crown Life Ins. Co. v. Casteel</i> , 22 S.W.3d 378 (Tex. 2000).....	7, 10, 11, 24
<i>Cruz v. Andrews Restoration, Inc.</i> , 364 S.W.3d 817.....	3, 6, 7, 9
<i>Dallas Mkt. Ctr. Dev. Co. v. Liedeker</i> , 958 S.W.2d 382 (Tex. 1997), <i>overruled in part on other grounds</i> , <i>Torrington</i> <i>Co. v. Stutzman</i> , 46 S.W.3d 829 (Tex. 2000).....	3, 5
<i>Delaney v. Scheer</i> , No. 03-02-00273-CV, 2003 WL 247110 (Tex. App.—Austin 2003, no pet.) (mem. op.).....	4
<i>Diamond Offshore Mgmt. Co. v. Guidry</i> , 171 S.W.3d 840 (Tex. 2005).....	22
<i>Doe v. Mobile Video Tapes, Inc.</i> , 43 S.W.3d 40 (Tex. App.—Corpus Christi 2001, no pet.)	4, 7, 8
<i>Editorial Caballero, S.A. C.V. v. Playboy Enters., Inc.</i> , 359 S.W.3d 318 (Tex. App.—Corpus Christi 2012, pet. denied).....	14
<i>Elbaor v. Smith</i> , 845 S.W.2d 240 (Tex. 1992).....	21
<i>Exxon Corp. v. Breezevale Ltd.</i> , 82 S.W.3d 429 (Tex. App.—Dallas 2002, pet. denied).....	14
<i>First Valley Bank of Los Fresnos v. Martin</i> , 144 S.W.3d 466 (Tex. 2004) (Wainwright, J., concurring).....	8
<i>Ford Motor Co. v. Castillo</i> , 444 S.W.3d 616 (Tex. 2014).....	24

<i>Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Ill.</i> , 21 S.W.3d 419 (Tex. App.—San Antonio 2000).....	7
<i>Gibbons v. Berlin</i> , 162 S.W.3d 335 (Tex. App.—Fort Worth 2005, no pet.).....	21, 23
<i>Green v. Dallas Cty. Sch.</i> , 537 S.W.3d 501 (Tex. 2017).....	15
<i>Greene v. Farmers Ins. Exch.</i> , 446 S.W.3d 761 (Tex. 2014).....	15
<i>Greenstein, Logan & Co. v. Burgess Mktg., Inc.</i> , 744 S.W.2d 170 (Tex. App.—Waco 1987, writ denied)	22
<i>Gunn v. McCoy</i> , 554 S.W.3d 645 (Tex. 2018).....	21
<i>H.E. Butt Groc. Co. v. Bilotto</i> , 985 S.W.2d 22 (Tex. 1998).....	23
<i>Halmos v. Bombardier Aerospace Corp.</i> , 314 S.W.3d 606 (Tex. App.—Dallas 2010, no pet.).....	22
<i>Harris County v. Smith</i> , 96 S.W.3d 230 (Tex. 2002).....	11, 23
<i>Hernandez v. Montgomery Ward & Co.</i> , 652 S.W.2d 923 (Tex. 1983).....	8
<i>HMC Hotel Props. II, LP v. Keystone-Texas Prop. Holding Corp.</i> , No. 04-10-00620 2011 WL 5869608 (Tex. App.—San Antonio 2011) <i>reversed on other grounds</i> , 439 S.W.3d 910 (Tex. 2014)	25
<i>Hoffmann-La Roche, Inc. v. Zeltwanger</i> , 69 S.W.3d 634 (Tex. App.—Corpus Christi 2002), <i>rev'd on other grounds</i> , 144 S.W.3d 438 (Tex. 2004).....	3
<i>Holland v. Wal-Mart Stores, Inc.</i> , 1 S.W.3d 91 (Tex. 1999).....	17
<i>Holubec v. Brandenberger</i> , 111 S.W.3d 32 (Tex. 2003).....	7
<i>In re B.L.D.</i> , 113 S.W.3d 340 (Tex. 2003).....	9
<i>In re V.L.K.</i> , 24 S.W.3d 338 (Tex. 2000).....	22

<i>Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n</i> , 710 S.W.2d 551 (Tex. 1986).....	9, 10
<i>Lemos v. Montez</i> , 680 S.W.2d 798 (Tex. 1984).....	22
<i>Longview Energy Co. v. Huff Energy Fund LP</i> , 533 S.W.3d 866 (Tex. 2017).....	16, 19
<i>M.D. Mark, Inc. v. PIHIP'ship</i> , No. 01-98-00724-CV, 2001 WL 619604 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (not designated for publication).....	7
<i>Maddox v. Denka Chem. Corp.</i> , 930 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1996, no writ).....	22
<i>Mason v. S. Pac. Transp. Co.</i> , 892 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1994, writ denied).....	8
<i>Maxus Energy Corp. v. Occidental Chem. Corp.</i> , 244 S.W.3d 875 (Tex. App.—Dallas 2008, pet denied).....	22
<i>Methodist Hosp. of Dallas v. Corporate Communicators, Inc.</i> , S.W.2d 879, 885 (Tex. App.—Dallas 1991, writ denied).....	24
<i>Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.</i> , 236 S.W.3d 765 (Tex. 2007).....	7
<i>Miga v. Jensen</i> , 96 S.W.3d 207.....	7
<i>Mission Park Funeral Chapel, Inc. v. Gallegos</i> , No. 04-00-00459-CV, 2001 WL 488007 (Tex. App.—San Antonio 2001, no pet.) (not designated for publication).....	7
<i>Osterberg v. Peca</i> , 12 S.W.3d 31 (Tex. 2000).....	14, 25
<i>Pathfinder Oil & Gas, Inc. v. Great Western Drilling, Ltd.</i> , No. 18-0186, 2019 WL 2256658 (Tex. May 24, 2019).....	27
<i>Perry & Perry Bldrs., Inc. v. Galvan</i> , No. 03-02-00091, 2003 WL 21705248 (Tex. App.—Austin July 24, 2003), appeal dism'd, 2003 WL 22024263 (mem. op.).....	14
<i>Placencio v. Allied Indus. Int'l, Inc.</i> , 724 S.W.2d 20 (Tex. 1987).....	2, 22
<i>Primrose Operating Co. v. Jones</i> , 102 S.W.3d 188 (Tex. App.—Amarillo 2003, pet. denied).....	7

<i>Romero v. KPH Consol., Inc.</i> , 166 S.W.3d 212 (Tex. 2005).....	11, 12
<i>Ron Craft Chevrolet, Inc. v. Davis</i> , 836 S.W.2d 672 (Tex. App.—El Paso 1992, writ denied).....	4
<i>Rosell v. Cent. W. Motor Stages, Inc.</i> , 89 S.W.3d 643 (Tex. App.—Dallas 2002, pet. denied).....	3
<i>S.E. Pipe Line Co. v. Tichacek</i> , 997 S.W.2d 166 (Tex. 1999).....	5, 9
<i>Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.</i> , 78 S.W.3d 425 (Tex. App.—Tyler 2001, pet. granted, judgm't vacated w.r.m.).....	7
<i>Scott v. Atchison, Topeka & Santa Fe Ry. Co.</i> , 572 S.W.2d 273 (Tex. 1978).....	13, 22
<i>Scroggs v. Morgan</i> , 130 S.W.2d 283 (Tex. 1939).....	24
<i>Smith v. Henson</i> , 270 S.W.3d 673 (Tex. App.—Fort Worth 2008, pet denied)	24
<i>Smith-Hamm, Inc. v. Equip. Connection</i> , 946 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1997, no writ)	7
<i>St. Joseph Hosp. v. Wolff</i> , 94 S.W.3d 513 (Tex. 2002).....	14
<i>State Dep't of Highways & Public Transp. v. Payne</i> , 838 S.W.2d 235 (Tex. 1992).....	1, 5, 9
<i>State v. Williams</i> , 940 S.W.2d 583 (Tex. 1996).....	22
<i>Stevens v. Travelers Ins. Co.</i> , 563 S.W.2d 223 (Tex. 1978).....	25
<i>Tex. Comm'n on Human Rights v. Morrison</i> , 381 S.W.3d 533 (Tex. 2012).....	4
<i>Tex. Dep't of Human Services v. E.B.</i> , 802 S.W.2d 647 (Tex. 1990).....	9, 10
<i>Tex. Mut. Ins. Co. v. Boetsch</i> , 307 S.W.3d 874 (Tex. App.—Dallas 2010, pet. denied).....	22
<i>Thota v. Young</i> , 366 S.W.3d 678 (Tex. 2012).....	13, 20, 24

Timberwalk Apts., Partners, Inc. v. Cain,
972 S.W.2d 749 (Tex. 1998).....21

United Scaffolding, Inc. v. Levine,
537 S.W.3d 463 (Tex. 2017).....17, 23

USAA Texas Lloyds Co. v. Menchaca,
545 S.W.3d 479 (Tex. 2018).....25, 26, 27

Varme v. Gordon,
881 S.W.2d 877 (Tex. App.—Houston [14th Dist.] 1994, writ denied).....23

Venture v. UTSW DVA Healthcare, LLP,
No. 16-0006, 2019 WL 1873428 (Tex. April 26, 2019).....4, 6

Wackenhut Corp. v. Gutierrez,
453 S.W.3d 917 (Tex. 2015).....5, 9

Wal-Mart Stores, Inc. v. McKenzie,
997 S.W.2d 278-80 (Tex. 1999)17

Wal-Mart Stores, Inc. v. Sturgis,
52 S.W.3d 711 (Tex. 2001).....2

Wal-Mart Stores v. McKenzie,
997 S.W.2d 278 (Tex. 1999).....23

Weitzul Constr., Inc. v. Outdoor Environs,
849 S.W.2d 359 (Tex. App.--Dallas 1993, writ denied).....22

Wiggins v. Cameron,
763 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1988, writ denied).....22

Woods v. Crane Carrier Co.,
693 S.W.2d 377, 379–80 (Tex. 1985).....2

Woods v. Crane Carrier Co.,
693 S.W.2d 377, 379-80 (Tex. 1985)2

State Rules

Rule 274.....2, 3, 4

Rule 286.....24

Tex. R. Civ. P. 272.....3, 4

Tex. R. Civ. p. 273.....2, 3

Tex. R. Civ. p. 274.....4

The Court's Charge

Tex. R. Civ. P. 276.....3

Tex. R. Civ. P. 277.....10, 22, 23

Tex. R. Civ. P. 278.....2, 21, 23

Tex. R. Civ. P. 289.....24

Tex. R. Civ. P. 295.....25

Gunn and Pfeiffer, *Preserving Error and Crafting the Jury Charge*,
State Bar of Texas, Advanced Personal Injury Course (2013)9, 12

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?

<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 (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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Court's Charge

Also available as part of the eCourse

[2019 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the 29th Annual Conference on State and Federal Appeals session "Jury Charge Update"