Preserving Error And How To Appeal

ANDREW B. SOMMERMAN
Sommerman & Quesada, L.L.P.
3811 Turtle Creek Boulevard, Suite 1400
Dallas, TX 75219

State Bar of Texas
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ANDREW B. SOMMERMAN

3811 Turtle Creek Blvd., Suite 1400
Dallas, Texas 75219
(214) 720-0720

POSITION: Senior Partner, Sommerman & Quesada L.L.P., 1991- Present

EDUCATION: Juris Doctorate, South Texas College of Law, 1986
Bachelor of Arts, University of Texas at Arlington, 1983

TEACHING EXPERIENCE:

Coach, Southern Methodist University, Mock Trial, Presently
Adjunct Professor, University of Texas at Arlington, 1999-Present
Adjunct Professor, Tarrant County Junior College, 1990-1992
Adjunct Professor, South Texas College of Law, 1986

BOARD CERTIFICATION:

Personal Injury Trial Law, 1997-Present
Texas State Bar College, 2000-Present

PAST EXPERIENCE:

Associate, Brown, Maroney and Oaks Hartline, 1990-1991
Associate, Law Offices of Windle Turley, 1986-1990
Research Assistant, South Texas College of Law, 1983-1985
Assistant to the City Manager, Town of Pantego, 1981-1983
Congressional Investigator, United States Congress, 1980-1981

LICENSES: Licensed by the Texas Bar, 1986
Licensed by the Federal District Court of the Northern District of Texas, 1986

BOOKS: How to Please the Court: A Moot Court Handbook, Sommerman, Knerr, Weizer et al, Peter Laws Publishing, 2004.

PRESENTATIONS AND PUBLICATIONS:

"Damages" paper delivered to the Continuing Legal Education Evidence Seminar of the University of Houston, January, 2004.

"Undergraduate Moot Court," Knerr, Charles R. and Andrew B. Sommerman; Published, 21 NAPLA Notes 53-56 (2003).

"Evidence on Damages" paper delivered to the Continuing Legal Education Evidence Seminar of the University of Houston, February, 2003.

"Undergraduate Appellate Simulation in American Colleges," Knerr, Charles R.; Andrew B. Sommerman; Suzy K. Rogers; Accepted for publication, in the Journal of Legal Studies Education, 2003.

"Expert Witnesses," South Texas College of Law, Automobile Injury Conference, 2003.

"Pleading, Proving and Defending Against Damages" paper delivered to the Advanced Personal Injury and Insurance Seminar, University of Houston Law Foundation, June, 2003.

"Venue and Forum Shopping" paper deliverd to the Advanced Civil Law Conference, South Texas College of Law, February, 2002.

"Bringing the Supreme Court into the Undergraduate Classroom: Appellate Simulation in American Colleges," Knerr, Charles R. and Andrew B. Sommerman; Accepted for publication, April 2001, in Law and Courts.

"Bringing the Courtroom into the Undergraduate Classroom: Appellate Simulation in American Colleges," Knerr, Charles R. and Andrew B. Sommerman; Accepted for publication, in Undergraduate Educator.

"Variation in the Conduct of Undergraduate Moot Court," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on March 15, 2001 at Annual Meeting of the Western Political Science Association, Las Vegas.

"Discovery Under The Not-So-New Rules," paper delivered on March 1, 2001 at the Advanced Personal Injury Seminar, South Texas College of Law.

"Forum Shopping," paper delivered on February 23, 2001 at the Multi-Party Litigation Seminar offered by the University of Houston Law School.

"Undergraduate Moot Court: Research Agenda," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on February 22-25, 2001 at Pacific Academy of Legal Studies in Business Annual Meeting (Palm Springs, California).

"Undergraduate Appellate Simulation in American Colleges and Universities," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on November 11, 2000 at National Communication Association Annual Meeting (Seattle).

"Undergraduate Moot Court: A Comparison with Law School and Appellate Practice," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on August 31, 2000 at American Political Science Association Annual Meeting (Washington, D.C.)

"Expert Witnesses and Their Evidence: Reliability and Relevance (Robinson Turns 5)," paper delivered on April 13, 2000 at the Advanced Personal Injury Seminar offered by the South Texas College of Law.

"Undergraduate Appellate Simulation in American Colleges and Universities," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on November 11, 2000 at National Communication Association Annual Meeting (Seattle).

"Depositions Under The Rules of Civil Procedure," paper delivered to the Civil Discovery Conference offered by the University of Houston Law School on April 14, 1999, January 27, 2000; and February 3, 2000.

"Evidence and Discovery: A New Ball Game," paper delivered to the Advanced Personal Injury Conference on August 26, 1999 offered by the University of Houston Law School.

"Undergraduate Appellate Simulation in American Colleges and Universities," Knerr, Charles R. and Andrew B. Sommerman; paper delivered on March 16, 2000 at Southwestern Political Science Association Annual Meeting (Galveston, Texas).

"Demonstrative Evidence," paper delivered to the Advanced Personal Injury Seminar in June 1999 offered by the State Bar of Texas.

"How to present a Soft Tissue Injury Case," paper delivered to the Automobile Injury Conference on April 23, 1999, May 15, 1998, April 14, 1997 and July 17, 1996; offered by the South Texas College of Law.

"Injuries in a Soft Tissue Injury Case," paper delivered to the Insurance Law Seminar on May 14, 1998; and May 16, 1997, offered by the University of Houston Law School.

"Mechanism of Harm in Head Injury Cases," paper offered to the Traumatic Brain Injury Conference on August 27, 1997 offered by Lorman Education Center.

"Proving Difficult Damages," paper offered to the Advanced Personal Injury and Insurance Law Course on May 1, 1997, May 1996 and February 1995; offered by the University of Houston Law School.

"Admissibility of Medical Evidence," paper delivered in May 1994 to the Advanced Personal Injury Seminar offered by the South Texas College of Law.

HONORS: Super Lawyers - Texas Monthly
Moot Court Champion - multiple competitions
Phi Delta Phi - Honor Society
Amjur award in Torts
Chief Prosecutor of the Honor Court
Nationally ranked debate team
Phi Sigma Alpha (honor society) - President
Who's Who in America

ORGANIZATIONS:

Past Director and current member, Texas Trial Lawyers Association
Past Director and current member, Dallas Trial Lawyers Association
Member, American Trial Lawyers Association
Member, American Bar Association
Member, Dallas Bar Association

OTHER EXPERIENCES:

Third place Greenville race track demolition derby, 1978.
Successfully rode the bull "Buttercup" at the Mesquite Rodeo, 1977

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PRESERVING ERROR AND HOW TO APPEAL

I. INTRODUCTION

A. Abstract

Preserving error at the trial court level is a crucial element of practice that presents numerous pitfalls for unaware or unprepared attorneys. Walking through the entire trial process, from pleading to post-verdict motions, this article seeks to sift through the complexity and provide lawyers with knowledge of the steps involved in preserving error.

B. Preservation Basics

Preservation of error is one of the most fundamental aspects of the appellate process. Unfortunately, the heat of trial serves to make these sometimes complicated and arcane procedures a trap for unwary lawyers. Failure to preserve error moots even the most sophisticated argument on appeal. As a result, mastery of these rules is a prerequisite to zealous and effective advocacy on behalf of your client.

Rule 33.1 is the controlling rule on the preservation issue.[1] The rule requires, generally, that the record show a complaint to the trial court by timely request, objection, or motion. TEX. R. APP. 33.1. Additionally, the objection must be specific enough that the trial court is aware of the complaint. The trial court must also make an implicit or explicit ruling on the issue. At the very least, the trial court must refuse to rule, coupled with an objection by the complaining party.

An objection is sufficiently specific if it identifies the issue, allows the trial court to make an informed ruling, and permits the other party to remedy the defect if it can. *McKinney v. Nat'l United Firestone Co.*,

[1] Appendix A contains the rule in full.

772 S.W.2d 72, 74 (Tex. 1989). The trial court's ruling may be either express or implied, as long as the record clearly indicates the trial court's decision. TEX. R. APP. P. 33.1(a). The safest course of action, however, is to obtain a signed order that rules on the motion, objection, or request.

Important prudential considerations underscore the preservation rules. The preservation serves three principal purposes.

Conserving Judicial Resources: Requiring parties to raise complaints at trial conserves judicial resources by giving trial courts an opportunity to correct an error before an appeal proceeds. This procedure allows the trial court to serve as gatekeeper, limiting the flow of litigation to the appellate courts.

Promotes Fairness: A party should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time. The preservation system prevents this kind of ambush-style litigation.

Increase Accuracy of Judicial Decision Making: Giving trial courts the first opportunity to consider and rule on error allows the parties to develop and refine their arguments. Judicial review further focuses and analyzes the question at issue, ensuring it is decided correctly.

See In re B.L.D., 113 S.W.3d 340, 350 (Tex. 2003).

Therefore, error must be preserved at the trial stage, and the error must be raised on appeal in order to justify reversing judgement. *See In re V.L.K.*, 24 S.W.3d 338, 343-44 (Tex. 2000) (stating that "[a] party complaining of charge error must properly preserve error in the trial court and must raise the issue on appeal").

Additionally, it is important to remember that error is not automatically reversible. Counsel must also demonstrate that harm results from the error if the error is to be reversed. Harmful error is a specific term of art. Counsel must demonstrate that a different judgment probably would have been entered but for the error. Including an explanation of the resulting harm when making the objection helps to prove this key element on appeal.

What follows is a brief summation of the steps required to sufficiently preserve error at the various stages of trial.

II. PRETRIAL PROCEEDINGS AND MOTION PRACTICE

Compared to the complex processes involved in preserving error in voir dire, preserving error in other pretrial proceedings is a relatively straightforward process. Generally, error is preserved via objection, but there are some other mechanisms to be aware of.

A. Pleadings

Despite relatively lax pleading requirements in the state of Texas, a party filing a lawsuit is required to plead each ground for recovery it seeks. If the defect you are challenging is non-jurisdictional, preserve error by filing a special exception.

1. Special Exceptions

To object to a party's deficient pleading, a filed special exception must state the pleading deficiency "intelligently and with particularity," such that it sufficiently notifies the opposing party of the defect. TEX. R. CIV. P. 91. To ensure that the special exception comes to the attention of the trial judge, obtain a hearing. This ensures that the special exception is brought to the judge's attention in a timely fashion.

Generally, if the trial court sustains a special exception, it must give the non-excepting party the opportunity to amend. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). If the non-excepting party believes that the trial court committed error by granting the special exception, the party can preserve error for appeal by refusing to amend the petition. *Fuentes v. McFadden*, 875 S.W.2d 772, 779 (Tex. App.—El Paso 1992, no writ).

2. Amendments

A party may file an amended pleading within seven days of trial only if the party has leave of the court. TEX. R. CIV. P. 63.To preserve the right to complain about the court's error in granting a motion for leave to amend, move for a continuance alleging surprise and seek attorneys' fees. *State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656 (Tex. 1994). To preserve the right to complain when a pleading is untimely filed, a party must move to strike. *Forscan Corp. v. Dresser Ind.*, 789 S.W.2d 389 (Tex. App.—Houston [14th Dist.] 1990, no writ).

B. Jurisdiction and Venue Issues

A Texas court does not have personal jurisdiction over non-resident defendants beyond what the Due Process Clause and the Texas Long-Arm statute provide. Unlike subject matter jurisdiction, which can be raised at any time on appeal regardless of whether the party raised the issue below, issues related to personal jurisdiction and venue must be preserved or the party risks waiving any challenges on appeal.

1. Special Appearances

One mechanism in place to challenge personal jurisdiction is the special appearance. Special appearances allow parties to contest personal jurisdiction without risking waiver via general appearance. An order denying a special appearance is interlocutory, allowing for immediate appeal.

To preserve error in a special appearance, comply strictly with the requirements of TEX. R. CIV. P. 120a. The party challenging jurisdiction must file the appearance before any other plea, pleading or motion. TEX. R. CIV. P. 120a(1). At the hearing, get a clear ruling on every objection. On appeal, make sure to challenge the trial courts findings of fact in addition to its legal conclusions, or the facts will have the weight and effect of a jury verdict. *Mondial, Inc. v. Karcher*, No. 01-03-01311-CV, 2004 WL 1351506 at *1 (Tex. App.–Houston 2004, no pet.).

2. Motion to Transfer Venue

It is the responsibility of the plaintiff to establish proper venue. Thus, it is the defendant's responsibility to challenge venue if the party believes venue to be improper. The motion to transfer venue must be filed concurrently or before the first responsive pleading (except special appearances), or the party risks waiving any right to appeal. Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 St. Mary's L.J. 997 (1999).

In addition to filing the motion concurrently with or prior to any other plea, the motion can be accompanied by affidavits supporting the venue facts. *Id.* at 1021. The affidavits do not necessarily need to be verified to properly preserve error. *Id.* The motion should "state that the county where the action is pending is not proper under either mandatory or permissive venue statutes." *Id.* Further, it is imperative for the challenging party to specifically deny each asserted fact relating to venue. *Id.* at 1022.

A plaintiff is not required to file a written response to successfully preserve error on appeal in a change of venue situation. *See Watson v. City of Odessa*, 893 S.W.2d 197, 200 (Tex. App.–El Paso 1995, writ denied). However, if the party decides to file one, and the defendant has specifically denied venue facts, it is the plaintiff's burden to establish support of venue facts via verified affidavit. *Id.* at 1023.

C. Summary Judgment Issues

Summary judgment practice has grown exponentially in Texas courts in recent years. Because of the added importance of summary judgment motions, preservation of error rises to a greater degree of importance as well.

On most occasions, a party cannot appeal a summary judgment denial because the denial is not a final judgment. *See*

Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980). As a result, most summary judgment challenges occur when judgment has been granted. A party should adhere closely to TEX. R. CIV. P. 166a when appealing a granted summary judgment.

1. Defect in the Motion

If a party wishes to challenge a defect in the motion itself, the party should undergo the same procedures detailed above related to pleading defects. Defects in the form of the pleading must be pointed out by special exception. If sustained, the opposing party must be given an opportunity to amend, and the opposing party must refuse to amend for error to be preserved. *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). For instance, to preserve a complaint that movant's grounds are unclear, specially except in writing before the hearing. *Lavy v. Pitts*, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied).

2. Nonmoving Party Seeking Additional Time for Discovery

Occasionally, a nonmoving party may object to a ruling on summary judgment due to inadequate time for discovery. Reversible error can occur if a judge improperly rules before allowing adequate discovery time. To preserve this error, the nonmoving party should first file an affidavit explaining its need for further discovery or file a motion for continuance. *Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex. 1996).

Next, the party should obtain ruling via a signed order. Though some courts have held that a trial court implicitly overrules a request for additional time for discovery when it decides the summary judgment motion, the safer course of action is to obtain the order. *Dagley v. Haag Eng'g Co.*, 18 S.W.3d 787, 795 n. 1 (Tex. App.—Houston [14th Dist.] 2000, no pet.). If these steps are properly completed, the error is properly preserved for the next stage of the process.

3. Evidentiary Objections

Defects in summary judgment evidence generally do not rise to the requisite level harmful error. However, if a party is attacking the evidence on appeal, it must have been preserved correctly.

If a party files an affidavit opposing your summary judgment motion, you must file a written objection specific enough to allow the opposing party to remedy the defect. Randy Wilson, *A View From the Bench: Why Can't Lawyers Preserve Objections?*, 69 Tex. B.J. 316, 318 (April 2006). Simply

filing the objection is not enough, however. You must obtain a ruling to preserve for appeal, in writing, signed, and entered of record. *Id*; *Eads v. American Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App.—Waco 1992). The written ruling should occur at, before, or very near the time the trial court rules on the summary judgment motion, or the party risks waiver. *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Failure to object only results in waiver of form objections. Wilson, 69 Tex. B.J. at 319. Form objections to an affidavit include hearsay, that the affiant is not competent, or that the affidavit is not based on personal knowledge. *Id.* These objections must be preserved, unlike substantive objections. Substantive objections may be raised for the first time on appeal. Substantive objections include allegations that the affidavit is not signed, or that the affidavit contained conclusions and unsubstantiated opinions. *Id; See De Los Santos v. Sw. Tex. Methodist Hosp.*, 802 S.W.2d 749, 755 (Tex. App.–San Antonio 1990, no writ).

D. Other Pretrial Motions and Hearings

1. Hearings Generally

On most motions, a party does not waive error by simply failing to obtain a hearing on a particular motion. Debbie McComas & Ben Mesches, *Preserving Error Before Trial*, 29 The Advoc. (Texas) 18, 21 (Winter 2004). However, if a particular motion requires the presentation of evidence and no hearing is held, any error is waived. Since the appellant always has the burden of proffering the record to show error, ensure that all evidentiary hearings are on the record. *Id.*

2. Motion for Continuance

In their helpful article about preserving error in pretrial motions, McComas and Mesches write that to preserve error regarding a motion for continuance sought to complete discovery, a party should:

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(3) explain the cause of your failure to obtain it;

(4) show the evidence is not available from other sources; and

(5) state that the continuance is not for delay only, but so that justice will be done.

Id.; TEX. R. CIV. P. 251; *Laughlin v. Bergman*, 962 S.W.2d 64, 65 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd).

A party that completes these steps will be able to appeal an adverse ruling on the issue.

3. Sanctions

A trial court also has discretion to impose sanctions for discovery abuses. A party seeking to challenge a trial court's sanctions ruling must properly preserve it at the trial court level. Debbie McComas & Ben Mesches, *Preserving Error Before Trial*, 29 The Advoc. (Texas) 18, 21 (Winter 2004).

If the discovery sanctions are preclusive in nature, the party must ensure that he or she makes a proper "offer of proof," pursuant to TEX. R. EVID. 103(a)(2). A "short, factual recitation of what the testimony would show is sufficient 'evidence' to preserve an issue for appeal." *In re N.R.C.*, 94 S.W.3d 799, 804 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Without this offer of proof, the appellate court has no basis for review. David E. Keltner, *Tex. Prac. Guide: Discovery* § 12.179 (2013). Additionally, attorneys should be aware that a complaining motion containing only the name of the client is not sufficient to preserve error as to additional sanctions against the attorney as well. *Valdez v. Valdez*, 930

S.W.2d 725, 728 (Tex. App.—Houston [1st Dist.] 1996, no writ).

4. Motion in Limine

In Texas state court, motions in limine are designed to require a party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury. Elaine A. Grafton Carlson, *McDonald & Carlson Tex. Civ. Prac.* § 19:3 (2d ed. 2012). Simply put, a complaint that a judge improperly excluded evidence can in no way be predicated on an adverse ruling on a motion in limine. Randy Wilson, *A View From the Bench: Why Can't Lawyers Preserve Objections?*, 69 Tex. B.J. 316 (April 2006).

A party that wishes to challenge the admissibility of evidence on appeal should not rely on motion in limine rulings for preservation of error purposes. Any challenges to the admissibility of evidence should be raised by objection at trial.

Accordingly, post-verdict challenges of the reliability of testimony are barred unless the reliability has been properly objected to before or at trial. Tracy C. Temple and Jacalyn A. Hollabaugh, *Expert Witness Issues on Appeal in State and Federal Court: Securing the Record From Adverse Robinson/Havner Rulings and the Standards of Review*, 33 The Advoc. (Texas) 28 (Winter 2005).

E. Expert Witnesses

The trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards for scientific reliability. *E.I. du Pont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549, 554 (Tex. 1995). There are two lines of cases related to the preservation of error in regard to disputes about expert witnesses.

To preserve a complaint that an expert witness's scientific evidence is unreliable, a party must object to the evidence before trial or when the evidence is offered. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998). Such questions about the reliability of the expert's methodology go to the trial court's gate-keeping function, and thus should be raised promptly as *Daubert/Robinson* objections.

There is still a question as to whether a party that properly makes a pretrial *Daubert/Robinson* objection must also make the objection at trial to preserve error. *Id.* Some courts of appeals have taken the seemingly logical approach that the pretrial objection is sufficient to preserve error. *See Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194 (Tex. App.–Texarkana 2000, pet. denied).

Another court has suggested that a pretrial objection to a party's reliability must be renewed at trial absent a live pretrial hearing. *See Piro v. Sarofim*, 80 S.W.3d 717 (Tex. App.–Houston [1st Dist.] 2002, no pet.). It is probably best practice to re-urge the objection at trial until the law is more settled in this area, to protect against a situation where this precedent is applied. Tracy C. Temple and Jacalyn A. Hollabaugh, *Expert Witness Issues on Appeal in State and Federal Court: Securing the Record From Adverse Robinson/Havner Rulings and the Standards of Review*, 33 The Advoc. (Texas) 28 (Winter 2005).

The second type of expert witness challenge requires a different mechanism to preserve error. *See Id.* The Texas Supreme Court drew a distinction between challenges to an expert's reliability and "no-evidence challenges restricted to the face of the record." *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004). In Coastal Transport, Coastal Transport argued in a motion for directed verdict that Crown Central's medical expert provided no evidence since the testimony was based on "bare evidence" that was "factually unsubstantiated." *Id.* at 231. The Court held that challenges asserting that evidence is non-probative on its face can be raised for the first time post-verdict.

In summary, a *Daubert/Robinson* challenge to an expert's reliability should be raised pretrial, and probably at trial, in order to properly preserve the error for appeal. If the expert testimony is being challenged facially on no-evidence grounds, the issue does not necessarily have to be raised pretrial.

III. VOIR DIRE

Failure to excuse even one disqualified juror in the jury selection process constitutes reversible error. However, without following the proper method to preserve error, the argument will be waived for appeal. The method of preserving error for failing to excuse a disqualified juror is technical and precise.[2] The prescribed procedure is not necessarily logical or intuitive; the attorney simply needs to know the rule.

[2] Appendix B provides a checklist for preserving error at voir dire.

Before exercising its peremptory challenges, a complaining party must first notify the trial court of two things:

(1) that the party will exhaust its peremptory

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*Hallet*i *v. Hous. Nw. Med. Ctr.*, 689 S.W.2d 1888, 890 (Tex. 1985).

1. No magic words are necessary

No "magic words" are required to preserve error on challenges for cause, but specificity is important. The challenging party must expressly state that he or she will be required to use peremptory strikes because of the court's failure to strike one or more jurors that the party challenged for cause. The challenger must also state that, as a result of the court's ruling, specific objectionable jurors against whom she would have exercised her peremptory strikes will remain on the jury.

2. Identify objectionable jurors

First, counsel must specifically identify the objectionable jurors that will remain on the jury. Hallet requires the objecting party to identify specifically each objectionable juror that will remain on the panel after the party's peremptory strikes are made. *Hallet*, 689 S.W.2d at 890. Counsel can avoid this waiver by naming the objectionable juror and/or reciting his or her juror number on the record. It is not necessary to explain why the juror is objectionable; simply make sure that the juror is identified.

3. Use peremptory strikes on objectionable jurors.

Next, counsel must use peremptory strikes to remove panel members the court refuses to strike for cause. The objecting party must strike the jurors the objecting party claims should have been struck for cause. This requirement is consistent with the directive set forth in Hallet that the complaining party will be forced to use its peremptory strikes on jurors who should have been struck for cause and, thus, are prevented from using the strikes on others who will serve on the jury.

4. Make the objection prior to executing the peremptory strike

Counsel's objection must be timely. The complaining party must advise the trial court of its objection while the court still has the ability to correct the error, which means the objecting party must bring the objection to the trial court's attention before exercising its peremptory strikes because at that point the judge still could grant additional challenges for cause, thus curing any harm.

5. Ensure that the timing of

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The record must clearly demonstrate when counsel exercised the peremptory strikes. Because timing is so important, counsel must assure that the appellate record clearly demonstrates timeliness. To assure that the objection appears in the record, it must be made orally. In addition, the record must clearly demonstrate that counsel stated the objection before she "exercised" peremptory strikes.

A party "exercises" peremptory strikes when it "delivers" or "tenders" its written list of strikes to the court. *McCluskey v. Randall's Food Mkts., Inc.*, No. 14-03-01087-CV, 2004 WL 2340278 at *4-5 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (mem. op.). The list is "delivered" when it is handed to the court. *Id.* If the record does not reflect when the list of strikes was delivered and, thus, does not establish that the party's objection was made before its strikes were exercised, any complaint concerning the failure to strike for cause is waived. To avoid a defect in the record concerning timing, the counsel should simply ask the court reporter to "let the record reflect" that he or she is delivering the list of peremptory strikes to the court.

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B. The Requirement to Show Harm

The failure to strike an unqualified juror for cause does not necessarily result in harmful error. Harm occurs when the complaining party is forced to use its peremptory challenges on one or more unqualified jurors who were not subjected to being challenged for cause. *Hallet*, 689 S.W.2d at 890.

On appeal, the complaining party must demonstrate that it was forced to accept objectionable jurors because of the judge's error. This principle implicitly requires the complaining party to strike the juror(s) that the trial court refused to strike for cause. Harm occurs because those strikes were not available for use on one or more remaining panel members who were objectionable.

IV. TRIAL

A. Evidence

Though trial court judges have broad discretion regarding the admissibility of evidence, a judge that abuses his discretion commits reversible error. Polly Jessica Estes, *Preservation of Error: From Filing the Lawsuit Through Presentation of Evidence*, 30 St. Mary's L. J. 997, 1063. Texas Rule of Evidence 103(a)(1) governs the objection process in these situations.

The rule states that a timely objection or motion to strike must appear on the record and the party must state the specific ground for the objection. TEX. R. EVID. 103(a)(1). Like other error preservation situations, the party must establish harm and obtain a ruling on the objection.

A timely objection is made as soon as the reason the objection is raised becomes apparent. Polly Jessica Estes, 30 St. Mary's L.J. at 1065.

Beall describes three reasons that timelessness is imperative in these situations.

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Beall v. Ditmore, 867 S.W.2d 791, 794 (Tex. App.—El Paso 1993, writ denied).

Litigants should make objections immediately before a piece of evidence is offered. Courts have allowed wiggle room to litigants in some cases. *Beall*, 867 S.W.2d at 795 (Objection was timely even though a party waited until after a second question was asked before approaching the bench and objecting to the answer of the first question). However, it is best not to push the limit to ensure compliance with Rule 103.

Rule 103 implies that a party need not state the specific ground for the objection if the ground for the objection is apparent through the context of the situation. TEX. R. EVID. 103(a)(1). Something is "apparent from the context" only if the record itself demonstrates the context. Polly Jessica Estes, 30 St. Mary's L.J. at 1069. As a result, the safest course of action is to not rely on the context, but to specifically identify the objectionable material. Additionally, a party should specifically identify the grounds for the objection, or risk waiving the objection. *Id.* Objections deemed too general are not objections at all, which waives the party's ability to make the objection. *See Ramirez v. Johnson*, 601 S.W.2d 149, 151 (Tex. App.—San Antonio 1980, writ ref'd n.r.e.) ("please note our exception to the court's ruling allowing that evidence to be presented to the jury" constituted a general objection, and was thus not sufficiently preserved on appeal).

If a party objects to testimony that has already been presented to the jury, and that objection is sustained, the lawyer must file a motion to strike to preserve the error. Polly Jessica Estes, 30 St. Mary's L.J. at 1079. The preservation rules for filing a motion to strike are the same as the rules for objecting: the party must specifically identify the objectionable material and the grounds for the objection.

B. Motion for Directed Verdict

If counsel believes that the evidence conclusively establishes one party's right to a judgment, or that evidence offered on a claim or defense is insufficient to create a fact issue, counsel can move for a directed verdict. *See Fort Bend Cnty. Drainage Dist. v.*

Sbrusch, 818 S.W.2d 392, 395 (Tex. 1991). Generally, the motion for directed verdict should be filed after the non-moving party has presented all evidence and rested. *Oil and Gas Corp. v. McCall*, 104 S.W.3d 80 (Tex. 2003).

The motion can be oral, but the wiser course of action is to file a written motion. 71 Tex. Jur. 3d *Trial and ADR* § 351 (2013). Either way, ensure that the motion sets out the grounds for the motion in the most specific terms possible. *Guffey v. Collier*, 203 S.W.2d 812 (Tex. Civ. App.—Eastland 1947, no writ). Once the judge makes a ruling on the motion, error is preserved as to the specific legal issues raised by the motion. *Field v. AIM Mgmt. Grp.*, 845 S.W.2d 469 (Tex. App.—Houston [14th Dist.] 1993, no writ).

V. JURY CHARGE

Like the voir dire process of preservation of error, preserving error in a jury charge can be a confusing endeavor. Specific rules must be followed depending on the type of error that occurs in a particular situation.

These errors can be divided into two distinct categories. Errors in the jury charge consist of either:

(1)

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definitions actually submitted in the

questions

instructions,

and

definitio

error of commission requires only an objection.

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A. Ther Objection

Affsirmative errors in the charge must be preserved by objection. *See* TEX. R. CIVo P. 274. An objection also preservfes error in the omission of the submission of an opposing party's claim or defOense. *See* TEX. R. CIV. P. 278 (explaining that if the question not submitted "is one relied upon by the opposing party," the complaining party can preserve error sufficiently by objection).

Objections cannot incorporate previous objections made to other portions of the charge by reference. Generally, a party must make its own charge objections. However, with permission of the trial court, a party can adopt another party's objections.

B. The Request

Each requires a different process to preserve error for appeal. Generally speaking, an error of omission requires a request to preserve error, while an

Unless an omitted question is relied upon by the opposing party, a party must request the question or error or its omission is waived. However, where one or more elements of a claim or defense are submitted in the charge, the party opposing the claim or defense can either request or object to preserve error as to the omitted element.

Additionally, a party must submit a request for an omitted instruction or definition, or else error is waived. *See* TEX. R. CIV. P. 278. A request must be tendered by the party complaining of the judgement even if the instruction is in the opponent's claim or defense.

It should be noted that a question is arguably affirmatively wrong if it does not contain all of the required elements and is therefore an error of commission requiring an objection. However, some courts have held that when a definition or instruction is omitted, the complaining party must both request and object. *See, e.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903

(Tex. App.—Austin 1991, no writ) (requiring a party to not only object to the trial court's failure to add a limiting instruction in its damages question, but also to request such an instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, no writ) (explaining that where the charge omits "an instruction relied on by the requesting party," the requesting party must tender a written request, make specific objections, and obtain a ruling); *see also Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 891 (Tex. App.—El Paso, pet. denied).

The basis of this dual requirement stems from the language of Texas Rule of Civil Procedure 274, which states: "Any complaint . . . on account of any . . . omission . . . is waived unless specifically included in the objections." However, Rule 278 and Texas Supreme Court precedent negate the dual requirement of a request and objection in this situation. TEX. R. CIV. P. 278 (expressing that the absence of a question, definition, or instruction "shall not be deemed a ground of reversal of the judgement, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment).; *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994) (construing Rule 274 to allow an objection to sufficiently preserve error for defective instructions and ruling that a request is unnecessary).

C. <u>The Confusion</u>

Charge rules were written in the 1940s when Texas followed special submission practice. Special submission practice required that elements of each claim or defense were submitted independently as questions. Here, the distinction between errors of omission and errors of commission were clear.

Currently, however, Texas follows the broad-form submission practice where the ultimate issues are submitted to the jury in only a few questions with instructions to define and explain the law.

Assume a cause of action or an affirmative defense contains four elements, all of which must be submitted in a single jury submission. If one of the elements is missing, is the error one of omission, usually requiring a request to preserve error, or one of commission, which usually requires an objection to preserve error?

One commentator stated:

> "It seems that if the issue, definition or instruction which the court is submitting can be said to be correct, in form and substance, complaints about failure to include additional instructions or language

> are really complaints about omissions, and thus require requests. . . On the other hand, if it can be said that the issue, definition or instruction is affirmatively erroneous, whether from including something that is improper or omitting something essential, the error is one of commission and is preserved by objection."

Louis S. Muldrow, *Avoiding and Preserving Errors in the Charge*, A-4 (1993) (on file with the St. Mary's Law Journal).

D. *State Department of Highways & Public Transportation v. Payne*

In an effort to simplify and streamline the inherent confusion of charge practice, the Texas Supreme Court ambiguously loosened the formal preservation of charge rules found in the Texas Rules of Civil Procedure. The new rule states that error is preserved when "the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). This rule has actually caused more confusion and difficulty than the traditional preservation of error rules.

In *Payne*, the trial court attempted to charge the jury on a negligence case based upon a broad-form question and accompanying instructions in compliance with Texas Rule of Civil Procedure 277. *Payne*, 838 S.W.2d at 239. However, an instruction in the charge was incorrect because it did not contain a required element. *Id.* at 240. Under the Rules and prior precedent, the defendant should have objected to the instruction as an affirmatively incorrect statement of the law, or, alternatively, submitted a requested instruction in substantially correct wording arguing the instruction contained an omission of a missing element. The defendant did neither; rather, it objected to an unrelated ground and requested a jury question - instead of an instruction - on the missing element. *Id.* at 239. However, the request itself was affirmatively incorrect as it misplaced the burden of proof. *Id.*

Notwithstanding the defendant's failure to meet the preservation of error requirements, the Texas Supreme Court decided that the error was preserved, even though an objection was required and the request was not in substantially correct wording, because the defendant's "request is clearer than such an objection because it calls attention to the very element . . . omitted from the charge." *Payne*, 838 S.W.2d at 240. "The issue is not whether the trial court should have asked the jury the specific question requested by the State; rather the issue is whether the State's request called for the trial court's attention to the State's complaint . . . sufficiently to preserve

error. . .. 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 trial court aware of the complaint, timely and plainly, and obtained a ruling." *Id.* at 239-41.

The goal after *Payne* is to apply the charge rules "in a commonsense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). In practice, however, *Payne*'s test of "making the trial court aware of the complaint" has generated a somewhat ad hoc system in which courts decide preservation issues relating to charge error on a case-by-case basis, occasionally making up the rules as they go - sometimes courts cite to *Payne*, sometimes they do not; sometimes the request has to be substantially correct wording, sometimes it does not; and sometimes there is a difference between an objection and a request, and sometimes there is not.

The post-*Payne* keys to error preservation now seem to be:

(1) when in doubt about whether to object or request to preserve error, do both; AND

(2) in either case, clarity is essential: make your arguments timely and plainly, and get a ruling on the record.

E. Preserving Error when using Broad-Form Charges

The charge is made of three components: questions, instructions, and definitions. The formulation of these components has altered between broad-form charges or special submission charges.

Under broad-form practice, questions are drafted generally and include most or all elements of a claim and can include multiple causes of action. Much of the charge is contained in instructions to the general questions. The jury is asked to find conclusions without having to agree on specific facts.

Texas Rules of Civil Procedure 277 states that "[i]n all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions." The court has defined "whenever feasible" to mean "in any or every instance in which it is capable of being accomplished." *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). However, problems arise in submitting broad-form charges to the jury in cases where one of the bases for the finding is not legally permissible, where there is no evidence to support it, or where the basis is improperly defined. *See, e.g., Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 227 (Tex. 2005) (determining the effect of including factually unsupported claims in broad-form jury charge).

Therefore, even though the charge rules require broad-form charges whenever feasible, the trial court's failure to submit a properly requested broad-form question is not per se harmful error where the granulated questions contain the proper elements of the theory. *See H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258, 260 (Tex. 1992).

The complaining party has the burden to timely and specifically object to the improper element of damage or liability theory and the inclusion of such in a broad-form question. *See, e.g., In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Solely objecting to an element of the question is sufficient to preserve error on the inclusion of the element in a broad-form question. *Mo. Pac. R.R. Co. v. Limmer*, 180 S.W.3d 803, 822 (Tex. App.—Houston [14th Dist.] 2005, pet. filed). A no-evidence objection will also suffice to preserve error:

> "To preserve error [a complaint as to the use of a broad-form question], a party must make '[a] timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is no evidence to support its submission . . . ."

In re A.V., 113 S.W.3d 355, 362 (Tex. 2003) (quoting *Harris Cnty v. Smith*, 96 S.W.3d 230, 236 (Tex. 2002)).

A party should make two objections to preserve error to broad-form charges:

> (1) that a theory is incorrectly submitted because it is not recognized, has no evidence to support it, or is incorrectly defined; AND
>
> (2) that the theory should not be submitted in a broad-form because doing so will prevent the party from determining whether the jury relied upon it or a proper theory in answering the broad-form question.

Dylan O. Drummond, *Preservation of Charge Error: The Pattern Jury Charge Committee Wades Into the Fray*, 25 App. Advoc. 11, 21 (Fall 2012).

VI. POST-VERDICT MOTIONS

After a verdict has been rendered, parties have the opportunity to persuade the court to enter judgements on a litigant's behalf, sometimes adverse to the verdict. Even though these motions can seem fruitless at the time, they provide important opportunities for parties to continue the litigation by preserving error for appeal.

A. Motion for Judgment

A motion for judgment serves to encourage the trial court to enter a judgement based on the verdict rendered by the jury or judge. On some occasions,

parties on the losing end of a verdict file this motion to expedite the judgment process and move on to the appeals process. Attorneys that engage this practice should be aware of the potential pitfalls.

Generally, a party filing a motion for judgment is barred from taking a position that is not consistent with the judgment. *See Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319 (Tex. 1984). The filing party must take specific steps in its motion to preserve error as to the judgment, or risk waiving its ability to challenge the sufficiency of evidence at trial.

In *Fojtik*, a party filed a motion for judgment that included recitations that the party disagreed with the verdict, that the judgment contained fatal defects, and its actions should not be construed as concurring with the result. *First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). The court decided this action did not constitute a waiver of the party's ability to challenge the sufficiency of evidence at trial, because those express objections were included in the motion for judgment.

Failure to object to the verdict has resulted in several different outcomes in the courts of appeals. Eileen K. Wilson, *Post-Verdict Preservation of Error*, 29 The Advoc. (Texas) 58 (2004). Some courts have held that only challenges to legal and factual sufficiency are waived on appeal. *See Chuck Wagon Feeding Co. v. Davis*, 768 S.W.2d 360, 366 (Tex. App.—El Paso 1989, writ denied). Other courts have gone further, holding that a party's right to oppose the judgment is waived in its entirety. *Mailhot v. Mailhot*, 124 S.W.3d 775, 777 (Tex. App.—Houston [1st Dist.] 2003, no pet.). To ensure that this does not happen, lawyers should clearly articulate their complaints and objections in the motion for judgment so as not to risk waiving their objections. Eileen K. Wilson, *Post-Verdict Preservation of Error*, 29 The Advoc. (Texas) 58 (2004).

For a party that receives an adverse verdict, this particular motion is an effective vehicle to preserve legal sufficiency of the evidence arguments

B. Motion for Judgment Notwithstanding the Verdict

Motions for judgment notwithstanding the verdict (_j.n.o.v._) provide a means for a party to persuade a judge that a jury finding is unfounded as a matter of law. In a way, this particular mechanism serves as a post-verdict summary judgment. Trial courts grant a j.n.o.v. if there is no evidence to support a particular element of the claim or if the evidence is conclusive as a matter of law. Eileen K. Wilson, *Post-Verdict Preservation of Error*, 29 The Advoc. (Texas) 58 (2004).

for appeal. Most trial courts allow this motion to be filed even after the judgment has been entered. *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd).

C. Motion to Disregard Jury Findings

A party that wishes to assert that a jury finding had no support in the evidence preserve the error for appeal by filing a motion to disregard the jury findings. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 214 (Tex. App.—Houston [14th Dist.] 1984, no writ). This motion will preserve legal sufficiency arguments for appeal. The best course of action is to file a written motion identifying the legal issue as specifically as possible. A ruling preserves the motion for appeal.

VII. CONCLUSION

For such a vital aspect of trial practice, going through the proper procedures to preserve error is often overlooked. Remember that sometimes simply objecting does not go far enough to preserve error, and that the processes involved in voir dire and the jury charge are particularly complicated. There is much to lose in this area of the law due to simple oversight. Best practice for an attorney is to over-preserve—always be as specific as possible, and get a ruling in writing as much as possible. Subscribing to an overly-cautious approach will reap dividends for both you and your client.

APPENDIX A

Rule 33. Preservation of Appellate Complaints

(a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) Ruling by Operation of Law. In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) Formal Exception and Separate Order Not Required. Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

(d) Sufficiency of Evidence Complaints in Nonjury Cases. In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence - including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact finding or to make an additional finding of fact - may be made for the first time on appeal in the complaining party's brief.

APPENDIX B

Preservation of Error Checklist (This might be a good appendix item)

(A) When preparing to exercise peremptory strikes, plan to strike juror(s) that the court refused to strike.

(B) Before giving your peremptory strike list to the court or the clerk, inform the court that:

(1) its refusal to strike Juror # __ for cause requires you to use a peremptory strike on that juror, exhausting your peremptory challenges; AND

(2) after you exercise all of your peremptory challenges, one or more objectionable jurors, juror(s) # __, __, and/or __, will remain on the jury.

(3) request additional peremptory strikes (optional)

(C) After step (B) is complete, tender your list of strikes to the judge or the clerk.

(D) While tendering the list, ask the court reporter to "let the record reflect that I am now delivering my list of peremptory strikes to the court."