

THE COURT'S CHARGE

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THE COURT'S CHARGE

I. SCOPE OF ARTICLE.

The purpose of this paper is to examine the evolution of the law on the court's charge. Because our objective is to report noteworthy and significant submissions in civil cases, this is not a comprehensive study and analysis and should not be construed as an endorsement of the particular jury submissions. Rather, this paper reviews the basic principles and guidelines used on a day to day basis when trying civil cases to a jury. We hope that this paper will complement the *Texas Pattern Jury Charges* and serve as a handy reference in drafting your jury charge and objecting to your opponent's proposed charge.

II. THE BROAD FORM SUBMISSION

A. The First Fifty Years: "Distinct and Separate."

In *Fox v. Dallas Hotel Company*, 240 S.W. 517, 522 (Tex. 1922), the Texas Supreme Court mandated the submission of "each issue distinctly and separately." *Fox* involved claims of negligence. *Id.* On review of the jury charge, the Supreme Court rejected the trial court's submission of contributory negligence in broad form. *Id.* Ultimately, the *Fox* rule required the jury charge to be restricted to the specific acts of negligence alleged and proven.

Negligence and tort cases strictly adhered to this special issue practice. However, non-tort litigation permitted broad form submission. Texas, therefore, developed a unique — and very complicated — practice for issue submission. Widespread criticism of Texas issue practice prompted a major overhaul of the procedural rules in 1973.

B. 1973 Amendment to Rule 277.

As amended in 1973, Rule 277 provided in pertinent part:

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

By the amendment, the Supreme Court replaced the previous language requiring issues to be submitted "distinctly and separately." Later, in *Mobil Chemical Company v. Bell*, 517 S.W.2d 245, 252-53 (Tex. 1974), the Court held that the new rule meant what it said: simply ask whether the party was negligent.

C. But Did They Really Mean It?

The wording of the 1973 amendment to Rule 277 should have warned that the days of separately submitting each act of negligence were over. However, more than fifty years of habit resisted this change. Interim court of appeals decisions maintained the pre-amendment interpretation, with only a temporary interruption while lawyers debated over the effect of *Scott v. Atchison, Topeka & Santa Fe Ry. Co.*, 572 S.W.2d 273 (Tex. 1979). In *Scott*, the court held that a “wide variance” between the pleading and proof caused a broad submission to be erroneous. *Id.* After its opinion in *Bell*, the Supreme Court insisted that Rule 277 means what it says and that it was designed to abolish the “distinctly and separately” requirement. *Siebenlist v. Harville*, 596 S.W.2d 113 (Tex. 1980); *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

Acknowledging that there “may be some continuing question” about its intentions with respect to broad form submissions, the Supreme Court expressly overruled all of the cases that arose before the 1973 revisions of Rule 277 and followed the mandate in *Fox. Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). The Court in 1984 reiterated its approval of “broad issues . . . as the correct method for jury submission.” *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

The impact of this one rule change was profound. Initially, the bench and bar were skeptical and hesitant. Today, use of broad form submissions is the rule and not the exception. *See* Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY’S L.J. 1 (1979) (offering an excellent historical perspective on the 1973 amendments). With the passage of the 1988 amendment to Rule 277, the transition from distinct and separate issues to broad form questions was complete.

D. 1988 Amendment to Rule 277.

Effective January 1, 1988, the new rule 277 provided that broad form submission “shall” be used “whenever feasible.” In this new rule, the Supreme Court also eliminated the language from Rule 277 permitting separate questions with respect to each element of a case at the discretion of the trial court. Accordingly, only the most unusual cases will allow the submission of a narrow, fragmented charge. *See, e.g., Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182, 185 (Tex. App.–Corpus Christi 1992, writ denied) (noting that broad form submission “is now set in concrete,” although “a case may be broadly submitted, if properly phrased, even if separate questions concerning each element would also be proper”), citing *Keetch v. Kroger*, 845 S.W.2d 262 (Tex. 1992).

E. They Really Mean It: The “E. B.” Problem.

In *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 648 (Tex. 1990), the Supreme Court again affirmed that Rule 277 means exactly what it says: that broad form questions are mandated and do not conflict with Rule 292, which requires a 10-2 verdict. The *E.B.* opinion also clarified what the broad form question should cover. The Court, after noting the “long” history and

struggle to recognize the broad-form question, stated that the charge in parental rights cases should be the same as in other civil cases. *Id.*

The controlling question in *E.B.* was whether the parent-child relationship should be terminated, not the specific grounds for termination that would support the answer to the ultimate issue. The court expressly approved the submission of the following question:

Should the parent-child relationship between [respondent] and the child be terminated?

Id. at 659. The supreme court, therefore, affirmed that a single broad form question incorporating two independent grounds for termination of a parent-child relationship permits the state to obtain an affirmative answer without discharging the jury's burden to determine whether a parent violated one or more of the grounds for termination under the statute. *Id.*, citing TEX. FAM. CODE § 15.02 (Vernon Supp. 1990). *See* TEX. R. CIV. P. 292.

When should the broad form submission be used? The court held that “whenever possible” means “in any or every instance in which it is capable of being accomplished.” *Id.* Accordingly, Rule 277 unequivocally requires the trial court to submit broad form questions “unless extraordinary circumstances exist.” *Id.* However, the trial court's failure to submit a properly tendered broad form question may not result in harmful error as long as the questions—although in granulated form—set forth the proper elements of the cause of action. *H.E. Butt Grocery v. Warner*, 845 S.W.2d 258 (Tex. 1992); *Byrne v. Harris Acacom Network Servs., Inc.*, 11 S.W.3d 244, 249 (Tex. App.–Texarkana 1999, pet. denied) (although the trial court abused its discretion in failing to submit appellant's fraud issue in broad form, as required by Tex. R. Civ. P. 277, appellant failed to show that he had suffered harm). *But see Westgate, Ltd. v. Texas*, 843 S.W.2d 448, 457-58 (Tex. 1992) (holding that the failure to use broad form questions was harmful error where it produced demonstrably different damage figures).

F. Broad Form on Unsettled Questions of Law.

In *Westgate, Ltd. v. Texas*, 843 S.W.2d 448, 455 (Tex. 1992), the Supreme Court stated that Rule 277 is not absolute and that “submitting alternative liability standards when the governing law is unsettled might very well be a situation when broad form submission is not reasonable.” .

This quandary was revisited in *Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34 (Tex. App.–Houston [14th Dist.] 1999, pet. denied). There, the court affirmed a trial court's submission of two separate negligence questions with accompanying definitions, one based on “high degree of care” and the other on “ordinary care.” Because it was unclear whether the defendant could, as a matter of law, be charged with a higher standard than ordinary care, the trial court submitted both standards to avoid the possible need for retrial following resolution of the unsettled question. In reviewing this submission, the appellate court found no error and noted that, “lawyers frequently

argue alternative theories of liability to juries. We do not see how two separate and independent standards of care would be more confusing.” *Id.* at 38.

G. Use of Broad Form Submission.

Since 1973, the Supreme Court has encouraged the broad form submission—especially in negligence cases. Indeed, negligence cases dominate the Supreme Court’s consideration of issue submission. Now broad form submissions in commercial cases have been reviewed and approved. Explanations and examples of broad submission practice since 1973 are listed below:

1. Fraud - Broad Submission.

ISSUE: “Do you find from a preponderance of the evidence that prior to the purchase of Greenhollow lots by Plaintiff Oxford (Trenholm), Raymond F. Ratcliff, Jr. made false representations, either one or more, to representatives of the Plaintiff as to material facts, with the intent of inducing the Plaintiff to purchase Greenhollow lots, which were relied upon by Plaintiff.”

ANSWER: “We do.”

Trenholm v. Ratcliff, 646 S.W.2d 927, 932 (Tex. 1983); *see also Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994) (the trial court’s refusal, over objection, to include necessary element of “intent to mislead” in definition of “fraud” constituted reversible error).

In *Trenholm*, the Texas Supreme Court approved the above broad form submission and decided that the plaintiff did not need to obtain a finding as to reliance related to the purchase of each of eighteen lots (even though purchase of seven lots occurred after plaintiff’s discovery of the misrepresentation) because plaintiff’s reliance did not occur when he purchased the lots but rather when he entered into an agreement obligating him to build on the lots. *Trenholm*, 646 S.W.2d at 932; *see also Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 438 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.).

However, where the plaintiff alleges that a single specific statement constituted fraud, a trial court may submit separate questions, the first to determine whether the statement was made, and the second, conditional question to determine whether the defendant committed fraud by making the statement. *Byrne v. Harris Adacom Network Servs.*, 11 S.W.3d 244, 253 (Tex. App.—Texarkana 1999, pet. denied).

2. Negligence - Lemos overrules Muckleroy.

ISSUE: Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?

- (a) The defendant, Verdie Webber.
- (b) The plaintiff, Jasper Muckleroy.
- (c) Both.

ANSWER: “a”

Members Mut. Ins. Co. v. Muckleroy, 523 S.W.2d 77, 79 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref’d n.r.e.).

Nearly ten years later, the Supreme Court rejected the use of jury answers for “both” and “neither” in an automobile negligence case. In *Lemos v. Montez*, 680 S.W.2d 798, 800 (Tex. 1984), the Court rejected the use of “both,” “neither,” or “no one” to the broad negligence / proximate cause special issue. The Court believed that such a charge effectively submitted special issues on unavoidable accident, and since unavoidable accident is an inferential rebuttal issue, the submission was erroneous. A portion of this erroneous charge was included in *Pate v. Southern Pacific Transportation Company*, 567 S.W.2d 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.) which included a space to indicate “no one,” but because there was no objection or complaint to the charge, the court did not address it. .

The correct way to submit an issue when there is evidence that neither party proximately caused the incident or accident made the basis of the suit is to set forth the correct definition of “unavoidable accident” and ask:

ISSUE: Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision of December 27, 1979 made the basis of this suit?

	Yes	No
(a) Alfred R. Montez	_____	_____
(b) Ignacio Nat Arrellano	_____	_____

Lemos, 680 S.W.2d at 800. This submission also incorporates the checklist format used in *Pate v. Tellepsen Const. Co.*, 596 S.W.2d 548, 550 (Tex.Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.), but without the use of “neither,” “no one,” or “both” disapproved in *Lemos*.

3. Breach Of Contract and Island Recreational

In *Island Recreational Development Corporation v. Republic of Texas Savings Association*, 710 S.W.2d 551, 553 (Tex. 1986), plaintiff Island sued defendant Republic for its failure to fund a loan commitment. In its petition, Island specifically alleged that a condition in the loan commitment had been waived and that it had performed everything it had been asked to do. *Id.* In contrast, Republic argued that the condition precedent of the commitment had not been met. *Id.* At trial, the court was presented with instructions and issues concerning waiver and estoppel, substantial

performance, full and final completion, assignment and others. One broad form question was submitted:

ISSUE: Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question?

ANSWER: “We do.”

Id. at 554.

In its initial 5-4 opinion, the Supreme Court reversed this broad form submission because Island failed to secure a specific jury finding on waiver. On rehearing, however, the Court withdrew its prior opinion, approved the broad form submission, and affirmed the trial court judgment in favor of Island. In so doing, the Court held that although the trial judge was following the policy concerning broad issue submissions, the trial judge should submit, when requested, appropriate accompanying instructions. *Id.* at 555.

The dissent suggested the following submission to resolve the waiver issue as an independent ground of defense:

ISSUE: “Do you find from a preponderance of the evidence that [plaintiff] performed all of the obligations under the commitment letter which [defendant] did not waive? You are instructed that waiver is defined as intentionally giving up a known right. You are instructed that performed means carrying out obligations as required by the contract.”

Id. at 557 n.1 (Spears, J. dissenting).

4. Breach of Insurance Policy.

ISSUE 1: Did State Farm breach the insurance contract with Ioan and Liana Nicolau which breach was a proximate cause of damage, if any, to Ioan and Liana Nicolau?

ANSWER: “Yes”

Nicolau v. State Farm Lloyds, 869 S.W.2d 543, 549 (Tex. App.—Corpus Christi 1993), *aff’d n part, rev’d on other grounds*, 951 S.W.2d 444 (Tex. 1997). Another example is as follows:

ISSUE 1: “Did a loss occur which was covered and payable under the policy?”

ANSWER: “Yes”

ISSUE 2: “What was the amount of such loss, if any, payable under the policy?”

ANSWER: “\$10,000,000.00”

National Fire Ins. Co. of Pittsburgh v. Valero Energy Corp., 777 S.W.2d 501, 506 (Tex. App.–Corpus Christi 1989, writ denied) (surviving the challenge that this submission had the effect of improperly asking the jury a question of law about the construction of the policy of insurance).

5. Contractual Performance

Following *Island*, the Fourteenth Court of Appeals approved the following controlling question in a case alleging both breach of contract and breach of fiduciary duty:

Do you find the failure, if any, of Quail Harbor Condominium Association, Inc. to act reasonably and in good faith under duties of maintenance and repair required by the Condominium Declaration proximately caused damage [to] the property of W. M. Riddick?

Riddick v. Quail Harbor Condominium Ass’n, Inc., 7 S.W.3d 663, 673 (Tex. App.–Houston [14th Dist.] 1999, no writ). Another example combines two disputed fact issues:

ISSUE: “Do you find from a preponderance of the evidence that during the time in question Coulson and Associates Engineers, Inc. furnished the Lake LBJ Municipal Utility District with sufficient plans and specifications for construction of a water system, a sanitary sewer system and drainage for the needs of such District, and to secure approvals from appropriate governmental agencies, under the circumstances then existing?”

ANSWER: “Yes”

Bennett Coulson & CAE, Inc. v. Lake LBJ Mun. Util. Dist., 781 S.W.2d 594, 596 (Tex. 1989). In this case, the court of appeals held that this submission erroneously commented on the weight of the evidence by combining an established fact (whether the plans and specification were sufficient to secure governmental approval) with a contested issue (whether the plans and specification were sufficient to meet the district’s needs). *Lake LBJ Mun. Util. Dist. v. Coulson & C.A.E., Inc.*, 771 S.W.2d 145 (Tex. App.–Austin 1988). The supreme court, however, saw no error in the conjunctive submission of the two disputed fact issues: “That one clause of the compound question might have been answered more easily than the other clause does not constitute reversible error. . . .” *Bennett Coulson*, 781 S.W.2d at 597.

6. Tortious Interference With Contract - *Texaco v. Pennzoil*.

ISSUE 1. Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive \$110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least \$5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths-4/7ths basis.

Answer: "We do" or "We do not."

The following instructions accompanied Special Issue No. 1:

1. An agreement may be oral, it may be written or it may be partly written and partly oral. Where an agreement is fully or partially in writing, the law provides that persons may bind themselves to that agreement even though they do not sign it, where their assent is otherwise indicated.

2. In answering Issue No. 1, you should look to the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated to each other by their words and deeds. The question is not determined by the parties' secret, inward, or subjective intentions.

3. Persons may intend to be bound to an agreement even though they plan to sign a more formal and detailed document at a later time. On the other hand, parties may intend not to be bound until such a document is signed.

4. There is no legal requirement that parties agree on all the matters incidental to their agreement before they can intend to be bound. Thus, even if certain matters were left for future negotiations, those matters may not have been regarded by Pennzoil and the Getty entities as essential to their

agreement, if any, on January 3. On the other hand, you may find that the parties did not intend to be bound until each and every term of their transaction was resolved.

5. Every binding agreement carries with it a duty of good faith performance. If Pennzoil and the Getty entities intended to be bound at the end of the Getty Oil board meeting of January 3, they were obligated to negotiate in good faith the terms of the definitive merger agreement and to carry out the transaction.

6. Modification or discussions to modify an agreement may not defeat or nullify a prior intention to be bound. Parties may always, by mutual consent and understanding, add new provisions spelling out additional terms that were not included in their original agreement.

ISSUE 2: Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Answer: “We do” or “We do not.”

The following Instructions accompanied Special Issue No. 2:

Knowledge of a fact can be shown either by direct evidence of what it knew or what it was told, or by indirect or circumstantial evidence. A fact may be established by indirect or circumstantial evidence when the fact is fairly and reasonably inferred from other facts proven in the case.

In order to find that Texaco interfered with the agreement, if any, inquired about above, it must be shown by a preponderance of the evidence that Texaco wanted to cause the breach, or to prevent the performance of this agreement, or that Texaco knew that a breach or failure to perform would occur as a result of its actions.

Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 812-13, 826 (Tex. App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert. disp’d*, 485 U.S. 994 (1988).

7. Medical Malpractice.

In a medical malpractice case, alleged misrepresentations during the physician’s disclosure of the risks and hazards of a medical procedure must be submitted to the jury as an issue of alleged failure to obtain informed consent. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.01-.07; *Marks-Brown v. Rogg*, 928 S.W.2d 304, 306 (Tex. App.–Houston [14th Dist.] 1996, writ denied). Even though

a separate action for fraud may be maintained under certain facts, article 4590i is the only valid theory of recovery for allegations of misrepresenting the risks and hazards of surgery. *Crundell v. Becker*, 981 S.W.2d 880, 883-84 (Tex. App.–Houston [1st Dist.] 1998, pet. denied) (concluding that “the issue of whether [plaintiff] would have agreed to the surgery had she not believed she had cancer is separate and distinct from the issue of whether she was fully informed of the risks attendant to having surgery”). Medical malpractice cases do not warrant an exception to the rule requiring broad form submission, no matter how many specific acts of negligence are alleged. *Crundell*, 981 S.W.2d at 884; *Winkle v. Tullos*, 917 S.W.2d 304, 312 (Tex. App.–Houston [14th Dist.] 1995, writ denied).

8. Check Kiting.

Check kiting is a species of fraud consisting of the exchange of checks of approximately the same dates and amounts between two banks for the purpose of obtaining money. *Denby v. State*, 654 S.W.2d 457, 459 (Tex. Crim. App. 1983), *overruled on other grounds*, *Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991). It is a process by which checks written on one account are continually covered with deposits of checks written on another account, thereby creating positive statement balances and preventing overdrafts, but resulting in a steadily decreasing deficit in the collective balance in most of the accounts. *Id.* Check kiting necessarily involves two or more accounts.

ISSUE: Do you find from a preponderance of the evidence that during the month of October, 1968, Joe Davis was kiting checks?

To “kite” checks means to write a check against a bank account where the funds are insufficient to cover them hoping that before they are presented, the necessary funds will be deposited.

JURY ANSWER: “We do.”

First State Bank and Trust Co. of Edinburg v. George, 519 S.W.2d 198, 204 (Tex. Civ. App.–Corpus Christi 1974, writ ref’d n.r.e.). The court in *George* specifically held that the definition of check kiting given in connection with this jury question was sufficient. *Id.*, citing *Sutro Bros. & Co. v. Indemnity Ins. Co. of N. Am., N.Y.*, 264 F. Supp. 273 (S.D.N.Y. 1967); *Citizens State Bank v. Western Union Tele. Co.*, 172 F.2d 950 (5th Cir. 1949).

9. Civil Conspiracy.

ISSUE: Do you find from a preponderance of the evidence whether a conspiracy existed between two or more persons, the purpose of which was to take the life of Dr. John R. Hill?

You are instructed that a conspiracy is defined as a combination of two or more persons to accomplish an unlawful purpose, or to

accomplish a lawful purpose by unlawful means. You are further instructed that in order to find a conspiracy, you must find from a preponderance of the evidence each and every one of the following: (1) there was a combination of two or more persons, (2) there was an agreement or meeting of the minds among these persons, (3) on a common purpose, (4) that each of those persons had knowledge of the purpose, (5) that each of those persons intended to participate therein, and (6) one or more overt acts done in pursuance of the conspiracy.

JURY ANSWER: “We do not.”

Hill v. Robinson, 592 S.W.2d 376, 382-83 (Tex. Civ. App.–Tyler 1979, writ ref’d n.r.e.). See *Operation Rescue - Nat’l v. Planned Parenthood of Houston and Southeast Tex., Inc.*, 975 S.W.2d 546, 554 (Tex. 1998) (holding that trial court’s failure to instruct the jury that the act found to be in furtherance of the conspiracy must be overt and unlawful was not harmful).

10. Deceptive Trade Practice.

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), an agent sued Crown Life under Article 21.21 of the Texas Insurance Code and also under the provisions of the Deceptive Trade Practices Act (DTPA) as a consumer. The trial court submitted a single broad form question on the issue of the insurance carrier’s liability to the agent. The question instructed the jury on thirteen independent grounds for liability, the first five of which were taken from the DTPA section 17.46(b) laundry list. The court held, however, that the agent was not a consumer and thus had no cause of action under the DTPA. The Supreme Court held that “submitting invalid theories of liability in a single broad form jury question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories.” *Id.* at 388. Although the Court in *Crown Life* was addressing liability issues, there should be no distinction to be made in the problems connected with a broad form submission of a damage question. *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 749 (Tex. App.–San Antonio 1999, pet. denied).

DTPA issues, like other questions controlled by statutes, must be submitted in language that closely tracks the statute. *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, 937 (Tex.), *cert. denied*, 449 U.S. 1015 (1980); see also *City of Houston v. Leach*, 819 S.W.2d 185, 197 (Tex. App.–Houston [14th Dist.] 1991, no writ). For example, the DTPA jury charge in *Spencer v. Eagle Star Insurance Company of America*, 876 S.W.2d 154, 157 (Tex. 1994), disapproved because it failed the *Brown* test by not tracking the language of the statute as closely as possible. The charge in *Spencer* improperly allowed the jury to find an unfair insurance practice based upon any action by defendant that took advantage of the plaintiffs and resulted in any inequitable result. *Id.*

Resembling the Texas Pattern Jury Charge example and closely tracking the language of the DTPA statutes, *Matthiessen v. Schaefer*, 27 S.W.3d 25, 32 (Tex. App.–San Antonio 2000, no pet.

h.), citing 4 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PCJ 102.01 at 102-3 (1993), offers the following jury question:

“Did [the sellers] engage in any false, misleading, or deceptive act or practice that was a producing cause of damages to [Schaefer]?” [definitions of “Producing cause” and “False, misleading, or deceptive act or practice” as included.]

11. Oil and Gas: Implied Covenant to Develop.

ISSUE: Do you find from a preponderance of the evidence that Sun has failed to reasonably develop the Jackson lease?

Answer: “Sun has failed” or “Sun has not failed.”

Answer: “Sun has not failed.”

In answering Special Issue No. 1, you are instructed that the term “to reasonably develop” means the development which a prudent operator would do with respect to any known producing formation of the lease.

In this context, reasonable development may include the drilling of additional wells into any such producing formation. A prudent operator will undertake to drill additional wells into such producing formation only if there is a reasonable expectation that the proceeds, if any, from the production obtained, if any, as a result of such drilling will exceed the cost of drilling and operating the well . . . [balance of the instruction not included].

Sun Exploration & Prod. Co. v. Jackson, 715 S.W.2d 199, 202-03 (Tex. App.–Houston [1st Dist.] 1986), *rev’d*, 783 S.W.2d 202, 204-05 (Tex. 1989) (approving jury charge).

12. False Imprisonment Case.

ISSUE: From a preponderance of the evidence, do you find that the plaintiff was falsely imprisoned by the defendant?

Answer “She was” or “She was not”

Answer: She was not.

Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985) (per curiam). In reversing the court of appeals decision, the Supreme Court held that the trial court correctly submitted the false imprisonment claim broadly, with the appropriate instructions, and within the court’s discretion under Rule 277.

13. Premises Liability - Invitee.

An invitee must prove that: (1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner’s failure was a proximate cause of injury to the invitee. *Dallas Market Dev. Co. v. Liedeker*, 958 S.W.2d 382, 385 (Tex. 1997) (per curiam); *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). In *Liedeker*, the Supreme Court held that the jury charge should track each element of an invitee’s premises liability claim so as to avoid holding the premises owner to an incorrect — and in this case, higher — standard. *Liedeker*, 958 S.W.2d at 352. The trial court’s charge in *Liedeker* inquired about the third and fourth elements, except that it asked about a failure to exercise a high degree of care rather than a failure to exercise ordinary care, which was clearly wrong. *Id.*

In section 66.3 of the Texas Pattern Jury Charges, the proposed issue for invitee premises liability is set forth as follows:

QUESTION: Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?

With respect to the condition of the premises, *Don Davis* was negligent if—

- a. *the condition* posed an unreasonable risk of harm, and
- b. *Don Davis* knew or reasonably should have known of the danger, and
- c. *Don Davis* failed to exercise ordinary care to protect *Paul Payne* from the danger, by both failing to adequately warn *Paul Payne* of *the condition* and failing to make that condition reasonably safe.

“Ordinary care,” when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No” for each of the following:

- a. *Don Davis* _____
- b. *Paul Payne* _____
- c. *Sam Settlor* _____
- d. *Responsible Ray* _____

e. *Connie Contributor* _____

3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGE PJC 66.3 (1997). The Supreme Court also recommends that the following definitions accompany the jury question:

“Negligence,” when used with respect to an owner or occupier of a premises, means failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier knows about or in the exercise of ordinary care should know about.

“Ordinary care,” when used with respect to an owner or occupier of a premises, means that degree of care which would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

See Keetch v. Kroger, 845 S.W.2d 262, 267 (Tex. 1992). Moreover, in *McReynolds v. First Office Management*, 948 S.W.2d 342 (Tex. App.–Dallas 1997, no writ), the Dallas Court of Appeals upheld this instruction in a case involving an elevator accident, and rejected the argument that Texas law requires elevator owners to use the “utmost human care” in operating the elevator. *McReynolds*, 948 S.W.2d at 345.

14. Gross Negligence.

In *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 19 (Tex. 1994), the Supreme Court “examin[ed its] traditional definition of gross negligence and identif[ied] its basic elements.” In so doing, the Court defined gross negligence as “such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.” *Id.* at 21, citing TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) (Vernon Supp. 1994). The Court also summarized the definition of gross negligence as including the following two elements:

(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

Id. at 23.

15. Exemplary Damages.

(a) The Kraus and Moriel Factors.

In *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 916 (Tex. 1981), the Supreme Court listed the following factors to be considered by an appellate court in evaluating whether a jury award of exemplary damages is excessive: (1) the nature of the wrong; (2) the character of the conduct; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which such conduct offends a public sense of justice and propriety. The jury instruction given in *Moriel* added two additional factors: (1) the frequency of the wrongs committed; and (2) the size of the award needed to deter similar wrongs in the future. *Moriel*, 879 S.W.2d at 27, n.22.

(b) Inclusion of the Kraus Factors in Jury Instructions Accompanying Questions on Exemplary Damages.

In *Moriel*, the Supreme Court acknowledged, but did not decide, the question of whether due process is implicated by the trial court's failure to instruct the jury on the *Kraus* factors. *Moriel*, 879 S.W.2d at 27, n.22 and at 29, n.26. Under tort reform, however, the Texas legislature implemented the requirement that the trial court instruct the jury to consider all of the *Kraus* factors and the net worth of the defendant. TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.011, 41.012 (Vernon 1997). A recent Supreme Court decision has upheld these statutory requirements. *See, e.g., Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (reiterating the *Kraus* factors and noting that a defendant's ability to pay bears directly on the question of adequate punishment and deterrence); *George Grubbs Enter., Inc. v. Bien*, 900 S.W.2d 337, 338-39 (Tex. 1995) (per curiam) (reversing the plaintiff's substantial exemplary damage award because the jury instruction was inadequate to guide the jury's consideration to disregard the corporate structure, and because the instruction allowed the jury to consider the wealth of a related corporate entity that had not been joined as a defendant).

16. Sources for Jury Charge Submissions.

The best source for approved charge submissions is a Texas Supreme Court opinion approving the submission. In the absence of a case on point, lawyers often use the proposed submissions contained in the State Bar's Pattern Jury Charges. These Pattern Jury Charges are well-established and are more likely to have been approved by the courts or even derived from a Supreme Court opinion. *See Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 22 (Tex. 1987) (approving Texas Pattern Jury Charge form of "misuse" applicable to products cases); *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.) (approving Texas Pattern Jury Charge form of questions and instructions related to product liability suits involving design defects).

Nevertheless, using the Texas Pattern Jury Charges is not without risk. For example, the Supreme Court case of *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989), established that proof of a defect is required in an action for breach of implied warranty of merchantability under TEX. BUS. & COM. CODE ANN. § 2.314(b)(3). The plaintiff in *Plas-Tex* used the Texas Pattern Jury Charge for his proposed submission on the implied warranty of merchantability claim. See 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 71.07 (1982) (now PJC 71.7 (1998)). As a result of the holding in *Plas-Tex*, PJC 71.7 now reads as follows:

QUESTION 1: Was the [product] supplied by the [ABC Company] unfit for the ordinary purpose for which such [product] is used because of a defect?

“Defect means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy.”

3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 71.7 (1998).

On the other hand, at least two courts have affirmed a submission derived from the *Texas Pattern Jury Charges*, though the court acknowledged that the PJC incorrectly stated the law. See, e.g., *State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996) (although the jury instruction incorrectly stated the law, the error was harmless); *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996) (instead of rendering a judgment, the court remanded the case for a new trial based on a jury instruction that incorrectly stated the law).

H. How Broad is Broad-Form? Rule 278 of the Texas Rules of Civil Procedure mandates that a party is entitled to a jury question if the issue is raised by the pleadings and evidence. TEX. R. CIV. P. 278. A question that omits conduct that supports a valid theory of liability pleaded by the plaintiff is harmful. See *Kajima Int’l., Inc. v. Formosa Plastics Corp.*, 15 S.W.3d 289, 294 (Tex. App.–Corpus Christi 2000 pet. filed). Thus, a broad form submission must, at a minimum, include all valid theories of liability supported by the pleadings and the evidence. See *Plainsman*, 898 S.W.2d at 790 (single question submitting “controlling issues” upheld).

In *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661 (Tex. 1999), the Texas Supreme Court approved the submission of multiple causes of action in a single broad-form question where the controlling questions are identical. In *Hyundai*, the plaintiff asserted claims for both strict liability and breach of warranty. The court concluded that a single question on liability was appropriate because “the controlling issues regarding the existence of a defect for strict liability and breach of implied warranty were functionally identical in this case.” *Accord Riddick v. Quail Harbor Condo. Ass’n., Inc.*, 7 S.W.3d 663, 673-74 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (approving submission of single broad-form question for breach of contract and breach of fiduciary duty claims). *But see In re: C.H.*, 25 S.W.3d 38 (Tex. App.–El Paso April 20, 2000, pet. filed) (“Because multiple grounds for termination [for parental rights] were alleged . . . and the trial court submitted the issue

using a broad form question, the jury’s findings should be upheld if any of the grounds for termination pleaded . . . support the jury’s findings.”).

Notably, the Court acknowledged in *Hyundai* that the causation standard for strict liability is producing cause, while the standard for breach of warranty is proximate cause, and noted that separate submissions would have been necessary for the two causation standards had the plaintiff’s “question and instruction correctly incorporated the element of proximate cause.” *Hyundai*, 995 S.W.2d at 667.

The submission of multiple claims in a single issue may create certain risks for the plaintiff on appeal. In a recent opinion, the Texas Supreme Court held that “when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories,” the error is reversible because “the appellate court is often unable to determine the effect of this error . . .” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). See *Kansas City Southern Railway Co. v. Stokes*, 20 S.W.3d 45, 51 (Texarkana 2000, no pet.) (finding improper instruction to FELA action resulting in reversible error because “it is impossible for [the court] to determine that the jury’s answer was not based on this improperly submitted duty instruction.”)

I. Broad Submissions and Damage Issues.

1. Is It Necessary to Submit Separate Issues On Special Damages?

“Special damages” are consequential damages limited to those “damages that proximately resulted from the fraud [alleged].” *El Paso Dev. Co. v. Ravel*, 339 S.W.2d 360, 365 (Tex. Civ. App.–El Paso 1960, writ ref’d n.r.e.); see *C & C Partners v. Sun Exploration & Prod. Co.*, 783 S.W.2d 707, 719 (Tex. App.–Dallas 1989, writ denied) (a special damages case). The Dallas court derived its definition in part from *Duval County Ranch Co. v. Wooldridge*, 674 S.W.2d 332, 335-36 (Tex. App.–Austin 1984, no writ). The Austin Court, in turn, relied in part on *Ravel*. *Wooldridge*, 674 S.W.2d at 336, quoting *El Paso Dev. Co. v. Ravel*, 339 S.W.2d 360, 363 (Tex. Civ. App.–El Paso 1960, writ ref’d n.r.e.).

“Special damages” do not require a separate submission, but need only be included in the definition of damages to be considered and determined by the jury if pled. For instance, in *Odom v. Meraz*, the Supreme Court neither approved nor disapproved of the Court of Appeals’ disposition of the DTPA damages. *Odom v. Meraz*, 810 S.W.2d 241, 244 (Tex. App.–El Paso 1991), writ denied per curiam, 835 S.W.2d 626 (Tex. 1992). In *Odom*, the plaintiff submitted a global question on actual damages relating to his DTPA claim instead of separately submitting a question on consequential damages. Further, no limiting instructions on damages were given by the trial court. *Id.* at 245. In reversing the judgment of the trial court, the El Paso Court of Appeals held that “consequential damages are classed as special damages and MUST BE PLEADED AND PROVED SEPARATELY, THEREFORE NECESSITATING SUBMISSION OF JURY QUESTIONS SEPARATELY.” *Id.* at 244 (emphasis in original).

Expressly disagreeing with *Odom*, the appellate court in *Insurance Company of North America v. Morris*, 928 S.W.2d 133, 151 (Tex. App.–Houston [14th Dist.] 1996), *aff'd in part, rev'd on other grounds*, 981 S.W.2d 667 (Tex. 1998), rejected the appellant's argument to impose a requirement for separate submission of consequential or special damages. . In the words of the court, "We instead believe that such a practice is contrary to the broad form submission mandated by our rules of procedure." *Morris*, 928 S.W.2d at 151, citing TEX. R. CIV. P. 277. Thus, submission of a single damage question accompanied by an instruction that "total loss sustained" includes "economic loss, and consequential losses, including reasonable expenses, damages for impairment of credit, and damages for mental anguish," with an additional instruction defining mental anguish as "mental sensation of pain resulting from painful emotions as grief, severe disappointment, wounded pride, shame, despair, and public humiliation" was not an abuse of the trial court's discretion. *Id.* at 151-52.

Another case that examines this issue is *English v. Fischer*, 649 S.W.2d 83 (Tex. App.–Corpus Christi 1982), *rev'd on other grounds*, 660 S.W.2d 521 (Tex. 1983). Here, the Corpus Christi Court found no error in a general damage question that allowed a jury to award consequential damages on causes of action submitted for fraud, breach of warranty and the DTPA. In *English*, the defendant argued that the damage question incorrectly allowed the jury to consider and award consequential damages. 649 S.W.2d at 90. The question, which included additional limiting instructions, read as follows: "What sum of money do you find from a preponderance of the evidence would compensate the Fischers for their damages, if any, incurred prior to September 13, 1980, the date the \$110,000.00 was released to the Fischers?" *Id.* Because the claim involved the breach of an implied warranty of good faith and fair dealing, the court held that consequences of the breach, if reasonably foreseeable, were a proper element of damages and could be considered by the jury in answering the damage question. *Id.*

Finally, if a trial court submits a single answer blank for damages, the court must ignore any marginal notes made by the jury concerning each damage element. *Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995).

2. Cavner's Separation of Past and Future Losses.

In the past, damage issues were combined in the same submission. Since the Texas Supreme Court issued its opinion in *Cavner v. Quality Control Parking Inc.*, 696 S.W.2d 549 (Tex. 1985), prejudgment interest on past pecuniary and non-pecuniary losses is allowed so long as the verdict separates past damages from future damages. In other words, the use of a broad form issue, which requires only a single answer for past and future damages, will not support an award for prejudgment interest.

3. Condemnation: Broad Questions Required.

Despite the changes made in 1973, condemnation cases were especially slow to adopt broad form submission. In *Westgate, Ltd. v. State*, 843 S.W.2d 448, 456 (Tex. 1992), the supreme court directed trial courts to conform damage questions in condemnation cases to the broad form submission required by Texas Rule of Civil Procedure 277. *Id.* The *Westgate* court noted that two jury questions should be submitted in such cases to determine (1) the market value of the land taken, considered as severed land, and (2) damages to the remainder, accompanied by an instruction that such damages should be determined by considering the difference between the remainder's pre- and post-taking value. *Id.* This reasoning has been most recently applied by the First Court of Appeals in *Exxon Pipeline Company v. Zwahr*, No. 01-99-00283-CV, 2000 Tex. App. LEXIS 8038, at *17-18 (Houston [1st Dist.] Nov. 30, 2000, no. pet. h.)

4. Damage Questions Must Relate to Cause of Action.

When multiple causes of action are asserted, special problems arise. As a result, the plaintiff should be careful to relate each cause of action to a particular damage question. The general rule is that a specific damages question should relate to each cause of action. *See Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987). *See also Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 1999), discussed *supra*.

Birchfield was a medical malpractice action brought by the parents of a blind premature infant against three physicians and the hospital. Plaintiffs alleged negligence against all of four defendants and a DTPA action against the hospital. The jury found that the physicians were negligent and that the hospital was negligent, grossly negligent and had violated the DTPA. The plaintiffs sought to recover both treble and exemplary damages awarded by the jury against the hospital.

The Texas Supreme Court held that plaintiffs could not recover both treble damages and punitive damages because they only submitted a single damage issue requesting compensation for the damages proximately resulting from the occurrence in question. *Id.* at 367. The Court stated that, "In the absence of separate and distinct findings of actual damages on both the acts of negligence and the deceptive acts or practices, an award of exemplary damages and statutory treble damages would be necessarily predicated upon the same findings of actual damages and would amount to a double recovery of punitive damages." *Id.* The Court thus denied the request for both exemplary and treble damages, finding that such an award "would be necessarily predicated upon the same findings of actual damages and would amount to a double recovery of punitive damages." *Id.*

On the other hand, in a case alleging that a bank's acts of altering and paying a check constituted both breach of contract and negligence, it was not error to submit a single causation question inquiring whether the bank's "conduct" caused damages. *Benjamin Franklin Sav. Ass'n v. Kotrla*, 751 S.W.2d 218, 222 (Tex. App.—Houston [14th Dist.] 1988, no writ).

In addition, the defendant should also be careful to make proper objections for failure to relate specific damage questions to applicable causes of action. See *American Nat'l Petroleum Co. v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274, (Tex. 1990). For example, in *Aero Energy Inc. v. Circle C Drilling Company*, 699 S.W.2d 821, (Tex. 1985), the defendant did not object to the broad issue submission that allowed consideration of attorney fees for two separate causes. . Because there was no objection to the failure of the trial court to segregate the fees between the claims, the party waived the point. *Id.*

J. Broad Submissions: Do They Submit Questions of Law?

The Supreme Court's decision in *Texas Department of Human Resources v. E.B.*, 802 S.W.2d 647 (Tex. 1990), implicitly answers concerns that broad form submissions allow juries to decide questions of law rather than controlling facts that determine the application of law. Indeed, this family law case confirms that the court was not concerned that the jury applied the facts to the law in determining if the parent-child relationship should be terminated. *E.B.*, 802 S.W.2d at 649. This apparent lack of concern is consistent with the Court's opinions in *Island Recreational*, 710 S.W.2d at 551 and *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1987). Recall the single issue submitted in *Island Recreational* stated, "Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question." 710 S.W.2d at 553. The single issue in *Castleberry* stated, "Do you find . . . that Texas Transfer, Inc. was the alter ego of the defendant?" 721 S.W.2d at 275.

In any event, the line dividing the roles of judges and juries is presently unclear. In *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 25 (Tex. 1998), the plurality opinion of the Supreme Court was highlighted by the spirited concurrence of former Justice Gonzalez, who argued that the time had come to directly advise juries of the effect of their answers. In addition, Justice Hecht's dissent argued that juries should not be permitted to apply or ignore the law by deciding which party should win. *Id.* at 28 (Hecht, J., dissenting).

K. The Effect of a Jury's Findings. All conduct supporting a jury's finding under broad-form that the defendant was negligent is subject to collateral estoppel. See *Fort Worth Hotel L.P. v. Enserch Corp.*, 977 S.W.2d 746, 753-54 (Tex.App.–Fort Worth 1998, no pet.).

In submitting questions to the jury, it is important to remember that a "no" finding by the jury to any question does not prove the inverse. See *Grenwelge v. Shamrock Reconstructors, Inc.*, 705 S.W.2d 693, 694-95 (Tex. 1986) (per curiam). Rather, a "no" finding means only that the plaintiff failed to meet its burden on that claim. *Id.* Thus, to obtain relief, the party with the burden of proof must submit jury issues that result in a "yes" finding by the jury. This fact is particularly important in considering how to draft questions on claims for declaratory relief.

carrier properly requested a subsequent compensable injury issue, and the court of appeals, with one justice dissenting, held that the carrier was entitled to have the issue submitted to the jury. *Id.*

1. The “And/Or” Submission.

“And/or” is both a conjunctive and disjunctive submission and therefore improper. *See, e.g., Parker v. Keyser*, 540 S.W.2d 827 (Tex. Civ. App.—Corpus Christi 1976, no writ) (holding that the use of “and/or” to inquire about the acts of two different people without allowing the jury to choose one or the other or both is multifarious and duplicitous, injects uncertainty into the issue, and leads to speculation as to what the jury intended by its answer); *Everman Corp. v. Haws & Garrett General Contractors, Inc.*, 578 S.W.2d 539 (Tex. Civ. App.—Fort Worth 1979, no writ) (criticizing “and/or” submission was akin to inferential rebuttal issues that are better handled by instruction rather than by issue to avoid potential conflicts).

2. Burden of Proof Problems in Disjunctive Submission.

The disjunctive submission of issues can create problems in the placing of the burden of proof. In the case of *Voight v. Underwood*, 570 S.W.2d 440, 441-42 (Tex. Civ. App.—San Antonio 1978), *rev'd on other grounds*, 616 S.W.2d 266 (Tex. 1981), a will contest case, the court held that a disjunctive submission that inquired whether the deceased “did or did not have sufficient mental capacity,” and was to be answered deceased “did have sufficient mental capacity” or deceased “did not have sufficient mental capacity” was improper. The court pointed out that the disjunctive submission in this case placed the burden of proof equally for finding either answer and thus the issue either failed to place the burden of proof or it erroneously placed the burden of proof. *Cf. Brantley v. Sprague*, 636 S.W.2d 224 (Tex. Civ. App.—Texarkana 1982, writ ref'd n.r.e.).

B. Predicating or Conditioning the Question.

Failure to properly predicate or condition a question on an affirmative answer to a preceding question may create an inferential rebuttal issue — which is no longer permitted — or may assume a fact in issue and thereby be objectionable as a comment on the weight of the evidence. Indeed, since the abolition of inferential rebuttal issues, a partial incapacity issue following a total incapacity issue would have to be predicated on a “no” answer to the preceding total incapacity issue or its permanent duration issue; otherwise, it would constitute an inferential rebuttal issue. *See Varne v. Gordon*, 881 S.W.2d 877, 881-82 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (trial court improperly conditioned answer to fraud question on affirmative answer to either tortious interference or conspiracy question because those causes of action have different elements and each constitutes separate theory of recovery, independent of the other); *Barnhouse Motors, Inc. v. Godfrey*, 577 S.W.2d 378 (Tex. Civ. App.—El Paso 1979, no writ) (by submitting the second issue on an affirmative answer to the first issue, it was proper to word the second issue in a way that assumed the existence of the disputed representation issue).

Predicating the damages question on an affirmative response to the liability issue does not constitute impermissible advice of the consequences of the jury's answers. TEX. R. APP. P. 277. Likewise, in cases calling for apportionment of the loss among the parties, an instruction that a percent-responsibility finding in excess of 50% for plaintiff would bar plaintiff from recovering any damages is consistent with Texas Rule of Civil Procedure 277. *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998).

Finally, a requested question that is drafted in an unconditional form (that is, not conditioned upon an affirmative finding to a preceding question) must not assume any facts that are in controversy. Otherwise, it will constitute a comment on the weight of the evidence and will be held to be properly refused by the trial court. See *Shihab v. Express-News Corp.*, 604 S.W.2d 204 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); see also *Houston General Ins. Co. v. Lane Wood Indus., Inc.*, 571 S.W.2d 384 (Tex. Civ. App.—Fort Worth 1978, no writ). In addition, there is no need to insert "if any" in a subsequent question which is properly conditioned upon an affirmative finding to the preceding question inquiring about such fact. *Youngblood's, Inc. v. Goebel*, 404 S.W.2d 617 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.); see also *Barnhouse Motors*, 577 S.W.2d at 381.

C. Comment on the Weight of the Evidence.

Rule 277 admonishes that the court shall not comment directly on the weight of the evidence. For instance, an instruction, while a correct statement of the law, may still be error if it is a comment on the weight of the evidence. See *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984). To constitute a comment on the weight of the evidence, the special issue must be worded so as to indicate an opinion by the trial judge as to the verity of the fact inquired about. *Molina v. Payless Foods, Inc.*, 615 S.W.2d 944 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

For example, in *Texas Industrial Contractors, Inc. v. Ammean*, 18 S.W.3d 828, 834 (Tex. App.—Beaumont 2000, no pet. h.), an appellant argued that an instruction included in the jury charge was an impermissible comment on the weight of the evidence. The instruction, that "a contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered, but is not controlling," was a correct statement of the law. *Id.* In this case, the Beaumont Court held that the instruction "clarified the issue for the jury and did not constitute a comment on the weight of the evidence." *Id.*

The test for whether a comment on the weight of the evidence has occurred is the same whether it occurs in an instruction or an issue. See *Armes v. Campbell*, 603 S.W.2d 249, 251 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). In *Foley's Dep't Store v. Garner*, 588 S.W.2d 627, 628 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ), the trial judge included within an issue the phrase "considering the distance separating the trailer from the dock," and it was contended that this constituted a comment on the weight of the evidence because the phrase made it appear that the trial court was pointing out to the jury that there was something unusual about the distance. The

appellate court held that the use of that phrase did not indicate an opinion by the trial judge as to the verity of the fact inquired about and was therefore not objectionable.

In *Alvarez v. M-K-T Railroad Co.*, 683 S.W.2d 375, 378 (Tex. 1985), the Supreme Court considered whether the phrase “in not timely applying the brakes” was an impermissible comment. Although the court noted that the issue could have been better worded, reversal was not required. *Id.* Even if the wording of a special issue constitutes an implied comment, not every such comment is cause for reversal. *Mason v. Yellow Cab & Baggage*, 269 S.W.2d 329, 331 (Tex. 1954) (“In an already complicated field like that of special issues, we cannot strain too hard for perfection without ultimate damage to the jury system in civil cases”).

Examples of charges containing impermissible comments on the weight of the evidence are found in the following cases:

- A tendered issue, which assumes the truth of material controverted facts, constitutes a comment on the weight of the evidence. *Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 24 (Tex. 1987).
- An issue inquiring whether “Otto Vehle, d/b/a Reserve Law Officers’ Association, agreed in advance to pay for the work represented by the \$9,207.21 bill” constituted a comment on the weight of the evidence because it assumed the existence of the fact that Otto Vehle was doing business as Reserve Law Officers’ Association. *Otto Vehle & Reserve Law Officers’ Ass’n v. Brenner*, 590 S.W.2d 147, 150 (Tex.Civ. App.–San Antonio 1979, no writ). In that case, the capacity in which the party was acting was a matter in dispute and thus the issue assumed the existence of a disputed material fact and was held to be harmful error.
- An issue inquiring whether “an employee for Cactus Drilling failed to properly connect the pipe in question” was held to be ambiguous and therefore erroneous as an impermissible comment on the weight of the evidence. *Cactus Drilling Co. v. Williams*, 525 S.W.2d 902, 905 (Tex. Civ. App.–Amarillo 1975, writ ref’d n.r.e.). This issue inquired about two fact issues and could have been interpreted as assuming the existence of one issue while inquiring only about the other. Therefore, the issue was a comment on the weight of the evidence because it assumed a disputed fact issue.

IV. INFERENCEAL REBUTTAL ISSUES

The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery. *Tex. Workers’ Comp. Ins. Fund v. Mandlbauer*, 988 S.W.2d 750, 752 (Tex. 1999); *Paul Mueller Co. v. Alcon Labs., Inc.*, 993 S.W.2d 851, 854 (Tex. App.–Fort Worth 1999, no writ); *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 477 (Tex. 1978).

Inferential rebuttal issues are sometimes classified as “denial issues or argumentative denials.” *Mueller*, 993 S.W.2d at 854.

A. Inferential Issues Abolished in 1973.

Rule 277 provides:

Inferential rebuttal questions shall not be submitted in the charge. TEX. R. CIV.
P. 277 (Vernon 2000).

By insertion of this language, the Texas Supreme Court in 1973 abolished the practice of submitting the defendant’s inferential rebuttal theories by special issues. Before the 1973 amendments, the defendants were entitled to an affirmative submission of their theory of the case. The classic examples of inferential rebuttal issues were unavoidable accident, sole proximate cause, new and independent cause and sudden emergency, so far as the liability issues were concerned. *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 495-96 (Tex. App.–San Antonio 1994, writ denied). With respect to damages, the defensive theory of “sole cause” was a commonly submitted inferential rebuttal issue in workers’ compensation cases. In workers’ compensation litigation the issue of partial incapacity, as opposed to total incapacity, was submitted unconditionally, thereby making it an inferential rebuttal issue. The confinement issue, another inferential rebuttal issue, would be submitted when the defendant sought to limit an alleged general injury to a specific member of the body or to limit a specific injury to a lesser part of such specific member.

Before the 1973 amendments to Rule 277, the Texas Supreme Court had eliminated the submission of unavoidable accident as an inferential rebuttal issue and had mandated that this defensive theory be handled by instruction. *See Yarbrough v. Berner*, 467 S.W.2d 188 (Tex. 1971). The effect of the Rule 277 amendment, wherein inferential rebuttal issues were abolished, was to make all inferential rebuttal issues defensive theories that the jury would be instructed upon when raised by the pleadings and evidence.

B. Inferential Issues in Tort Cases.

Under current Texas law, inferential rebuttal defenses may be submitted to the jury as instructions, but not questions. *Wigglesworth v. Peebles*, 985 S.W.2d 659, 665 (Tex. App.–Fort Worth 1999, pet. denied); *Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 832 (Tex. App.–El Paso 1993, writ denied). One court recently noted, that intellectually, it is hard to justify why an inferential rebuttal question is bad, but an inferential rebuttal instruction is good. *Perez*, 881 S.W.2d at 495.

An example of an issue held to be an inferential rebuttal and therefore not proper under Rule 277 is *Dallas County v. Romans*, 563 S.W.2d 827, 830 (Tex. Civ. App.–Tyler 1978, no writ). The question in the charge was:

State whether or not you find the injury claimed by [plaintiff worker] was brought about by a risk which is incident to and arose out of the task that [plaintiff worker] had to do in fulfilling his contract for service to which [plaintiff worker] would not have been subjected but for his contract of service.

Id.

Another inferential rebuttal issue is the inclusion of the alternative of “neither” as a possible answer when inquiring which, if any, of two parties committed an act of negligence which was a proximate cause of the occurrence in question. *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984). A finding of “neither” equals unavoidable accident. *Id.* at 800. Therefore, jury answers for “both,” “neither” and “no one” are improper inferential rebuttal jury questions in negligence cases. *Id.*

“New and independent cause” is also an inferential rebuttal defense that may be submitted to the jury as an instruction, but not as a special issue. *Wigglesworth*, 985 S.W.2d at 665; *accord*, *Perez*, 881 S.W.2d at 496. A “new and independent cause” is an act or omission of a separate and independent agency that destroys the causal connection between the defendant’s original negligent act and the occurrence in question. *Wigglesworth*, 985 S.W.2d at 665. However, if an intervening cause was reasonably foreseeable by the defendant in the exercise of ordinary care, it cannot be considered a new and independent cause that will break the chain of causation. *Id.*

Moreover, a defendant is not entitled to an “assent and acquiescence” issue in a conversion action because such issue is an inferential rebuttal issue. *Prewitt v. Branham*, 643 S.W.2d 122 (Tex. 1983).

Furthermore, “sole proximate cause” is an inferential rebuttal issue. *Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996). If the pleadings and evidence raise an issue that other acts or omissions caused a plaintiff’s injuries, it is error to refuse to submit a defendant requested instruction on “sole proximate cause.” *Id.* However, because an inferential rebuttal is a defensive theory, in most cases a failure to submit an inferential rebuttal instruction could injure only the defendant. *Mandlbauer*, 988 S.W.2d at 752. Thus, a plaintiff may not complain on appeal when a trial court fails to submit a “sole cause” inferential rebuttal jury instruction.

C. Inferential Issues in Business Cases.

In the non-tort context, the inferential rebuttal issues are not as easy to identify.

Kemp v. Rankin, 530 S.W.2d 324 (Tex. Civ. App.—Amarillo 1975, no writ), is helpful in identifying an inferential rebuttal issue in a contract case. Rankin sued Kemp to recover the alleged difference between the \$1,200 monthly salary she alleged he had orally agreed to pay her and the salary she actually received. Kemp’s response was that the monthly salary agreed upon was \$1,100. The trial court submitted one issue inquiring whether Kemp agreed to pay Rankin \$1,200 a month for managing the business. Kemp appealed, claiming he was entitled to a separate issue inquiring whether the monthly salary was \$1,100.

The appellate court concluded that the defendant’s request was prohibited because it was an inferential rebuttal. The court explained that the defendant was not deprived of his defense because the plaintiff, to discharge her burden of persuasion on the controlling issue, was required to convince the jury by a preponderance of the evidence that her salary was indeed \$1,200 a month and not the

salary contended by Kemp. *See also, Gulf Ins. Co. v. Hodges*, 513 S.W.2d 267, 270-71 (Tex. Civ. App.–Amarillo 1974, no writ).

In *Paul Mueller Co. v. Alcon Laboratories, Inc.*, 993 S.W.2d 851 (Tex. App.–Ft. Worth 1999, no writ), the court distinguished a theory that amounted to an inferential rebuttal from an affirmative defense, on which a separate issue would have been proper. *Mueller*, 993 S.W.2d 851. Quoting *Kemp*, the court observed that “an affirmative defense permits a party to introduce evidence to establish an independent reason why its opponent should not prevail, not to rebut the factual proposition to its opponent’s pleadings.” *Mueller*, 993 S.W.2d at 854 (quoting *Kemp*, 530 S.W.2d at 325). The court held that the trial court had properly refused to submit the defendant’s contract formation questions that sought factual findings that the contract plaintiff sued on was never perfected. *Mueller*, 993 S.W.2d at 854.

V. BURDEN OF PROOF

A. Proper Methods for Addressing the Burden of Proof.

Rule 277 states: “The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.” TEX. R. CIV. P. 277 (Vernon 2000). The common practice of prefacing each issue with “Do you find from a preponderance of the evidence” was rendered unnecessary by the 1973 amendment that permitted the placing of the burden of proof by instruction. It is recommended that the burden of proof be addressed by instruction rather than by inclusion in each question. 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC xxiv (1998); *see Morales v. Chrysler Realty Corp.*, 843 S.W.2d 275, 279 (Tex. App.–Austin 1992, no writ). Accordingly, the court can save time and expense by including in its general instructions the following instruction when the issues call for “yes” or “no” answers:

Answer “Yes” or “No” to all questions unless otherwise instructed. A “Yes” answer must be based on a preponderance of the evidence *unless otherwise instructed*. If you do not find that a preponderance of the evidence supports a “Yes” answer, then answer “No.” The term “preponderance of the evidence” means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than “Yes” or “No,” your answer must be based on a preponderance of the evidence unless otherwise instructed.”

Id. at PJC 1.3.

In order to place the burden of proof properly, the charge must be worded so that an affirmative answer indicates that the party with the burden of persuasion on that fact established the fact by a preponderance of the evidence. *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.–Houston [1st Dist.] 1991, writ denied).

B. Examples of Incorrect Jury Charges on Burden of Proof.

Tender of an issue that misplaces the burden of proof is not tender of an issue in substantially correct language. *Goodnight v. Phillips*, 458 S.W.2d 196, 202 (Tex. App.–Houston [1st Dist.] 1970,

writ ref'd n.r.e.). In *Goodnight*, the trial court properly refused to include the following question in the charge:

Do you find from a preponderance of the evidence that the defendant, Dr. John R. Phillips, had the informed consent of the plaintiff, Chester Goodnight, to operate into plaintiff's left thigh to obtain suture materials for the hernia repair? Answer 'We do' or 'We do not.'

Id. This question was improper because the burden of proof as to informed consent is on the plaintiff, and the question incorrectly placed the burden on the defendant. *Id.*

Another error was made in *Chasewood Construction Co. v. Rico*, 696 S.W.2d 439 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.). In *Chasewood*, the following question was asked:

Did Chasewood, on December 1, 1981, act in bad faith in terminating Rico's framing contract and/or the trim contract?

ANSWER: "They acted in bad faith" or "They did not act in bad faith" for each contract separately.

The preliminary instructions in the charge stated that every finding made by the jury must be by a preponderance of the evidence. The issue before the San Antonio Court of Appeals was whether this submission, which omitted the standard, "Do you find by a preponderance of the evidence," properly placed the burden of proof. The Court reversed and remanded the bad faith claims because the issue improperly placed the burden upon the defendant. Quoting *Southern Pine Lumber v. King*, 161 S.W.2d 483 (Tex. 1943), the San Antonio noted the importance of maintaining the burden of proof on the plaintiff:

Had the instructions been merely to answer the questions 'yes' or 'no' the special issues would not have been subject to the objections urged against them. [citation omitted.] But they went further than that and informed the jury, in effect, that whether their answers were 'yes' or 'no' they must, in either case, be determined from a preponderance of the evidence. . . . [T]he form of the charge was calculated to confuse rather than aid the jury in determining the answer to the question under discussion, and that appellant was deprived of his right to have either a specific instruction placing upon appellee the burden of proving the affirmative of such question, or to have such question so framed that the jury would necessarily understand that the same should be answered affirmatively only in the event the testimony preponderated in favor of such answer, and, absent such preponderance, in the negative.

Chasewood, 696 S.W.2d at 441-42.

C. Preservation of error.

A misplaced burden of proof is not an error of which a party may complain for the first time after verdict. *Lapsley v. Tatum*, 667 S.W.2d 877, 880 (Tex. App.–Dallas 1984, no writ). Such an error is waived in the absence of a timely objection. *Id.* An objection prior to the submission of the charge to the jury on the ground that the question does not properly place the burden of proof is sufficient to preserve error. *Turk*, 810 S.W.2d at 759. Furthermore, the failure to submit an instruction regarding the burden of proof does not constitute a ground for reversal unless a substantially correct instruction has been requested in writing and tendered to the trial court by the party complaining of the judgment. *Brantley v. Sprague*, 636 S.W.2d 224, 225 (Tex. Civ. App.–Texarkana 1982, writ ref’d n.r.e.).

VI. EXPLANATORY INSTRUCTIONS

A. Instructions Must Be “Proper”.

The 1973 change in Rule 277 replaced the word “necessary” with the word “proper.” Under the 1988 amendment to Rule 277, the Court shall submit “such instructions and definitions as shall be proper to enable the jury to render a verdict.” TEX. R. CIV. P. 277 (emphasis added.) As Justice Pope has written,

Although the submission of instructions has been expanded to give the trial judge more discretion in his use of instructions, this discretion is not unfettered. Instructions are limited to those that should enable the jury to render its verdict.

Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY’S L.J. 1, 39 (1979). Limitations on the use of instructions and certain basic principles pertaining to their use are set out below.

B. Source of Definitions and Instructions.

The most acceptable source for definitions and instructions is an appellate decision approving the particular language. Consequently, use of “words and phrases” in the location of a decision (preferably from the Texas Supreme Court) approving a definition or instruction is the most satisfactory course.

If a definition or instruction cannot be found in a reported appellate decision and liability is asserted based upon a provision of a statute or regulation, the jury charge should track the language of the provision as closely as possible. *Toennies v. Quantum Chem. Corp.*, 998 S.W.2d 374, 377 (Tex. App.–Houston [1st Dist.] 1999, pet. granted); *Travelers Ins. Co. v. Wilson*, No. 06-99-00175-CV, 2000 WL 1052965, at *2 (Tex. App.–Texarkana Aug. 1, 2000, no pet. h.). Other respected and acceptable sources include The Uniform Commercial Code and The Restatement of Laws series, including the Restatements of Contracts, Restitution and Agency. These sources appear to be highly favored by Texas courts. *See e.g., McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967).

The Texas Pattern Jury Charges have not been adopted and approved in their entirety by the Texas Supreme Court. *Whiteside v. Watson*, 12 S.W.3d 614, 623-24 (Tex. App.–Eastland 2000, pet. denied). As a result, Texas courts have broad discretion to add instructions and definitions to a Pattern Jury Charge that has not been declared by the supreme court as the exclusive method of charging a jury in Texas. *Id.* However, a trial court does err by altering a specific Pattern Jury Charge that the Texas Supreme Court has adopted as the law of the state to the exclusion of all other instructions, definitions, and questions. *Id.* at 623.

C. Standard of Review.

Rule 277 of the Texas Rules of Civil Procedure requires the trial court to submit “such instructions and definitions as shall be proper to enable the jury to render a verdict.” TEX. R. CIV. P. 277. This rule affords the trial court great latitude and considerable discretion to determine necessary and proper jury instructions. See *Texas Workers’ Compensation Ins. Fund v. Mandlbauer*, No. 99-1204, 2000 WL 1535867, at *2 (Tex. Oct. 19, 2000); *Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998); *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997); *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995). Trial courts possess considerably more discretion in submitting instructions and definitions than in submitting questions. *Raiford v. May Dep’t Stores Co.*, 2 S.W.3d 527, 530 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.–San Antonio 1998, pet. denied). However, the discretion afforded during the submission of instructions and definitions is not absolute — the instruction or definition must be “proper.” *Wal-Mart*, 982 S.W.2d at 470.

Appellate courts review the denial of a requested jury instruction or definition under an abuse of discretion standard. *J. Wigglesworth Co. v. Peebles*, 985 S.W.2d 659, 665 (Tex. App.–Fort Worth 1999, pet. denied); *Raiford v. May Dep’t Stores Co.*, 2 S.W.3d 527, 530 (Tex. App.–Houston [14th Dist.] 1999, no pet.); *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.–Beaumont 1999, pet. denied). The court of appeals must determine whether the trial court acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *J. Wigglesworth*, 985 S.W.2d at 665.

However, where the trial court actually provided the jury with an instruction or definition, the inquiry on appeal as to whether the instruction or definition was “proper” is de novo. *Raiford*, 2 S.W.3d at 530; *St. Joseph Hosp. v. Wolff*, 999 S.W.2d 579, 586 (Tex. App.–Austin 1999, pet. granted); *Schorlemer v. Reyes*, 974 S.W.2d 141, 146 (Tex. App.–San Antonio 1998, pet. denied). In other words, the substance of a submitted instruction or definition – whether it properly defines the terms it uses or correctly states the law – is appropriately reviewed de novo. *Wolff*, 999 S.W.2d at 586; *Schorlemer*, 974 S.W.2d at 146 (whether an instruction misstates the law or constitutes an impermissible comment on the weight of the evidence is a question of law, reviewable de novo).

D. What is “Proper”?

Rule 277 only requires the court to submit such instructions as shall be “proper.”

It has been held that an instruction is “proper” if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and the evidence. *Texas Workers’ Compensation Ins.*

Fund v. Mundlbauer, No. 99-1204, 2000 WL 1535867, at *2 (Tex. Oct. 19, 2000); *Travelers Ins. Co. v. Wilson*, No. 06-99-00175-CV, 2000 WL 1052965, at *1 (Tex. App.–Texarkana Aug. 1, 2000, no pet. h.); *Whiteside v. Watson*, 12 S.W.3d 614, 621 (Tex. App.–Eastland 2000, pet. denied); *Wylor Indus. Works, Inc. v. Garcia*, 999 S.W.2d 494, 510-11 (Tex. App.–El Paso 1999, no pet.); *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.–San Antonio, 1998, pet. denied). All three requirements must be met for the instruction to be proper. *Wal-Mart*, 982 S.W.2d at 470. Accordingly, an instruction that misstates the law or correctly states the law but does not assist the jury is improper. *Id.*

What instructions are permissible under Rule 277 can best be understood by studying the case development since 1973.

1. Instruction Cannot Be a Comment on Evidence.

An instruction must not be a direct comment on the weight of the evidence. Rule 277.

An instruction must not be lengthy, repetitive or couched in terms of the victory or defeat of one of the parties. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974). See *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182, 187 (Tex. App.–Corpus Christi 1992, writ denied) (plaintiff’s requested instruction was not proper because it sought to have the court instruct a verdict that the Plaintiff had made a prima facie case).

However, a charge is not objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence when the comment is properly a part of an instruction or definition. *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995) (trial court’s instruction in mineral rights case that “to be ‘reasonable,’ a method does not have to be the best technical method or the most economical method, nor does it mean that the uranium must be removed by that method” was not a comment on the evidence). See *Raiford v. May Dep’t Stores Co.*, 2 S.W.3d 527, 532 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (charge was not objectionable on ground that “contemporaneous search” instruction might incidentally comment on the evidence because it was properly part of an instruction); *Texas Indus. Contractors, Inc. v. Ammean*, No. 09-98-073CV, 2000 WL 365665, at *5 (Tex. App.–Beaumont April 6, 2000, no pet. h.) (instruction stating that “a contract between two employers providing that one shall have the right of control over certain employees is a factor to be considered, but is not controlling” was a correct statement of the law and not a comment on the weight of the evidence under the circumstances of the case).

2. Instruction Must Aid Jury.

The trial court must exclude anything, no matter how relevant, that does not aid the jury in answering the issues. *Brookshire Bros. Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.–Beaumont 1999, pet. denied); *Jones v. Jefferson County*, 15 S.W.3d 206, 210 (Tex. App.–Texarkana 2000, pet. denied); *Facciolla v. Linbeck Const. Corp.*, 968 S.W.2d 435, 444 (Tex. App.–Texarkana 1998, no pet.); *Union Oil Co. of Cal. v. Richard*, 536 S.W.2d 955, 958 (Tex. Civ. App.–Beaumont 1975, no writ). Rather, the instruction must assist or aid the jury in answering the question. Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY’S L.J. 1, 38, 41 (1979). In *Union Oil*, the appellate court held that the trial judge had properly excluded instructions to the

effect that (1) the defendant is not obligated to provide an accident-proof ship; (2) the mere occurrence of an accident does not raise an inference or presumption of negligence or unseaworthiness; and (3) that a corporation is entitled to a fair trial on the same basis as a private individual. 536 S.W.2d at 957. In *Facciolla*, the trial court did not abuse its discretion in refusing to instruct the jury in a tortious interference case to the effect that:

A party may interfere with an agreement by persuasion alone, by offering better terms, by giving an indemnity against damage claims to the party or parties induced to breach, or by any act interfering with the performance of a legal duty arising from the agreement.

968 S.W.2d at 444. The general instruction on tortious interference given by the trial court did not limit the type of act which could possibly interfere with a legal duty arising from the agreement at issue; accordingly, the laundry list instruction proposed by the plaintiff was unnecessary, even if a correct statement of the law. *Id.*

3. “Findings of Fact” and “Adjudicative Facts” in Charge Constitute an Impermissible Comment on the Evidence.

Substantial jury verdicts were reversed in two cases because the trial court instructions constituted an impermissible comment on the weight of the evidence. *American Bankers Ins. Co. v. Caruth*, 786 S.W.2d 427 (Tex. App.–Dallas 1990, no writ); *First Nat’l Bank of Amarillo v. Floyd Jarnigan*, 794 S.W.2d 54 (Tex. App.–Amarillo 1990, writ denied). In *Jarnigan*, the trial court instructed the jury as to 13 “adjudicative” facts under the authority of Rule 201 such as, the legal documents in question constituted a single transaction and the contractor did not substantially perform its contract with the Jarnigans. The findings, according to the *Jarnigan* court, were not designed to be helpful to the jury in answering any of the questions in the charge; instead, the recitation of the findings tended to suggest that the trial court thought the law and the facts were in favor of the Jarnigans and that they should be compensated accordingly.

In *Caruth*, the trial court struck the pleadings of the insurance company as a sanction for repeated discovery abuse. In the damage phase of the suit, the trial court presented 36 “Findings of Facts” to the jury such as, American Bankers engaged in an unconscionable action and an unconscionable course of action by taking advantage of the lack of knowledge, ability, experience and capacity of plaintiff to a grossly unfair degree. A verdict of \$5,500,000 was reversed because the instructions were improper.

4. General Instruction About Law Is Improper.

An instruction must not merely instruct the jury about the general state of the law regarding who is and who is not liable. Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY’S L.J. 1, 34 (1979). An instruction that simply informs the jury of an abstract principle of law without the jury’s knowledge of what bearing it has on the case is not a proper instruction. *Texas Gen. Indem. Co. v. Welch*, 595 S.W.2d 205, 207-08 (Tex. Civ. App.–Eastland 1980, writ ref’d n.r.e.). See *Park v. Larison*, No. 06-99-00105-CV, 2000 WL 1133130, at *6 (Tex. App.–Texarkana Aug. 11, 2000, no pet. h.); *First Int’l Bank in San Antonio v. Roper Corp.*, 686

S.W.2d 602, 603-05 (Tex. 1985) (giving a correct but unnecessary instruction is an impermissible comment on the weight of the evidence); *Acord v. General Motors Corp.*, 669 S.W.2d 111, 116 (Tex. 1984) (instruction that a manufacturer is not an insurer, although a correct statement of law, was unnecessary and therefore an erroneous comment on the evidence); *Fluor Daniel, Inc. v. Boyd*, 941 S.W.2d 292, 295-96 (Tex. App.–Corpus Christi 1996, writ denied) (unnecessary instruction placing undue emphasis on extraneous factors constitutes an improper comment on the weight of the evidence). *See also Maddox v. Denka Chem. Corp.*, 930 S.W.2d 668, 671 (Tex. App.–Houston [1st Dist.] 1996, no writ). In *Welch*, the compensation insurance carrier requested an instruction to the effect that evidence of prior compensation payments is not an admission of liability. The appellate court, in holding that the instruction was properly refused, pointed out that no issue was submitted in the case inquiring as to whether Texas General was “liable.” Therefore, the requested instruction could not aid the jury in answering any of the submitted issues. *Texas Gen. Indem. Co.*, 595 S.W.2d at 208.

A general explanation of law should not be given. *See Shihab v. Express-News Corp.*, 604 S.W.2d 204, 211 (Tex. Civ. App.–San Antonio 1980, writ ref’d n.r.e.); *Park*, 2000 WL 1133130, at *5. In *Shihab*, the requested instruction was a correct statement of the law, but the court held that the trial judge is not required to give to the jury a general explanation of the law. *Id.* In *Park*, the trial court did not abuse its discretion in refusing to submit the following instruction to the jury, although the instruction was a correct statement of Texas law:

You are instructed that a defendant who undertakes, gratuitously or for consideration, to render services necessary to protect another’s person or property is liable to that person for physical harm resulting from the failure to exercise reasonable care to perform the undertaking if either (1) the defendant’s failure to exercise care increases the risk of harm, or (2) the harm is suffered because the other person relied on the defendant’s undertaking.

2000 WL 1133130, at *5-6. It is not necessary or proper to include every correct statement of law in the jury charge *Id.* at *6.

5. Instructions that “Nudge”.

Instructions that attempt to aim or nudge the jury toward a particular result are improper. *Acord v. General Motors*, 669 S.W.2d 111, 116 (Tex. 1984); *Lemos v. Montez*, 680 S.W.2d 798, 800-01 (Tex. 1984); Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY’S L.J. 1 (1979); *Stevens v. Travelers Ins. Co.*, 563 S.W.2d 223, 226-29 (Tex. 1978). Instructions explaining terms that have technical and precise meanings and that the jury is to use in assessing damages do not nudge the jury when they are placed at a point in the charge after the jury has determined negligence but before it has assessed damages. *Whiteside v. Watson*, 12 S.W.3d 614, 623-24 (Tex. App.–Eastland 2000, pet. denied).

The refusal of the following defense instructions requested by Caterpillar Tractor Co. was approved in *Caterpillar Tractor Co. v. Gonzales*, 599 S.W.2d 633, 638 (Tex. Civ. App.–El Paso 1980, writ ref’d n.r.e.): (1) that evidence of a better design was not sufficient to establish that a step was negligently or defectively designed; (2) that the ultimate in safety was not required of a

manufacturer; and (3) that the duty of a manufacturer was minimized where the plaintiff was a member of that trade.

Similarly, in a case involving the issue of whether a landowner had a right to control the work of an independent contractor, an instruction that generally, “an owner does not have a duty to see that an independent contractor performs work in a safe manner” was held an impermissible comment on the weight of the evidence. *Maddox v. Denka Chem. Corp.*, 930 S.W.2d 668, 671 (Tex. App.–Houston [1st Dist.] 1996, no writ).

a. Nudging in a FELA Case.

The plaintiff successfully argued in *H.W. Mitchell v. Missouri-Kansas-Texas Railroad Co.*, 786 S.W.2d 659 (Tex.), *cert. denied*, 498 U.S. 896 (1990), that the following instruction was an improper comment on foreseeability:

In answering this issue, you are instructed that before negligence, if any, can be established against the Defendant-Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.

Id. at 660-61. After first approving the instruction, the supreme court on motion for rehearing held the instruction confused the issue of foreseeability by relating duty with the concept of causation. Instead, the court recommended for future FELA cases the use of the Pattern Jury Instructions adopted by the Judicial Counsel of the Fifth Circuit.

The court of appeals in another FELA case – *Kansas City Southern Railway Co. v. Stokes*, No. 06-99-00085-CV, 2000 WL 231943 (Tex. App.–Texarkana March 2, 2000, no pet.) – similarly found that the following exclusivity instruction constituted reversible error:

[Plaintiff] is not entitled to benefits under Texas Workers Compensation laws, and the FELA is his exclusive remedy to obtain compensation for his alleged on-the-job injury.

Id. at *2. The court of appeals held that the inability of the plaintiff to receive worker’s compensation benefits under Texas law was irrelevant to the defendants’ liability under FELA, and allowing the jury this information could be prejudicial to the defendant. *Id.*

b. Nudging in a Products Case.

The question in *Ahlschlager v. Remington Arms Co.*, 750 S.W.2d 832 (Tex. App.–Houston [14th Dist.] 1988, writ denied) was whether the sole cause instruction in the products liability case was excess baggage as in *First Int’l Bank in San Antonio v. Roper*, 686 S.W.2d 602 (Tex. 1985), or was a proper instruction under Rule 277. *Ahlschlager*, 750 S.W.2d at 833-34. *Remington* implicated the conduct of a third party as being the sole cause of the accident. Indeed the Houston court concluded that it was difficult to imagine a stronger case for giving an instruction on sole cause. Distinguishing *Roper* because it went to trial before the court’s decision in *Duncan v. Cessna Aircraft*

Co., 665 S.W.2d 414 (Tex. 1984), the Houston court approved the following instructions on sole cause:

There may be more than one cause of an occurrence, but there can only be one sole cause. If an act or omission of any person not a party to the suit was the sole cause of the occurrence, then no act, omission, or product of any party to the suit could have been a cause of the occurrence.

* * * * *

There may be more than one proximate cause of an event, but there can only be one sole proximate cause. If an act or omission of any person was the sole proximate cause for an occurrence, then no act or omission of any other person could have had a proximate cause.

Ahlschlager, 750 S.W.2d at 833-34.

6. Pleadings and Proof Required.

An instruction on a defensive theory that is not supported by both pleading and proof is erroneous. *DeViney v. McLendon*, 496 S.W.2d 161, 166-67 (Tex. Civ. App.–Beaumont 1973, writ ref'd n.r.e.). See *Watson v. Brazos Elec. Co-op, Inc.*, 918 S.W.2d 639, 644-45 (Tex. App.–Waco 1996, writ denied) (refusal to submit nuisance instruction that failed to conform to pleadings was proper); *McReynolds v. First Office Management*, 948 S.W.2d 342, 344 (Tex. App.–Dallas 1997, no writ). If, however, there is any support in the evidence for an instruction, the instruction is proper. *Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998) (instruction on “sudden emergency” proper where evidence showed it was raining, the streets were wet, and plaintiff abruptly applied her brakes after which defendant ran into her from behind).

7. No Marshaling of Evidence.

Instructions that array the evidence or marshal the facts should be avoided. Jack Pope and William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY'S L.J. 1, 44 (1979). The Texas Supreme Court specifically disapproved the practice of marshaling in *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449, 453 (Tex. 1978), on grounds that the charge was a comment on the evidence and advised the jurors of the effect of their answers.

Summarizing the testimony of the witnesses was held to be error in *Southern Pac. Co. v. Hayes*, 391 S.W.2d 463, 467-68 (Tex. Civ. App.–Corpus Christi 1965, writ ref'd n.r.e.). The trial court did not err in *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1997) in refusing to include in the jury charge specific terms of the insurance contract at issue where the policy itself was in evidence, relevant exclusions were presented to the jury in an exhibit and discussed at length, and there was no dispute about the meaning of the policy's terms. *Id.* at 451-52.

8. You Can't Be Perfect.

“[I]n an already complicated field like that of special issues, we cannot strain too hard for perfection without ultimate damage to the whole jury system in civil cases.” *Alvarez v. Missouri-Kansas-Texas Ry. Co.*, 683 S.W.2d 375, 378 (Tex. 1984), quoting *Mason v. Yellow Cab & Baggage Co.*, 269 S.W.2d 329, 331 (Tex. 1954); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert. dismiss’d*, 485 U.S. 994 (1988).

This quote is often used by appellate courts where the problem in submission amounts to harmless error. For example, the court in *Texaco* used the “you can’t be perfect” rationale:

As previously noted, in viewing the charge as a whole, the final “if any” conditional language of special issue no. 3 reasonably appears to qualify the entire phrase “Texaco’s knowingly interfering with the agreement between Pennzoil and the Getty entities.” Consequently, the jury could not assume this fact.

Texaco, 729 S.W.2d at 811.

9. What Terms Should be Defined.

The trial court is required to give definitions of legal and technical terms when such definitions would aid the jury. *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.–Beaumont 1999, pet. denied). See *Whiteside v. Watson*, 12 S.W.3d 614, 624 (Tex. App.–Eastland 2000, pet. denied) (“It is a proper function of the jury charge to define words that have specific meanings that may not be known by the members of the jury.”). However, jurors are presumed to have average intelligence and the court is not required to convert the charge into a dictionary. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 814 (Tex. App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.), *cert dismiss’d*, 485 U.S. 994 (1988); *Texas Employers Ins. Ass’n v. Hamor*, 97 S.W.2d 1041, 1041 (Tex. Civ. App.–Amarillo 1936, no writ). Ordinary words used in their common meaning need not be defined. *West Texas State Bank v. Tri-Serv. Drilling Co.*, 339 S.W.2d 249, 256 (Tex. Civ. App.–Eastland 1960, writ ref’d n.r.e.). Accordingly, a trial court’s refusal to substitute “contract” for “agreement” and its refusal to give a proper legal definition of “agreement” is not error because no definition of “agreement” is necessary. *Texaco*, 729 S.W.2d at 814. See *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87 (Tex. App.–San Antonio 1988, writ denied) (“gross and willful misconduct,” as used in stock option contracts, were words of ordinary meaning that did not require technical legal definition for the jury).

Further, the “better practice” is not to define terms which are unrelated to the issues submitted to the jury. *Barnhouse Motors, Inc. v. Godfrey*, 577 S.W.2d 378, 381 (Tex. Civ. App.–El Paso 1979, no writ) (deceptive trade practice case in which the term “deceptive trade practice” was defined even though no issue was submitted containing such term, held not reversible error); *Texas Workers’ Compensation Ins. Fund v. Mandlbauer*, No. 99-1204, 2000 WL 1535867, at *2 (Tex. Oct. 19, 2000) (where employee in workers’ compensation case did not plead or try his case under a producing cause theory and the charge described the causation issues in terms of “resulting from” not “producing cause,” the trial court did not abuse its discretion in refusing to define the term “producing cause” when the term was not used in the charge).

10. Do Not Assume Facts.

The giving of instructions that assumed the existence of facts not in evidence was held to be prejudicial error in *Southern Pacific Co.*, 391 S.W.2d at 467-68. In another case, a requested instruction that stated the plaintiff made a prima facie case in an age discrimination suit was held erroneous because the issue of whether the plaintiff was qualified for her job was “hotly disputed.” *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182, 187 (Tex. App.–Corpus Christi 1992, writ denied).

11. Directly Advising the Legal Effect of the Answer Is Not Proper.

Texas Rule of Civil Procedure 277 precludes the trial court from directly advising the jury of the effect of their answers. TEX. R. CIV. P. 277; *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 24 (Tex. 1998). To directly advise the jury of the legal effect of its answers, the issue submitted must instruct the jury how to answer each question in order for the plaintiff or defendant to prevail. *H.E. Butt*, 985 S.W.2d at 24. Indirect advisement, however, is permissible under certain circumstances. Specifically, the court’s charge is not objectionable on the ground that it advises the jury of the effect of their answers when it is properly a part of an instruction or definition. For example, a charge that tells the jury to answer the question on actual damages only if the jury found that 50 percent or less of the negligence that caused the occurrence in question was attributable to defendant is proper because Rule 277 expressly authorizes such a conditional submission. *H.E. Butt Grocery*, 985 S.W.2d at 23-24. Such a charge does not directly inform the jury of the legal effect of its answers, but merely directs the jury to answer the damages question only if certain conditions are satisfied. *Id.* at 24. Therefore, the instruction merely incidentally informs the jury of the legal effect of its answers. *Id.* *Accord Wal-Mart Stores, Inc. v. Sholl*, 990 S.W.2d 412, 419 (Tex. App.–Corpus Christi 1999, pet. denied); *Alamo Lumber Co. v. Pena*, 972 S.W.2d 800, 807-08 (Tex. App.–Corpus Christi 1998, pet. denied). Similarly, an instruction on a defensive theory should not go further than merely focusing the effect of the concept on the relevant issues to be considered by the jury. It was held error in *Davis v. Thompson*, 581 S.W.2d 282, 285-86 (Tex. Civ. App.–Amarillo 1979, writ ref’d n.r.e.) to add to the standard instruction on unavoidable accident the following underlined sentence:

You are instructed that an occurrence may be an unavoidable accident, that is, an event not proximately caused by negligence of any party to the occurrence. If you believe, from a preponderance of the evidence, that the occurrence which is the subject of this suit was an unavoidable accident, then you may not find any party to the occurrence was guilty of negligence which was a proximate cause of the occurrence. (Emphasis added)

12. Personalization of the Charge.

Courts frequently “personalize” or “individualize” the charge so as to make the law contained in the charge applicable to the facts in the case and more easily understood by the jury. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 821-822 (Tex. App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.), cert. *dism’d*, 485 U.S. 994 (1988); *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 88 (Tex. Civ. App.–El Paso 1976, writ ref’d n.r.e.). Problems arise when the instruction deviates from “enabl[ing] the jury to render a verdict,” TEX. R. CIV. P. 277, to actually misstating the law or

misguiding the jury. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973). An example of an improper deviation is *Owen Development Co. v. Calvert*, 157 Tex. 212, 302 S.W.2d 640, 643 (1957), in which one issue, which tied the jury to a 31-day time period, singled out and gave prominence to the testimony of an interested witness. In *Texaco*, the disputed instruction was a true statement of the law; it personalized the law to the parties without misleading the jury. *Texaco*, 729 S.W.2d at 811.

13. Example of an Egregious Instruction.

An instruction as to what an ordinarily prudent person would do under certain circumstances was error in *City of Beaumont v. Fuentez*, 582 S.W.2d 221 (Tex. Civ. App.—Beaumont 1979, no writ). In that case the court inquired as to whether Frank Fuentez was negligent and instructed the jury:

In evaluating the conduct of Frank Fuentez who was familiar with the intersection in question and who knew that a stop sign was on the northeast corner of the intersection for traffic traveling west on Lavaca, you are instructed that the driver of an automobile approaching an intersection has a right to assume that the driver of another automobile also approaching an intersection will stop in obedience to a stop sign, and the failure of Frank Fuentez to yield the right-of-way, decrease his speed, apply his brakes, turn to the left, or sound his horn does not constitute negligence until the other automobile is in such a perilous position that Frank Fuentez, in the exercise of ordinary care, would know and appreciate that the automobile was not going to stop.

The court held that this instruction left no fact issue for the jury to determine as to whether Fuentez was negligent in his approach to the intersection. *Id.* at 224.

14. Instruction About Partial Instructed Verdict.

An explanatory instruction with regard to the trial court's decision on a partial instructed verdict for one party was an impermissible comment on the weight of the evidence. *Board of Regents v. Denton Constr. Co.*, 652 S.W.2d 588, 594-95 (Tex. Civ. App.—Fort Worth 1983, no writ). The practice among trial judges has always been not to advise the jury that the trial court has rendered judgment for either party on any part of the case submitted to them.

15. Improper Instruction in Libel Case.

In a libel suit it was held that the trial court correctly refused the defendant's requested instruction on the substantial truth doctrine. "The only function of an explanatory instruction in the charge is to aid and assist the jury in answering the issues submitted. The only requirement to be observed is that the trial court must give definitions of legal and other technical terms. Nothing else, however interesting, or, indeed, however relevant to the case in general, which does not aid the jury in answering the issue, is required." *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

16. Improper Instruction In Medical Malpractice Cases.

An explanatory instruction can be a comment on the evidence even though the instruction might be a correct statement of the law. The following instruction was held to be error in *Levermann v. Cartall*, 393 S.W.2d 931 (Tex. Civ. App.–San Antonio 1965, writ ref'd n.r.e.):

You are further instructed as a part of the law of this case, that a medical doctor is not an insurer or guarantor of his work; neither is he responsible in law for an honest mistake in judgment, unless such mistake is due to want of ordinary care, as the term “ordinary care” has been defined hereinabove.

The only function of an explanatory instruction in the charge is to aid and assist the jury in answering the issue submitted. *Levermann*, 393 S.W.2d 935-396; TEX. R. CIV. P. 277. This is the same basis upon which many post-1973 cases have held instructions erroneous, so it would appear that this and similar instructions would still be error. See *Texas General Indem. Co. v. Welch*, 595 S.W.2d 205, 207-08 (Tex. Civ. App.–Eastland 1980, writ ref'd n.r.e.); *Union Oil Co. of Cal. v. Richards*, 536 S.W.2d 955, 957-58 (Tex. Civ. App.–Beaumont 1975, writ ref'd n.r.e.); *First State Bank & Trust of Edinburg v. George*, 519 S.W.2d 198, 207 (Tex. Civ. App.–Corpus Christi 1974, writ ref'd n.r.e.); *First State Bank of Corpus Christi v. Ake*, 606 S.W.2d 696, 701 (Tex. Civ. App.–Corpus Christi 1980, writ ref'd n.r.e).

The *Levermann* court found that the instruction quoted above did not refer to any particular issue or term used in the charge and could only be considered by the jury as applying to the case as a whole. It was not necessary to assist the jury in answering any issue. *Levermann* was cited with approval and relied upon in the post-1973 amendment case of *DeLeon v. Otis Elevator Co.*, 610 S.W.2d 179 (Tex. Civ. App.–San Antonio 1980, writ ref'd n.r.e.), in which the court approved the refusal of an instruction on the non-delegable duty of a building owner in an elevator case. In *DeLeon*, after quoting the provisions of Rule 277, as amended in 1973, the court held that this meant that special instructions are authorized only when it is necessary “to enable the jury to properly pass upon and render a verdict on such issues.” *DeLeon*, 610 S.W.2d at 181.

17. Improper Instructions In Products Liability Cases.

A 1984 Supreme Court decision in *Acord v. General Motors*, 669 S.W.2d 111 (Tex. 1984) supports the *Levermann* holding that explanatory instructions can be a comment on the evidence even though the instruction might be a correct statement of the law. *Acord* was a products liability case. The following instruction is an impermissible comment on the weight of the evidence:

A manufacturer is not an insurer of the product he designs, and it is not required that the design adopted be perfect, or render the product accident proof, or incapable of causing injury, nor is it necessary to incorporate the ultimate safety features in the product.

Acord, 669 S.W.2d at 116.

18. Improper Instructions in Premises Liability Cases.

In two recent cases, the Supreme Court has clarified and approved the appropriate instruction to be used in a premises liability case. In both *State v. Williams*, 940 S.W.2d 583 (Tex. 1997) (per curiam) and *City of San Antonio v. Rodriguez*, 931 S.W.2d 535 (Tex. 1996) the trial courts instructed that the defendant was negligent if (among other factors):

[the defendant] failed to adequately warn [the plaintiff] of the condition[s] or to make the condition reasonably safe . . .

In both instances, the defendants argued that this instruction was an incorrect statement of the law because it could lead the jury to believe that the defendant had the duty to both adequately warn and make the condition reasonably safe. The Texas Supreme Court held that the instruction was improper and expressly approved the instruction in premises liability cases when the plaintiff is a licensee as follows:

With respect to the condition of the premises, defendant was negligent if —

- a. the condition posed an unreasonable risk of harm;
- b. defendant had actual knowledge of the danger;
- c. plaintiff did not have actual knowledge of the danger; and
- d. defendant failed to exercise ordinary care to protect plaintiff from danger, by both failing to adequately warning plaintiff of the condition and failing to make that condition reasonably safe.

Williams, 940 S.W.2d at 584; *Rodriguez*, 931 S.W.2d at 535. See *Dabney v. Wexler-McCoy, Inc.*, 953 S.W.2d 533, 536 (Tex. App.—Texarkana 1997, pet. denied).

19. Improper Instruction - Unavoidable Accident.

Embellishments in instructions were the subject of the 1984 decision in *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984). In *Lemos*, the jury was instructed in an automobile collision that: “[t]he mere happening of a collision of motor vehicles is not evidence of negligence.”

The Texas Supreme Court found the extra instruction to be error. The correct definition of unavoidable accident has been settled since the decision in *Dallas Ry. & Terminal Co. v. Bailey*, 250 S.W.2d 379 (Tex. 1952). The definition in *Bailey* is carried forward in the Pattern Jury Charges. *Lemos* stands for the proposition that addenda to the charge amount to impermissible comments that tilt or nudge the jury one way or the other. Justice Pope again warns:

This court’s approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history

that the growth and proliferation of both instructions and issues come one sentence at a time.

Lemos, 680 S.W.2d at 801.

In *Hill v. Winn Dixie Texas, Inc.*, 849 S.W.2d 802 (Tex. 1992), the Supreme Court seems to announce a new rule for an unavoidable accident instruction which requires affirmative evidence to support the instruction. In *Hill*, plaintiff slipped and fell on a cookie. The cookie was on the floor for a maximum of an hour and a half and a minimum of fifteen minutes. The assistant manager did not see the cookie on the floor when he made his inspection at 6:00 p.m. and saw no one in the aisle. A stocker, working only a few feet from the plaintiff when she fell at 7:25 p.m. did not see the cookie during the fifteen to thirty minutes he was in the aisle.

The Court stated that an unavoidable accident instruction is “proper only when there is evidence that the event was proximately caused by a non-human condition and not by any party to the event. The court then noted that the instruction is proper where (1) environmental conditions are present (snow, fog, sleet, wet pavement or obstruction of view) or (2) where a very young child legally incapable of negligence was the only human cause of the accident. Because there was no “affirmative evidence of an extrinsic, unavoidable event, such as an act of God, which caused the plaintiff to slip and fall, the unavoidable accident instruction should not have been given.” *Id.*

The dissent argued that “as a rule, a jury instruction must be based upon evidence in the case, but inferences are evidence.” *Id.* at 360 (Hecht, J. dissenting). Despite the inference that the cookie fell from a cart or bag without anyone’s negligence or knowledge, the majority of the court overlooked this evidence and hence creates an unnecessary distinction. *Id.*

Reinhart v. Young, 906 S.W.2d 471 (Tex. 1995), is the latest twist in the controversy over the use of an unavoidable accident instruction. The Supreme Court held that under the facts of the case (the overpass obstructed the view of the defendant driver), the trial court did not commit reversible error by submitting the instruction. The Court cautioned, however, that the instruction should be used with great discretion to avoid confusing or misleading the jury. Subsequently, in *Ford Motor Co. v. Miles*, 976 S.W.2d 377, 387 (Tex. 1998), the Court commented that its decision in *Reinhart* did not decide whether giving the instruction was error but concluded only that because it was not a close case where a superfluous instruction would be more likely to influence the jury improperly, any error was harmless.

20. Absence of Proper Instruction in Whistleblower Act Case.

Under the Whistleblower Act, when a public employee’s termination occurs within 90 days of his reporting a violation of law, the report is presumed to have caused the termination. *Texas Dept. of Human Services v. Hinds*, 904 S.W.2d 629, 637 (Tex. 1995); TEX. GOV’T CODE § 554.004. This presumption is rebuttable. *Hinds*, 904 S.W.2d at 637. However, where the employee is terminated more than 90 days after he reports a violation of law, the presumption does not apply, and the jury should be instructed as follows:

An employer does not discriminate against an employee for reporting a violation of law, in good faith, to an appropriate law enforcement authority, unless the employer's action would not have occurred when it did had the report not been made.

Id. A trial court's failure to submit this instruction under these circumstances is reversible error. *Id.* (trial court committed reversible error by failing to include this instruction and, instead, asking jury only if defendant discriminated against plaintiff "in retaliation for" reporting a violation of law).

Further, the Whistleblower Act provides that a "state agency or local government may not suspend or terminate the employment of or discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement authority." TEX. GOV'T CODE § 554.002. "Good faith" is not defined in the Act. In *Wichita County, Texas v. Hart*, 917 S.W.2d 779 (Tex. 1996), the Supreme Court adopted the following definition of "good faith":

"Good faith" means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience."

Id. at 784.

21. Explaining a Statutory Presumption.

It is not proper to explain to the jury a statutory presumption that only fixes the burden of producing evidence. The function of such a presumption is to compel a conclusion as a matter of law in the absence of evidence to the contrary. However, upon the introduction of contrary evidence the presumption ceases to exist and is neither to be weighed nor treated as evidence by the jury in arriving at its verdict. *See Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. Civ. App.–Amarillo 1979, writ ref'd n.r.e.); *Hailes v. Gentry*, 520 S.W.2d 555, 558-59 (Tex. Civ. App.–El Paso 1975, no writ); *Armstrong v. West Texas Rig Co.*, 339 S.W.2d 69, 74 (Tex. Civ. App.–El Paso 1960, writ ref'd n.r.e.).

22. Attorneys' Fees.

In *Roberts v. Grande*, 868 S.W.2d 956 (Tex. App.–Houston [14th Dist.] 1994, no writ), the court of appeals expressly disapproved of the following manner of submission of attorneys' fees:

What is a reasonable fee for the necessary services of [the appellants'] attorneys in this case, stated as a percentage of recovery?

Id. at 960, n.1 (emphasis added). The court noted that this type of submission "generates problems" and suggested that, at a minimum, a definition should be included in the charge or the jury should be instructed as to what items of damages are included in the "recovery" for purposes of calculation of attorneys' fees. *Id.* at 960-61, n.1. *See also Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 100-103 (Tex. App.–Houston [14th Dist.] 1994, writ denied) (noting that submission of attorneys' fees as percentage of "recovery" in a case involving multiple causes of action without

segregating claims for which attorneys' fees are and are not recoverable may permit party to recover fees on claims for which attorneys' fees are not recoverable).

Further, in cases involving application of the "one satisfaction rule" to prevent recovery of multiple damages for a single indivisible injury, the above submission raises the question whether the award of attorneys' fees should be calculated before or after application of the offset. Although the Roberts court concluded that attorneys' fees must be calculated before application of the offset, there is authority to the contrary. *Cf. Roberts*, 868 S.W.2d at 962; *Berry Property Management, Inc. v. Bliskey*, 850 S.W.2d 644 (Tex. App.—Corpus Christi 1993, writ dismissed by agr.).

More recently, in a case under the DTPA, the Supreme Court disapproved of submission of a percentage question to the jury on attorneys' fees. In *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 819 (Tex. 1997), the Court held that, in order to recover attorneys' fees under the DTPA, the plaintiff must prove that the amount of attorneys' fees sought are both reasonable and necessary to the prosecution of the case and "must ask the jury to award the fees in a specific dollar amount, not as a percentage of the judgment.". The Court reasoned that while a contingent fee agreement should be a factor considered by the jury in determining reasonable attorneys' fees, this factor alone does not give the jury any meaningful way to assess whether the fees were in fact reasonable and necessary. *Id.* Rather, the Court identified eight factors that a jury should consider in determining reasonableness:

- (1) the time and labor required, the novelty and difficulty of the question involved, and the skill required to perform the legal service properly;
- (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. at 818 (citing TEX. DISCIPLINARY R. PROF. CONDUCT 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. (STATE BAR RULES, art. x, § 9)). The supreme court's holding in *Anderson* has been extended to other contexts. *See e.g., Lubbock County v. Strube*, 953 S.W.2d 847, 858 (Tex. App.—Austin 1997, no writ) (Whistleblower Act case); *Jackson Law Office, P.C. v. Chappell*, No. 12-98-00210-CV, 2000 WL 764202, at *5 (Tex. App.—Tyler May 31, 2000, no pet. h.) (contract

case); *Purina Mills, Inc. v. Odell*, 948 S.W.2d 927, 940 (Tex. App.–Texarkana 1997, writ denied) (products liability/breach of warranty / negligence case).

VII. OBJECTIONS TO THE CHARGE

A. Some Good Ideas About the Charge Conference.

1. Inspection of the Charge.

The charge “shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto. . . .” TEX. R. CIV. P. 272.

2. Objection in Writing Before the Charge is Read to the Jury.

Objections to the charge must be made “outside the presence of the jury” and must “be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury.” TEX. R. CIV. P. 272. Otherwise, any objection is waived. See *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 187 (Tex. App.–Dallas 1996, no writ).

One caveat for the careful practitioner. At least one court has implied that the parties and the court may agree to “relax the rules of civil procedure” with respect to the making of objections and tendering of requests. The implication is incorrect. In *Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670 (Tex. App.–Houston [1st Dist.] 1986, writ ref’d n.r.e.), cert. *dism’d*, 481 U.S. 1073 (1987), the court said:

Unless there is an agreement between the parties and the court to relax the Rules of Civil Procedure, the proper time to make objections to the court’s charge is before the court has submitted the charge to the jury.

This stray language might indicate that the parties can agree to make objections to the charge after the charge has been read. There is no authority in support of such a procedure, and the cases in fact explicitly hold that objections and requests must be presented and ruled upon before the charge is read. See, e.g., *Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 885 (Tex. App.–Dallas 1991, writ denied) (holding that “[a]n agreement of the parties, even with the consent and approval of the court, that calls for a party to present objections after the court reads the charge to the jury violates the rule, defeats one of its main purposes, and results in a waiver of the late objection”).

3. Secure Ruling on Objections.

The judge must announce his rulings on the objections that have been properly presented and shall (1) endorse his rulings on the objections if written, or (2) dictate the same to the court reporter in the presence of counsel if the objections have been dictated to the court reporter. TEX. R. CIV. P. 272.

Formerly, implied rulings were insufficient and an attorney's failure to obtain the court's express ruling on the objection waived the objection, even if the court specifically denied the requested issues. *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923 (Tex. 1983); *See also Cogburn v. Harbour*, 657 S.W.2d 432, 433 (Tex. 1983). However, in *Accord v. General Motors Corp.*, 669 S.W.2d 111, 114 (Tex.1984) the Texas Supreme Court overruled *Hernandez* regarding what constitutes a ruling on an objection. The Court said that "[w]e interpret the presumptive provision of Rule 272 to mean that if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled." *Accord*, 669 S.W.2d at 114; *see also Borden, Inc. v. Rios*, 850 S.W.2d 821, 834 (Tex. App.–Corpus Christi), *writ granted, judgment set aside and cause remanded without reference to merits*, 859 S.W.2d 70 (Tex. 1993).

4. Invited Error.

If a party requests a particular issue that is submitted by the trial court, that party cannot complain on appeal that the trial court erred in submitting all or part of that issue. *See, e.g., Marino v. Hartsfield*, 877 S.W.2d 508, 513 (Tex. App.–Beaumont 1994, writ denied).

5. Objections Must be Distinct.

The failure to make an objection specifically enough to identify clearly the defect for the court constitutes waiver. *See Universal Servs. Co., Inc. v. Ung*, 904 S.W.2d 638, 640 (Tex. 1995). "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a defect, omission or fault in pleading insofar as it may support an issue, definition or instruction will be deemed waived unless specifically included in the objections." TEX. R. CIV. P. 274; *see also Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985) (holding an objection waived "because the objection did not distinctly point out" the ground). Objections that do not clearly state the grounds asserted on appeal are insufficient because they do not afford the trial court an opportunity to correct any mistake. *Riddick v. Quail Harbor Condominium Ass'n*, 7 S.W.3d 663, 675 (Tex. App.–Houston [14th Dist.] 1999, no writ).

Rule 274 affords the trial court an opportunity to correct errors in the charge, by requiring that objections clearly designate the error and explain the grounds for complaint. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1987); *see also Brown v. American Transfer and Storage*, 601 S.W.2d 931, 938 (Tex.), *cert. denied*, 449 U.S. 1015 (1980); *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978). Objections on grounds that an instruction "may confuse the jury" or "prejudice the defendant" are too general because they do not explain why the instruction is legally incorrect or how it would confuse the jury or prejudice the objecting parties. *Castleberry*, 721 S.W.2d at 276. Consequently, in *Castleberry* an incorrect instruction on the issue of alter ego was waived because there was not a proper objection under Rule 274. The dissent, however, complained that "the majority's interpretation of the objection was hypertechnical." *Castleberry*, 721 S.W.2d at 281.

A litigant is not required, however, to make full appellate arguments during preparation of the charge. Such a requirement would run afoul of Rule 274's policy of minimizing verbose, prolix objections. *Ahlschlager v. Remington Arms Co., Inc.*, 750 S.W.2d 832 (Tex. App.–Houston [14th Dist.] 1988, writ denied) (an objection that the instructions were a comment on the weight of the evidence was sufficient to complain of their placement in the charge and of their combined effect);

See also *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.–Beaumont 1987, writ ref’d n.r.e.). An objection that does not mention controlling authority by name but identifies substantive defects of the submission is sufficient. *Ford Motor Co. v. Miles*, 976 S.W.2d 377, 386 (Tex. 1998).

6. Avoid Voluminous Objections.

The rules specifically warn that when an objection is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, the objection or request shall be untenable. TEX. R. CIV. P. 274; see also *Borden v. Rios*, 850 S.W.2d at 827 (saying that “a party violates Rule 274 by making voluminous objections which obscure or conceal the objection”).

7. Objections by Adoption Prohibited.

“No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.” TEX. R. CIV. P. 274. See also *Minnesota Min. & Mfg. v. Nishika, Ltd.*, 885 S.W.2d 603, 616 (Tex. App.–Beaumont 1994), *rev’d on other grounds*, 953 S.W.2d 733 (Tex. 1997).

8. Refusal.

Rule 276 provides in detail the manner in which the judge shall endorse requested matters, depending upon whether it is refused or modified, and provides that when so endorsed it shall constitute a bill of exceptions. However, in *Dallas Market Center Development Company v. Liedeker*, 958 S.W.2d 382, 387 (Tex. 1997), the Supreme Court held that Rule 276 nowhere suggests that the trial court’s endorsement is a prerequisite to preservation of error, or that the trial court’s failure to comply with the rule waives the requesting party’s complaint:

To make endorsement the exclusive means of preserving error for refusing a charge request, when the court’s refusal is otherwise clear from the record, would promote form over substance and be ill advised. A lawyer has no practical way of ensuring that a trial court will accurately endorse charge requests as promised . . . Rule 276 allows for preservation of error by other means. Consistent with the rule, the clear weight of authority, and sound policy, we hold that an endorsement by the trial court is not the exclusive means of preserving error for refusing a charge request.

In *Liedeker*, the trial court admitted that he had considered the requested question, had refused it, and had meant to endorse it but simply failed to do so, for which he was sorry.

9. Objection after Modification.

Where the trial court modifies or amends a jury question based on a party’s objection, the complaining party must assert a new objection to the amended or modified question in order to preserve the issue for appellate review. *Hart v. Moore*, 952 S.W.2d 90, 94 (Tex. App.–Amarillo 1997, pet. denied).

10. Tender Questions, Instructions and Definitions in Writing.

Failure of a trial judge to submit a question is not a ground for reversal unless a question in substantially correct wording has been tendered *in writing* by the party complaining of the judge's failure. TEX. R. CIV. P. 278. See *Texas Dep't Human Servs. v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995); *University of Texas v. Ables*, 914 S.W.2d 712, 715 (Tex. App.–Austin 1996, no writ). The same is true for the failure of a trial judge to submit requested definitions or instructions. TEX. R. CIV. P. 278.

An oral request for an instruction or a requested instruction which is dictated to the court reporter is insufficient. TEX. R. CIV. P. 278; see also *Fairfield Estates L.P. v. Griffin*, 986 S.W.2d 719, 724 (Tex. App.–Eastland 1999, no writ). However, an objection alone, without a request and tender of a substantially correct issue, will suffice if the issue is one relied upon by the opposing party. TEX. R. CIV. P. 278.

11. Summary: What To Do and When.

The charge process is complicated enough that, before the exceptions are explained, a short summary of what to do when is prudent.

Object to preserve complaints about questions, instructions or definitions actually submitted in the charge. TEX. R. CIV. P. 274.

Object and submit a correct form 1) to preserve error for failure to submit a question relied upon by the complaining party; or 2) to preserve error for failure to submit any instruction or definition, regardless who relies upon it. TEX. R. CIV. P. 278.

Remain Silent if opposing party fails to submit an entire cause of action (or affirmative defense) upon which it relies.

12. The Jim Howe Problem: Is there a Requirement to Both Object to a Question Submitted by Your Opponent and Tender a Proper Written Instruction?

In most instances, a party who finds fault with a proposed jury question need only object to the inclusion of the question in the charge. TEX. R. CIV. P. 272. However, if the allegedly improper question is a broad question on damages, error may not be preserved unless the party also submits a limiting instruction. See *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.–Austin 1991, no writ); see also *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W.2d 68 (Tex. App.–Corpus Christi 1993, writ denied) (holding that, when the trial court failed to include instructions on the proper measure of damages, the complaining party had a “burden both to object to the charge and to tender such instructions in substantially correct form”); *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 878 (Tex. App.–Corpus Christi 1988, writ denied) (saying that “where the court has failed to include a limiting instruction, it is the complaining party’s responsibility both to object to the charge and to tender written instructions on the proper measure of damages in substantially correct form”)

In *Howe*, the plaintiff submitted the following damage question: “What sum of money, if any, does Jim Howe Homes, Inc. owe Jodi Rogers?” The defendant timely objected that the plaintiff’s damage question provided insufficient guidance for the jury, and did not give the jury “any definition of what they are to consider in determining what sum of money should be awarded in the event they reach that question.” Rule 272 requires that objections to the charge of the jury be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel. Normally, an objection to a deficient instruction or definition not relied on by the complainant is sufficient to preserve the objection on appeal. *Chrysler Corp. v. McMorries*, 657 S.W.2d 858, 864, (Tex. App.–Amarillo 1983, no writ); *Stewart v. Moody*, 597 S.W.2d 556, 558 (Tex. Civ. App.–Beaumont 1980, writ ref’d n.r.e.). However, with the change to broad form questions mandated by Rule 277, the Austin Court of Appeals in *Howe* reasoned that “the party who stands to benefit from the limiting instruction now has the burden of requesting such an instruction” as well as objecting to the deficiencies in the instruction submitted. *Howe*, 818 S.W.2d at 903.

Howe and *Texas Cookie* are apparently based on the Supreme Court’s decision in *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 538 n.4 (Tex. 1981). *Cameron* was decided before the Supreme Court’s ruling in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981) which expressly overruled cases that followed the separate and distinct submission requirement. *Howe*, 818 S.W.2d at 903; *Texas Cookie*, 747 S.W.2d at 873. In *Cameron*, the court noted that the appellant’s objection to the trial court’s failure to include in the charge an instruction to the jury as to the proper elements of damages was waived for its “fail[ure] to object . . . and [for its fail[ure] to request an instruction on the proper measure of damages in substantially correct form.” *Barnhill* comes to the same conclusion simply by citing to Rule 279 (now 278). *Barnhill*, 639 S.W.2d at 335.

Although the holding in *Howe* and similar cases do not track the requirements of Rule 272, the practitioner should be prepared to both object and tender a proper instruction on the measure of damages in substantially correct wording to instructions or questions not relied on by the complainant to preserve error on appeal.

13. Simplifying the Charge Objection: The Payne Rule.

In *State Dep’t of Highways v. Payne*, 838 S.W.2d 235 (Tex. 1992), the Supreme Court announced

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. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

Id. at 241. This language created a quandary as aptly described in a footnote by Justice Hinojosa

Since this passage is cast as advice rather than as an order (“There *should* be but one test”), we are uncertain whether this language represents the present state of the law or a yet to be reached ideal. On the one hand, the Texas Supreme Court tells us that

Payne does not change any rules; yet, on the other hand, Payne reverses and renders on charge error which was not raised by objection.

Borden v. Rios, 850 S.W.2d 822.

The quandary was resolved by the Supreme Court's per curiam opinion in *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450 (Tex. 1995). In *Alaniz*, the court of appeals acknowledged that Alaniz may have preserved his objection on appeal under the decision in *Payne*. However, the court of appeals declined to follow *Payne* holding instead that Alaniz did not meet the requirements of Rule 273. In reversing the court of appeals' decision, the Texas Supreme Court reaffirmed the *Payne* rule, saying

[t]he court of appeals also erred in concluding that *Payne* conflicts with Rule 273. In *Payne* we held that a party has preserved error in the jury charge when he has made the trial court reasonably aware of the complaint, timely and plainly, and obtained a ruling. 838 S.W.2d at 241. While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate 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. Under the reading of Rule 273 *Payne* requires, Alaniz preserved his jury charge complaint.

Alaniz, 907 S.W.2d at 451-52; see also *Galveston County Fair & Rodeo, Inc. v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996)(per curiam); *Lester v. Logan*, 907 S.W.2d 452 (Tex. 1995); cf. *Dallas Mkt. Ctr. Dev't Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex.1997)

It is unclear what effect the *Payne* rule might have on the above mentioned "Howe Problem." The court said that "[t]he flaws in our charge procedures stem partly from the rules governing those procedures and partly from case law applying those rules." The court then noted that, while changes in the rules must wait, the Court can "begin to reduce the complexity that case law has contributed to charge procedures." *Payne*, 838 S.W.2d at 241. The Court, however, made no mention of any particular cases or theories of law.

14. Tender Must Not Be Affirmatively Incorrect.

Rule 278 provides that the trial court's failure to submit an issue shall not be a ground for reversal of the judgment unless the issue was tendered in writing in "substantially correct wording." This does not mean that an issue must be absolutely correct, it means an issue that "in substance and in the main is correct, and that is not affirmatively incorrect" will be upheld. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20 (Tex. 1987). In *Placencio*, the Texas Supreme Court affirmed the trial court's refusal to submit a tendered issue. The Court found the issue to be affirmatively incorrect, because it failed to include conditioning language suggested by the *Texas Pattern Jury Charges*. In *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182 (Tex. App.—Corpus Christi 1992, writ denied) The court found the Plaintiffs' requested instruction accompanying the broad question regarding age discrimination was not substantially correct because (i) it made factual errors, (ii) the requested instruction sought to have the trial court instruct a verdict that the plaintiff had made a

prima facie case and (iii) the requested instruction did not adequately inform the jury of the shifting burden of proof.

A request will not be substantially correct if it is too vague or contains a term that requires a definition but the party fails to tender the definition. *See Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 493 (Tex. App.–San Antonio 1994, writ denied).

15. Separate Objections from Requests for Questions, Instructions, and Definitions.

“A request by either party 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
This only requires that the written request be “plainly separate” from the oral objection. *Alaniz*, 907 S.W.2d at 451; *Smith-Hamm, Inc. v. Equipment Connection*, 946 S.W.2d 458, 464 (Tex. App.–Houston[14 Dist] 1997, no writ). As a practical matter, however, “to expect a judge, after hearing oral and lengthy requests just once, to weigh their merits for inclusion in a charge ignores realities.” *Woods v. Crane Carrier Co., Inc.*, 693 S.W.2d 377 (Tex. 1985).

Because the rules provide that objections may be dictated to the court reporter, it is a common mistake to assume that a requested instruction can likewise be dictated to the court reporter. The rules specifically require otherwise. TEX. R. CIV. P. 272, 273.

16. Avoid Stock Objections.

The so called “stock objections” are widely considered to be objections that must be made in order to preserve error. The authors of the first volume of the *Texas Pattern Jury Charges* went out of their way to dissuade practicing attorneys from continuing this needless and erroneous practice. The “stock objections” are: (1) no pleading to support submission of the issue; (2) no evidence to support submission of the issue; (3) insufficient evidence to support submission of the issue; and (4) that an affirmative finding would be against the great weight and preponderance of the evidence.

Only the first, “no pleading,” is an objection that needs to be made in order to preserve error. That is, the first objection is the only one that will be considered waived if it is not made prior to submission of the charge to the jury.

The “no evidence” objection, on the other hand, can be appropriately used if the purpose is to attempt to persuade the trial judge not to submit the particular issue. However, if the judge has decided what issues he or she is going to submit and has so advised the attorneys, the objection of “no evidence” is purely a waste of the court’s and everyone else’s time. If the attorney truly feels that there is no evidence to support the issue, he or she should exhaust every persuasive ability in the charge conference to convince the judge rather than thereafter dictating a useless objection to the court reporter.

The “insufficient evidence” or “against the great weight” objections are not only unnecessary, but approach the absurd because by their very definitions they presuppose that there is some evidence,

and if there is any evidence of any probative value then the trial judge has no discretion and must submit the issue. *Barnhouse Motors, Inc. v. Godfrey*, 577 S.W.2d 378 (Tex. Civ. App.–El Paso 1979, no writ); *see also* TEX. R. CIV. P. 279 (“[a] claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant”). The only remedy for the party making such complaint based on sufficiency of the evidence is by a motion for new trial after verdict. *Koen v. Gardner*, 178 S.W.2d 173 (Tex. Civ. App.–Waco 1944, no writ). *Cf. Harmes v. Arklatex Corp.*, 615 S.W.2d 177 (Tex. 1981).

17. En Masse Tender of Requested Questions.

The persuasive strategy of presenting questions to a trial judge en masse so that the party’s requested charge is in final form and ready for submission to the jury carries with it a special problem when the judge refuses to submit the charge as tendered. In such a case, it must be kept in mind that the issues and instructions should be separately tendered in order to complain of any error on appeal. A trial judge is not required to search through the requested issues and submit those which are proper and refuse those which are improper. *Demler v. Demler*, 836 S.W.2d 696, 698 (Tex. App.–Dallas 1992, no writ); *see also* *Gutierrez v. County of Zapata*, 951 S.W.2d 831, 843 n.14 (Tex. App.–San Antonio 1997, no writ).

As a practical matter, it is prudent to prepare a complete charge. However, each instruction and question should be on a separate page that can be tendered to the court for inclusion or refusal once the entire charge has been prepared by the trial court.

VIII. PROBLEMS WITH SUBMITTING MULTIPLE CAUSES OF ACTION IN A SINGLE CASE

A. Need for Separate Issues.

When multiple causes of actions are asserted, special problems arise. In general, a separate issue must be submitted for each ground pled and supported by some evidence. *See Rodriguez v. Hyundai Motor Co.*, 944 S.W.2d 757, 777 (Tex. App.–Corpus Christi 1997, writ granted March 13, 1998). When a single factual issue will control whether a plaintiff has a right to recover under multiple theories, a single broad-form question on the controlling issue may be acceptable. *Riddick v. Quail Harbor Condo. Ass’n*, 7 S.W.3d 663, 673-74 (Tex., App.–Houston [14th Dist.] 1999, no writ). But a subsequent holding that one of the included theories of liability is invalid will taint the finding. In *Crown Life Insurance v. Casteel*, 22 S.W.3d 328 (Tex. 2000), the court had submitted the damage issue as a single broad-form question containing alleged acts under the Insurance Code and the DTPA. The Texas Supreme Court held “that submitting invalid theories of liability in a single broad-form question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories.”

B. Relate Damage Issues to Specific Liability Findings.

Simply stated, when multiple causes of action, which give rise to a different measure of damages, are submitted; the damage questions and accompanying instructions should be drafted to permit the jury to make separate damage findings for each theory of liability. *See Kenneth H. Hughes Interests, Inc. v. Westrup*, 879 S.W.2d 229, 236 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (damages questions did not instruct jury how to allocate damages found between breach of warranty and DTPA claims; however, appellants failed to object that the questions did not segregate the damages, nor did they tender proposed instructions segregating damages between the two claims).

It is reversible error to submit multiple theories of liability involving different alleged damages to the jury in a form which fails to tie damage findings with liability findings. *Oakes v. Guerra*, 603 S.W.2d 371, 372 (Tex. Civ. App.–Amarillo 1980, no writ); *Lucas v. Nesbitt*, 653 S.W.2d 883 (Tex. App.–Corpus Christi 1983, writ ref'd n.r.e.) (failure of trial court to submit separate issues on negligence damages and DTPA damages was reversible because that format prevented the trial court from knowing what portion of damages were attributable to each cause of action).

Equally as important, plaintiffs must tie damage questions to specific liability findings when the plaintiff alleges multiple causes of action, some of which are DTPA violations and some of which are not, when those DTPA and non-DTPA claims allegedly cause different damages. Otherwise, it is impossible to determine which damages should be trebled. *Ruben H. Donnelley Corp. v. McKinnon*, 688 S.W.2d 612, 617 (Tex. App.–Corpus Christi 1985, writ ref'd n.r.e.).

Perez v. Weingarten Realty Investors, 881 S.W.2d 490, 495 (Tex. App.–San Antonio 1994, writ denied) illustrates the problems with global submissions in cases involving multiple defendants that own a single entity. Ms. Perez, a tenant of Summerplace Apartments, was raped in her apartment by another tenant, and she sued several defendants, specifically: (1) WRI/Palans Venture (a joint venture that owned the apartment complex, which was owned 50% by Seymour Palans [“Mr. Palans”] and 50% by Weingarten Realty Investors [“WRI”]); (2) Mr. Palans; (3) WRI; and (4) SPL, Inc. (the management company, which was owned 50% by Mr. Palans and 50% by his two sons).

The plaintiff’s requested DTPA questions and the requested negligence question were all predicated upon findings against “the ownership of Summerplace Apartments, acting through any of its servants, agents or employees.” The requested DTPA questions asked whether “the ownership of Summerplace Apartments, acting through any of its servants, agents or employees” committed various acts of wrongdoing. The court of appeals held that the trial court properly refused the requested instructions because they were not in substantially correct form. *Perez*, 881 S.W.2d at 493. “All of the defendants were ‘lumped together’ and the jury was left to speculate as to whose conduct was inquired about.” *Id.* The court noted that the requested submission, if submitted by the trial court, would have rendered impossible compliance with Rules 301 and 306 of the Texas Rules of Civil Procedure, which require that the judgment conform to the verdict and that the judgment “shall contain the full names of the parties . . . against whom the judgment is rendered.” The requested negligence issue was defective for the same reason. *Id.* at 494. Further, the percentage of responsibility question was not in substantially correct form because the plaintiff “attempted to lump all of the defendants into a single question and thus failed to request an issue asking the jury to find

a percentage of responsibility for each defendant and settling person as required by the Civil Practice and Remedies Code.

The court acknowledged that if there is no dispute as to which of the named defendants are responsible, or if there is no dispute that all of the named defendants are responsible, a single generic submission may be proper with an appropriate contribution percentage question. *Id.* If, however, as in *Perez*, the evidence raises a fact issue as to which defendant was responsible, “there is no choice but to submit the question as to each defendant separately.” *Id.* at 494-95. “This is more cumbersome, but must be done.” *Id.* See also *Stewart & Stevenson Services, Inc. v. Serv-Tech, Inc.*, 879 S.W.2d 89, 100-03 (Tex. App.–Houston [14th Dist.] 1994, writ denied) (trial court erred in submitting, over objection of all defendants, a single, global issue on damages; evidence required “the damage issue to be, at the very minimum, separated as to defendant, cause of action and past and future damages.”)

C. Handling of Recoveries on Alternative Theories.

1. General Rule.

When a party tries the case on alternate theories of recovery, and a jury returns favorable findings on two or more theories, the prevailing party has a right to judgment on the theory entitling it to the greatest or most favorable relief. *Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988); *Hargrove v. Trinity Universal Ins. Co.*, 152 Tex. 243, 256 S.W.2d 73 (1953).

As a result, the prevailing party may seek a judgment on the cause of action granting the most favorable relief, and in doing so does not waive the alternative findings. *Boyce*, 747 S.W.2d at 787. Therefore, the prevailing party may seek recovery on an alternative theory if the judgment is subsequently reversed on appeal. *Id.*

2. Procedure to Preserve All Recoveries.

a. Drafting of Judgment.

The prevailing party should draft the judgment, incorporating all of the jury’s findings. *Id.* at 787. Failure to do so is fatal to raising cross points on appeal, if the judgment is subsequently reversed. *Id.* The best practice is to set out all of the jury findings in the judgment. However, the jury findings can be incorporated by reference, if the jury findings are attached to the judgment.

b. Cross Points.

In common situations, the prevailing party requests a judgment on the cause of action that allows it the greatest recovery. Thereafter, if the Court of Appeals reverses the judgment, the party raises cross points urging recovery under one or more of the alternative causes of action. In two recent cases, the Supreme Court has stated: (1) The prevailing party has no duty to complain in the trial court for raising the cross point on appeal and (2) Prevailing party is not required to raise the issue of an alternate ground for recovery by a cross point until the Court of Appeals renders its judgment reversing the trial court's judgment. *Boyce Iron Works, Inc. v. Southwestern Bell Tel. Co.*, 747 S.W.2d at 787; *Chesshir v. First State Bank*, 620 S.W.2d 101 (Tex. 1981). This is a common sense rule because it seems illogical to force the prevailing party who receives a verdict containing favorable findings on alternate theories of recovery, to object to the Court's judgment because it allows the specific relief that the prevailing party requested.

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