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**Analyzing Legal and Factual Sufficiency Issues,  
Recent Supreme Court of Texas Cases**

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## INTRODUCTION

This article discusses how to analyze legal and factual sufficiency issues. It presents some analytical tools—including the Zones of Evidence construct, evidentiary categories, and specific questions—and it examines a few recent supreme court cases on sufficiency issues.

## BACKGROUND

For more than a century, Texas courts and commentators have written about how to analyze legal and factual sufficiency issues, *see, e.g., Joske v. Irvine*, 44 S.W. 1059, 1062, 1064 (Tex. 1898) (opining that “great difficulty has been experienced in determining the exact legal meaning of the phrase ‘any evidence’” and reversing a jury verdict because “[t]here [was] no direct testimony [to support the charge question] and we are of the opinion that such fact cannot be reasonably inferred from the circumstances”), and some of the challenges still persist.

In an article from six decades ago, some of Justice Calvert’s musings then still sound familiar today.

It was thought that the per curiam opinion of the [s]upreme [c]ourt in *In re King’s Estate* and the publication of former Associate Justice Garwood’s excellent article, *The Question of Insufficient Evidence on Appeal*, would resolve, both for lawyers and judges of Courts of Civil Appeals, most of the problems growing out of points of error challenging a verdict or judgment because of a lack of evidence or lack of sufficient evidence to support it, or because it is contrary to the great weight and preponderance of the evidence; but a growing number of recent decisions indicate a continuing misunderstanding in some quarters of the nature and office of points of error of that type, justifying, it seems to the writer, a somewhat more analytical discussion of the subject.

Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 TEX. L. REV. 361, 364 (1960) (footnotes omitted) (citing *In re King’s Estate*, 244 S.W.2d 660 (Tex. 1951) (per curiam); W. St. John Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803 (1952)).

Justice Calvert’s article distinguished legal and factual sufficiency points and commented on how to evaluate each type; this article continues the discussion using some recent supreme court cases.

## ARTICLE’S GOALS

Before examining the cases, this article discusses some analytical tools. The tools provide some structure and methods for analyzing cases. The tools may be familiar or new, but the real value in this article is in the questions it raises in your mind—and the answers you find—pertaining to analyzing legal and factual sufficiency issues.

## ZONES OF EVIDENCE INTRODUCTION—DON’T SKIP THIS PARAGRAPH

This article begins with the Zones of Evidence construct because it is a powerful, multipurpose tool. As experienced appellate practitioners, you may feel the construct is remedial, but not every judge or justice, new associate, or client has your experience and understanding of appellate law. If you do not already know and use the Zones of Evidence in your practice, you

may benefit from studying the construct<sup>1</sup> and at least skimming the following paragraphs. The construct can, among other things, help you explain concepts to clients, train new associates, and persuade courts on sufficiency of the evidence questions.

### ZONES OF EVIDENCE CONSTRUCT

Many lawyers are quite comfortable arranging lots of complex concepts from words alone. But some, like me, need a picture<sup>2</sup> to transform a maelstrom of words into a comprehensible scene.

#### A. Big Picture

The Zones of Evidence construct is “the big picture” for evidentiary standards. It sorts evidentiary standards, procedures, and remedies into sets according to the quantum of evidence the proponent has produced.

The construct recognizes there are five zones of evidence—where each zone has certain characteristics and for which there is an associated body of law. The construct is a way to organize those bodies of law. The construct does not change the law, but it can change how you understand and argue the law with respect to the evidence.

The construct—as represented by the Zones of Evidence diagram—organizes the types of evidentiary challenges, the procedures to raise a challenge, the standards of review, and the relief available based on the zone of evidence to which each applies.

#### B. Five Zones

The zones are a graphical representation of an evidentiary spectrum from the evidentiary proponent’s perspective. The diagram shows how, as the proponent puts on an increasing quantum of probative evidence, the evidence crosses defined legal boundaries.

Zones 1 and 5 are the two ends of the spectrum: Zone 1 on the left; Zone 5 on the right. The evidence’s path starts in Zone 1; the proponent’s goal is to present enough evidence to advance it from left to right all the way to Zone 5. As the proponent puts on admissible, direct evidence of the vital fact, the quantum of evidence advances into Zone 2, potentially into Zone 3 or Zone 4, and ideally reaches Zone 5. Zone 5 represents the evidence needed for the proponent to prevail on a question as a matter of law.

Each of the zones has an associated descriptor, a type of evidentiary challenge, procedures to raise the challenge, a standard of review, and available relief. For example, Zone 1 is described as the no evidence zone—where the proponent has produced no evidence of legal consequence, and the opponent challenges the evidence using a legal sufficiency challenge such as a no-evidence motion for summary judgment.

The court will review the evidence to determine whether there is any evidence to support the finding, and if not, it will grant the opponent’s motion.

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<sup>1</sup> See generally William Powers Jr. & Jack Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence,”* 69 TEX. L. REV. 515 (1991); Alex Wilson Albright & David Peeples, TEXAS COURTS: TRIAL & APPEAL 10–71 (12th ed. 2007) (featuring a lengthy excerpt from the Powers and Ratliff article, and additional instructional material); Matthew S. Compton, *How to Win Using the Zones of Evidence*, in SOAKING UP SOME CLE: A SOUTH TEXAS LITIGATION COURSE (2018).

<sup>2</sup> See Appendix I, Zones of Evidence Diagram.

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