



# The Appellate Advocate

*State Bar of Texas Appellate Section Report*

## ARTICLES

Preservation of Charge Error: The Pattern Jury Charge  
Committee Wades into the Fray

*Dylan O. Drummond & LaDawn H. Conway*

Illusory Arbitration Agreements: It Takes Two to Arbitrate

*Michael S. Finkelstein*

Bankruptcy Appeals: A Primer (Revisited)

*Bruce W. Akerly*

## SPECIAL FEATURES

Appellate Q&A

*Robert B. Gilbreath & Kendall M. Gray*

A Word from the New Co-Editors

*Justice Greg Perkes & William C. Little*

Texas Supreme Court Advisory—In Memory of  
Justice Bob Gammage (1938-2012)

---

## Preservation of Charge Error: The Pattern Jury Charge Committee Wades into the Fray

*Dylan O. Drummond, Law Office of Dylan O. Drummond,  
Austin*

*LaDawn H. Conway, Alexander Dubose & Townsend LLP,  
Dallas<sup>1</sup>*

### INTRODUCTION

*Appellate Advocate* readers who have perused the 2012 editions of the four-volume *Texas Pattern Jury Charges* will notice a new instruction addressing preservation of error in the charge.

The authors had the privilege of assisting with the drafting of the instruction alongside Amarillo Court of Appeals Chief Justice Brian Quinn at the request of the Pattern Jury Charge (PJC) Oversight committee, and wish to explain its formulation as a further aid to Texas practitioners.

#### I. The Basics of Charge Error

Errors in the charge consist of either: (1) defective questions, instructions, and definitions actually submitted in the charge (that is, definitions, instructions, and questions that, while included in the charge, are nevertheless incorrectly submitted); or (2) questions, instructions, and definitions omitted entirely from the charge.

##### A. The fundamentals

The Texas Rules of Civil Procedure provide or instruct how and when objections must be lodged and requested submissions must be made.

<sup>1</sup> The authors currently serve on the State Bar of Texas Standing Committee on Pattern Jury Charges for the Business, Consumer, Insurance & Employment volume.

- Objections, requests, and rulings must be made before the charge is read to the jury. TEX. R. CIV. P. 272.
- Objections must—
  - be made in writing or dictated to the court reporter in the presence of the court and opposing counsel, TEX. R. CIV. P. 272; and
  - specifically point out the error and the grounds of complaint, TEX. R. CIV. P. 274.
- Requests must—
  - be made separate and apart from any objections to the charge, TEX. R. CIV. P. 273;
  - be in writing and tendered to the court, TEX. R. CIV. P. 278; and
  - be in substantially correct wording, TEX. R. CIV. P. 278. “‘Substantially correct ... does not mean that [the request] must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court. ... It means one that, in substance and in the main is correct, *and that is not affirmatively incorrect.*’” *Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (quoting *Modica v. Howard*, 161 S.W.2d 1093, 1094 (Tex. Civ. App.—Beaumont 1942, no writ) (emphasis added)).

*See, e.g.*, COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *TEXAS PATTERN JURY CHARGES: BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT* PJC 251.1 (2012) [hereinafter “2012 PJC”].

Rulings on objections and requests must abide by a few mandates as well:

- Rulings on objections may be oral (on the record) or in writing. TEX. R. CIV. P. 272.
- Rulings on requests must be in writing and must indicate whether the court refused, granted, or

granted but modified the request. TEX. R. CIV. P. 276.

*See, e.g.*, 2012 PJC 251.1.

### **B. Common mistakes that can result in waiver of charge error**

The following common mistakes could result in a finding of waiver of charge error:

- Failing to submit requests in writing (oral or dictated requests will not preserve error).
- Failing to make requests separately from objections to the charge (generally it is safe to present a party's requests at the beginning of the formal charge conference, but separate from a party's objections).
- Offering requests "en masse"; that is, tendering a complete charge or obscuring a proper request among unfounded or meritless requests (submit each question, definition, or instruction separately, and submit only those important to the outcome of the trial).
- Failing to file with the clerk all requests the court has marked "refused" (a prudent practice is to also keep a copy for one's own file).
- Failing to make objections to the court's charge on the record before it is read to the jury (agreements to put objections on the record while the jury is deliberating, even with court approval, will not preserve error).
- Adopting by reference objections to other portions of the court's charge.
- Dictating objections to the court reporter in the judge's absence (the judge and opposing counsel must be present).

- Relying on or adopting another party’s objections to the court’s charge without obtaining court approval to do so beforehand (as a general rule, each party must make its own objections).
- Relying on a pretrial ruling to preserve charge error that is the subject of a question, definition, or instruction.
- Failing to assert at trial the same grounds for charge error urged on appeal; grounds not distinctly pointed out to the trial court cannot be raised for the first time on appeal.
- Failing to obtain a ruling on an objection or request.

*See, e.g.*, 2012 PJC 251.1.

## II. The Traditional Expression of the Basic Rules for Preserving Charge Error

Excellent articles have been written exploring preservation of charge error. *See* Marie R. Yeates et al., *Preservation of Error*, State Bar of Tex. Prof. Dev. Program, 24th Annual Advanced Evidence and Discovery Course, ch. 10 (2011) [hereinafter “Yeates”]; David E. Keltner et al., *Preservation of Error*, State Bar. of Tex. Prof. Dev. Program, 23rd Annual Evidence and Discovery Course, ch. 3 (2010) [hereinafter “Keltner”]; Karen S. Precella, *Jury Charge Trends*, State Bar of Tex. Prof. Dev. Program, Advanced Civil Appellate Practice Course, ch. 6 (2008) [hereinafter “Precella”].

These articles recommend the following actions for preserving charge error:

- Defective Question, Definition, or Instruction: **Object**
- Omitted Definition or Instruction: **Request**
- Omitted Question: complaining party must **request** if relying on omitted question; opposing party need only **object** to omission

*See* Yeates at 28; Keltner at 28; Precella at 24.

As explained in Part IV below, the preservation comment in the 2012 volumes of the *Texas Pattern Jury Charges* alters this traditional approach to some degree out of an abundance of caution to assist practitioners.

### III. The Current State of the Law Regarding Objections to Preserve Charge Error

A primary goal of the PJC committee in drafting the preservation comment was to define the circumstances requiring *both* an objection and a request to preserve error.

#### A. *Payne* attempted to clarify preservation of charge error

In its 1992 opinion in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992) (op. on reh'g), the Texas Supreme Court did nothing to revise the rules governing preservation of error in the charge, but stated:

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 (emphasis added). The goal after *Payne* is to apply the charge rules “in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them.” *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). In practice, however, *Payne*’s test of “making the trial court aware of the complaint”<sup>2</sup> has generated a somewhat ad hoc system in

<sup>2</sup> *Payne*, 838 S.W.2d at 241; *see also Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012). *Thota* includes an excellent retrospective of the several decisions from the court addressing the presumed-harm analysis under

which courts decide preservation issues relating to charge error on a case-by-case basis.

**B. *Equistar* confirmed that an objection is all that is required to preserve error for a defective question, definition, or instruction**

In 2007, the Texas Supreme Court confirmed that an objection under Rule 274 is all that is required to preserve error regarding a submitted and allegedly defective question and instruction. *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 868 (Tex. 2007).

[The defendant] did not object to the damages question or instruction as proposed and submitted. If [the defendant] believed that the jury charge presented an improper measure of damages because it allowed the jury to find both tort and contract damages by a single answer, it was *required to timely object* and make the trial court aware of its complaint in order to preserve error for appeal. [The defendant] failed to preserve error to challenge the measure of damages the jury was instructed to use. Thus, damages are measured by the question and instruction given.

*Id.* (emphasis added) (internal citations omitted).

Since *Equistar*, the authors have found no appellate court opinions requiring both an objection and a request to preserve error regarding a defective question, definition, or instruction submitted in the charge. At least two post-*Equistar* decisions have, however, held that an objection alone is insufficient to preserve error if it fails to make the trial court aware of the

---

*Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) and its progeny. *Thota*, 366 S.W.3d at 687–88 (citing *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 756–57 (Tex. 2006); *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 227–78 (Tex. 2006); *Harris Cnty. v. Smith*, 96 S.W.3d 230, 233–34 (Tex. 2002); *Casteel*, 22 S.W.3d at 387–88.

error, as required by *Payne*. See, e.g., *C. C. Carlton Indus. v. Blanchard*, 311 S.W.3d 654, 663 (Tex. App.—Austin 2010, no pet.) (“[The petitioners] neglected to point out clearly to the trial court the objectionable elements of damages in the jury charge and the grounds of their objection.”); *Hani v. Jimenez*, 264 S.W.3d 881, 887 (Tex. App.—Dallas 2008, pet. denied) (“[The petitioner’s] objection only attacked the pecuniary loss element of the broad damages question on no evidence grounds, but did not argue the question itself presented an improper amalgamation of damages because it allows the jury to find pecuniary loss and non-economic damages in a single answer.”).

**C. *Equistar* was not an aberration; the Texas Supreme Court has repeatedly held that a party need only object to a defective submission**

*Equistar* is merely the latest in a long line of post-*Payne* cases consistently confirming that an objection is all that is required to preserve error regarding a submitted question, definition, or instruction.<sup>3</sup>

For example, in *Diamond Offshore Mgmt. Co. v. Guidry*, the court reiterated that a party need only object to preserve error regarding a submitted, allegedly defective question. 171 S.W.3d 840, 844 (Tex. 2005) (per curiam) (defendant was “*not obligated to request* such a question,” but was “*required only to object* to the absence of any inquiry” (emphasis added)). In so holding, the court relied upon Justice Wainwright’s concurrence in *First Valley Bank v. Martin*, 144

<sup>3</sup> Although *Payne* allows a request to serve as an objection for preservation purposes as long as the trial court is made aware of the complaint and issues a ruling, 838 S.W.2d at 240–41, the court has explicitly held that a “request for another charge is not a substitute for an objection.” See *Hernandez v. Montgomery Ward*, 652 S.W.2d 923, 925 (Tex. 1983), *overruled on other grounds by Acord v. Gen. Motors*, 669 S.W.2d 111, 114 (Tex. 1984).



S.W.3d 466 (Tex. 2004),<sup>4</sup> which elaborated on the wealth of jurisprudence on this point:

It is clear that to preserve a complaint that an instruction in a charge is defective, the party who does not rely on the instruction *need only object, and a request in substantially correct language is not required*. See TEX. R. CIV. P. 274; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994) (“An objection is sufficient to preserve error in a defective instruction. A request of substantially correct language is not required.”); *State Dep’t of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992); *Angelina Cas. Co. v. Holt*, 362 S.W.2d 99, 101 (Tex. 1962) (“The law is that where the court gives a definition which is defective, an objection by the opposite party is sufficient to preserve his rights, and it is not necessary for him to tender a correct definition.”); *Johnson v. Johnson*, 869 S.W.2d 490, 492 (Tex. App.—Eastland 1993, writ denied) (“The proper method of preserving error as to a question, definition, or instruction actually submitted is by objection, regardless of whether the issue is relied upon by the complaining party.”); *Diamond Shamrock Ref. and Mktg. Co. v. Mendez*, 809 S.W.2d 514, 521 (Tex. App.—San Antonio 1991) (noting in the case of a defective instruction “the defect may properly be called to the court’s attention by an objection without requesting a substantially correct instruction in writing”), *rev’d in part on other grounds*, 844 S.W.2d 198 (Tex. 1992); *Tex. Gen. Indem. Co. v. Moreno*, 638 S.W.2d 908, 914 (Tex. App.—Houston [1st Dist.] 1982,

<sup>4</sup> *Diamond Offshore Mgmt. Co.*, 171 S.W.3d at 844 n.13 (citing *First Valley Bank v. Martin*, 144 S.W.3d 466, 475-76 (Tex. 2004) (Wainwright, J., concurring)).

no writ) (“Only if an instruction is omitted is a request a prerequisite to preserving the complaint.”); *Lyles v. Tex. Employers’ Ins. Ass’n*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref’d n.r.e.) (“If the *definition* is *given*, but is claimed to be *defective*, under Rule 274 *objection* is the means of preserving the complaint.”).

*First Valley Bank*, 144 S.W.3d at 475 (Wainwright, J., concurring) (emphasis added).

In fact, two years before its decision in *Diamond Offshore*, the court reached the same conclusion in *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003). Writing for the court, Chief Justice Phillips explained that, “[b]ecause the question actually submitted was defective, however, the [defendants] *did not have to submit their own substantially correct question*. The [defendants’] *objection was sufficient to preserve error*. TEX. R. CIV. P. 274.” *Id.* (emphasis added) (internal citation omitted).

**D. Intermediate appellate opinions requiring both an objection *and* a request pre-date *Equistar* and are inconsistent with *Diamond Offshore***

The Wainwright concurrence in *First Valley Bank* is important because it refutes the jurisprudential underpinnings of intermediate appellate opinions cited to require for error preservation both an objection and a request (or just a request) to defective questions, definitions, and instructions in the charge. *See, e.g.*, Keltner at 31–32 (collecting cases); Yeates at 31–33 (same); Precella at 28–30 (same).

Notably, intermediate courts that have construed *Payne* as not allowing an objection alone to preserve error when an obligation to request exists have done so under Rule 278. *See* Keltner at 32. Aside from the obvious distinction that an obligation to request under Rule 278 arises only when a question, definition, or instruction has been *omitted*, not

when one has been *submitted*,<sup>5</sup> Justice Wainwright in *First Valley Bank* succinctly contrasted the objection requirements in Rule 274 with the request requirements in Rule 278:

It is also clear under Rule 278 that a party who complains on appeal that an instruction is entirely omitted from the jury charge must submit the requested instruction in writing and in substantially correct wording to the trial judge to preserve the point on appeal. TEX. R. CIV. P. 278; *Lyles[ v. Tex. Employers' Ins. Ass'n]*, 405 S.W.2d [725, ]727 [(Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.)] . . . .

An interpretation that a party who is not relying on an alleged defective instruction is required to adhere to Rule 278 and the Rule 276 submission and endorsement requisites conflicts with the language of Rule 274 and settled Rule 274 jurisprudence. Moreover, *it makes no sense to erect a higher hurdle for a party who complains by written request to an instruction compared to one who simply verbalizes an objection on the record*. . . . Rule 276 will continue to govern preservation of error for a party relying on requested definitions, questions, and instructions in a charge. Rule 274 governs preservation of charge error when the party's obligation is simply to object to a defective instruction, which he must do timely and plainly, and obtain a ruling. *See Texas Emp[loyers'] Ins. Ass'n v. Mallard*, 182 S.W.2d 1000, 1002 (Tex. 1994) (“When, as here, the court’s charge does contain a definition, but some is unsatisfactory to the [complaining party], Rule 274 is applicable.”).

*First Valley Bank*, 144 S.W.3d at 475–76 (Wainwright, J., concurring) (emphasis added). This passage became binding

<sup>5</sup> Compare TEX. R. CIV. P. 278 with TEX. R. CIV. P. 274.

precedent when the *Diamond Offshore* Court expressly relied upon it to hold that an objection was sufficient to preserve error to a defective question, and there was no need to request. 171 S.W.3d at 844 n.13.

Moreover, most of the cases catalogued by Keltner, Yeates, and Precella were issued before *Equistar*. See Precella at 28–30; Keltner at 31–32; Yeates at 31–33. The lone case that postdates *Equistar* is *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). Because the court found that the complaining party had preserved the charge error both by objecting to the definition submitted and requesting an alternate definition, 242 S.W.3d at 43, courts have construed *Ledesma* as requiring both an objection and a request to preserve error. See Keltner at 31–32 (collecting cases); Yeates at 31–32 (same).

But *Ledesma* does not support this implication. There, the court simply cited Rule 274’s requirement that a party object to submitted charges to preserve error, *Payne*’s holding that such objections must be sufficient to make the trial court aware of the complaint, and Rule 278’s requirement that a party request a substantially correct question, definition, or instruction to preserve error as to omitted elements in a given charge. *Ledesma*, 242 S.W.3d at 43. Nothing in the court’s analysis is inconsistent with its longstanding jurisprudence that objections are sufficient to preserve error in submitted questions, definitions, and instructions. In fact, *Ledesma*’s discussion on this point expressly supports that line of authority. See *id.*

#### **IV. The PJC Committee’s “Abundance-of-Caution” Alteration to the Basic Rules for Preserving Charge Error**

Out of an abundance of caution, the PJC committee has suggested slightly altered rules for preserving charge error.

In 2009, the Corpus Christi Court of Appeals in *Wackenhut Corrections Corp. v. de la Rosa* raised a concern that, even if a practitioner is convinced he need only object to an omitted definition or instruction, there may still be a risk of

waiving error by not also making a request. 305 S.W.3d 594, 610–18 & 611 n.16 (Tex. App.—Corpus Christi 2009, no pet.). Post-*Payne*, the keys to error preservation now seem to be: (1) when in doubt about whether to object or request to preserve error, do both; and (2) in either case, clarity is essential: make your arguments timely and plainly, and get a ruling on the record. *See id.*

In light of the fine distinctions that arguably still exist regarding preserving charge error, and *Wackenhut's* caution to both object and request if unsure, the PJC committee suggests the following actions to preserve error:

- Defective question, definition, or instruction:

**Object**

Affirmative errors in the jury charge must be preserved by objection, regardless of which party has the burden of proof for the submission. TEX. R. CIV. P. 274. Therefore, if the jury charge contains a defective question, definition, or instruction, an objection pointing out the error will preserve error for review.

- Omitted definition or instruction: **Object and request**

If the omission concerns a definition or an instruction, error must be preserved by an objection and a request for a substantially correct definition or instruction. TEX. R. CIV. P. 274, 278. For this type of omission, it does not matter which party has the burden of proof. Therefore, a request must be tendered even if the erroneously omitted definition or instruction is in the opponent's claim or defense.

- Omitted question, Party's burden: **Object and request**; Opponent's burden: **Object**

If the omission concerns a question relied on by the party complaining of the judgment, error must be

preserved by an objection and a request for a substantially correct question. TEX. R. CIV. P. 274, 278. If the omission concerns a question relied on by the opponent, an objection alone will preserve error for review. TEX. R. CIV. P. 278. To determine whether error preservation is required for an opponent's omission, consider that, if no element of an independent ground of recovery or defense is submitted in the charge or is requested, the ground is waived. TEX. R. CIV. P. 279.

- Uncertainty about whether the error constitutes an omission or a defect: **Object *and* request**

If there is uncertainty whether an error in the charge constitutes an affirmative error or an omission, the practitioner should both request and object to ensure the error is preserved. *See Payne*, 838 S.W.2d at 239–40 (Tex. 1992).

*See, e.g.*, 2012 PJC 251.1.

## CONCLUSION

The authors hope this explanation adds guidance for the appellate bar and background to the new preservation-of-error comment in the 2012 PJC volumes.