THE JURY CHARGE 101

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OVERVIEW KEY MATTERS INTELLIGENCE	Leane K. Capps enjoys effectively solving companies' legal problems while insuring clients' legal outcomes align with their culture and business objectives. Not only does Leane have extensive litigation and courtroom experience, clients also turn to her for advice in order to avoid litigation and meet best practices in a variety of industries.
NEWS/EVENTS	Leane Capps has extensive commercial litigation experience in a wide variety of matters that can arise for business clients, including non-competition agreements, Fair Labor Standards Act claims, class actions, discrimination claims, copyright, trademark, patent and trade secret claims, contractual disputes, privacy issues, and indemnity claims. Leane has extensive experience in a wide variety of industries involving technology, aviation, collegiate sports, and energy. She has extensive experience in complex multijurisdictional litigation including class actions, multiple parallel proceedings and multidistrict litigation. She is also board certified in civil appellate law by the Texas Board of Legal Specialization. She has been named in the *Best Lawyers of America* and *Texas Super Lawyers* for commercial litigation and appeals; she has been repeatedly named as one of the Top 50 Women Attorneys in Texas and one of the Top 100 lawyers in Dallas/Fort Worth. Leane has been named one of the Top 100 Texas Superlawyers.
DISTINCTIONS	Board certified in Civil Appellate Law by the Texas Board of Legal Specialization AV® Rated by Martindale Hubbell Listed in Bar Register of Preeminent Women Lawyers™ Selected for inclusion in The Best Women Lawyers in Texas® Selected for inclusion in *The Best Lawyers in America*®, Appellate Practice, 2012-2016 Selected in Texas Super Lawyers publication as one of its Top 100 Texas Super Lawyers, 2013 Selected in *Texas Super Lawyers* publication as one of its *Top 50 Women Lawyers* in 2009, 2011, 2012, 2013 Selected in *Texas Super Lawyers* publication as one of *The Top 100 Lawyers* in the Dallas/Fort Worth Region in 2011, 2012, 2013 Selected for inclusion in *Texas Super Lawyers* published in *Texas Monthly* magazine, 2007-2014

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MEMBERSHIPS

- American Bar Association
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    - Secretary, 2013-2014
    - Executive Board 2006-2008; 2012-2014
    - AJEI Summit, Chair, 2013
    - Publications Committee, Chair, 2007-2008
    - Long Range Planning Committee, 2006-2007
    - Program Committee for Annual Bench-Bar Summit, 2006-2007
    - Appellate Practice Institute
      - Steering Committee, 2008-2009
      - Faculty, Northwestern Law School, 2009
  - Litigation Section
    - Appellate Practice Committee
      - Aviation Litigation Committee
      - Woman Advocate Committee
  - Tort, Trial and Insurance Practice Section
    - Appellate Advocacy Committee
      - Vice-Chair, 2007-2012
    - Aviation and Space Law Committee
      - Vice-Chair, 2006-2012
    - Aviation and Space Law Committee Newsletter
      - Co-Editor, 2007-2012
- State Bar of Texas
  - Appellate Section
    - Leadership Council Member 2009-2013
    - Annual Meeting Co-Chair, 2006-2008
    - Foreign Affairs Co-Chair, 2008-2009
    - Nominations Committee 2011
    - E-filing Subcommittee 2011
    - Membership Committee, 2010-2014
  - Litigation Section
- Texas Supreme Court Historical Society
- Higginbotham Inn of Court, Barrister, 2013-2014
- Dallas Bar Association
  - Appellate Section
  - Business Litigation Section
- Federal Bar Association, Dallas Chapter
- Dallas Women Lawyers Association
- International Aviation Women's Association
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- Sports Lawyers Association
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OVERVIEW KEY MATTERS NEWS/EVENTS	Caitlin Morgan focuses on finding creative solutions to complex problems. Her practice has focused on large commercial disputes, which often require outside-the-box thinking and resolutions. Caitlin brings a deep understanding of the law coupled with a keen sensitivity to clients' ultimate goals and best options for resolution. Caitlin has represented a variety of businesses, from hotel owners and *Fortune* 500 companies to private health care companies and closely-held corporations. Her experience is as diverse as her representative work, which includes experience in: • Mediation of disputes prior to trial by formal mediate and informal settlement negotiations • State and federal court practice in a wide variety of complex litigation matters • Bankruptcy practice resulting in settlement and successful reorganization of a corporation.
DISTINCTIONS	Selected for inclusion in *Texas Super Lawyers*, Rising Stars, 2014 and 2015
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THE JURY CHARGE: 101

I. INTRODUCTION

At my law school, Professor Muldrow repeatedly said: "He who controls the charge, controls the case." I have never forgotten those words. But to control the charge, you need to understand the rules relating to the charge, the cases interpreting the rules, preservation of error, and charge conference strategies. You will also need to know how to conduct a charge conference to make sure you have a clear record on appeal. This article offers an overview of the process and some strategies to consider in preparing a jury charge, but it is not intended to comprehensively address all the issues relating to the jury charge and error preservation.

II. DRAFTING THE CHARGE

A. Getting Started

Most trial lawyers do not draft a jury charge until the last possible minute. This practice not only causes stress during trial, it often results in an erroneous charge. I am an advocate of not only preparing the charge long before the charge is to be submitted to the jury, but that it be prepared at the pleading stage of a case. Especially in complex cases, preparing the jury charge early helps guide your claims or defenses from the beginning of the case. I prefer to prepare the jury charge before a single deposition is taken. If you utilize this approach, it will guide the overall strategy for the case. If you are not involved in the case from the beginning, prepare the charge as soon as possible.

In many cases, you will begin drafting the charge using the Texas Pattern Jury Charges. The Texas Pattern Jury Charges are an excellent resource, but they are not authoritative and are not binding. "The Texas Pattern Jury Charges are nothing more than a guide to assist the trial courts in drafting their charges; they are not binding on the courts." *Keetch v. Kroger Co*., 845 S.W.2d 276, 281 (Tex. App.—Dallas 1990), *aff'd*, 845 S.W.2d 262 (Tex. 1992). As a practical matter, however, the trial court will look to the pattern jury charge and if you are going to ask the court to change the pattern charge you need to be fully prepared to support your position. But you should also be aware that some courts have held that "[w]ell-settled pattern jury charges should not be embellished with addendum." *Walker & Associates Surveying, Inc. v. Roberts*, 306 S.W.3d 839, 857 (Tex. App.—Texarkana 2010, pet. denied) (*citing Weeks Marin, Inc. v. Salinas*, 225 S.W.3d 311, 319 (Tex. App. – San Antonio 2007, pet. dism'd)).

If there is a pattern jury charge, I will use this as a starting point and then determine if there is a factual or legal basis to modify the charge. I will also look at the cases cited in the pattern jury charge and see if the law has changed. If you think that the pattern jury charge is not a correct statement of the law, you should advocate your position. In *Ford Motor Company v. Ledesma*, 242 S.W.3d 32, 41-42 (Tex. 2007), the Texas Supreme Court held that the pattern jury charge definitions for a manufacturing defect and producing cause were both legally incorrect.

What do you do if there is no pattern jury charge? Begin with the substantive law that governs your case and then research whether there are appellate decisions that discuss submitting your issues to a jury. I also look for jury charges that have been filed by other litigants. Many times, drafting a jury charge is an art. When you are drafting a charge, and there is no pattern jury charge, your ultimate goal should be to assist the court in submitting issues that are logical, simple, fair, legally correct and complete. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999). But if you are unsure about a legal issue, the trial court has more discretion in the submission of definitions as long as the definition is reasonably clear in performing its function. *Harris v. Harris*, 765 S.W.2d 798, 801 (Tex. App.—Houston [14th Dist.] 1989, writ denied). Similarly, the trial court is afforded more discretion to determine necessary and proper jury instructions. *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied). An instruction is proper if it might assist the jury in answering the submitted questions, accurately states the law, and finds support in the pleading and evidence. Tex. R. Civ. P. 277 ("[t]he court shall submit such instructions and definitions"); *Elbaor v. Smith*, 845 S.W.2d 468, 470 (Tex. 1992).

B. Understanding Broad-Form Submission Issues

Rule 277 of the Texas Rules of Civil Procedure states "[i]n all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277. Despite the clear language of this rule, in 2000 the Texas Supreme Court issued the decision of *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), which held the use of broad form submissions was reversible error in some cases.

In *Casteel*, Casteel sold insurance policies as an independent agent for Crown Life Insurance Company. *Id.* at 381. The policyholders sued Castell and Crown, and Casteel filed a cross-claim against Crown asserting he had been injured by the unfair and deceptive actions of Crown under Article 21.21 of the Texas Insurance Code. *Id.* The Texas Supreme Court held that Castel did not have standing to bring claims under Article 21.21 of the Texas Insurance Code. *Id.*

The trial court submitted a single broad-form question on the issue of Crown's liability to Casteel that instructed the jury that there were thirteen independent grounds for liability, which the jury answered affirmatively. *Id.* at 387. Crown objected to the charge on the grounds that Casteel did not have consumer standing under Article 21.21. *Id.* The

court of appeals held the error was harmless and relied upon a line of cases that held the submission of an invalid theory of liability in a single broad-form question is harmless if any evidence supports a finding of liability on a valid theory. *Id.* at 388. The Texas Supreme Court reversed and held that the error was not harmless. *Id.* The court stated:

> It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed on the law. Yet, when a jury bases a finding of liability on a single broad-form question that co-mingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence *could* have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a fact finder actually found that the defendant *should* be held liable on proper, legal grounds. *Id.*

Two years later, the Texas Supreme Court issued *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). The issue in *Harris County* was whether it was harmful error to submit a broad-form damages question that included an element of damages without any evidentiary support. *Id.* at 231. The case involved two plaintiffs who sustained injuries in a collision with a patrol car. *Id.* The trial court's charge allowed the jury to award a lump sum to one plaintiff and told the jury that it could consider physical pain and mental anguish, loss of earning capacity, physical impairment and medical care. *Id.* The county objected and requested the court submit each element of damages separately and objected that there was no evidence of loss of earning capacity. *Id.* Similarly, the jury was allowed to award a lump sum to the second plaintiff and was instructed that it could consider physical pain and mental anguish, physical impairment, and medical care. *Id.* The county objected and asserted there was no evidence of physical impairment. *Id.*

The court of appeals agreed that there was no evidence on these elements of damages, but found the error was harmless because there was evidence to support the properly submitted elements of damages. *Id.* at 232. The Texas Supreme Court disagreed and extended *Casteel's* harmful error analysis to the broad-form submission of damages and found that the mix of valid and invalid elements of damages in a single broad-form submission was harmful because it prevented the appellate court from determining whether the jury based its verdict on an improperly submitted element of damages. *Id.* at 233-234. Under *Casteel*, the appellate court presumes that the error is harmful. *Id* at 388.

The Texas Supreme Court then extended the reasoning in *Casteel* to the apportionment of liability in *Romero v. KPH Consolidation, Inc*., 166 S.W.3d 212, 227 (Tex. 2005). Romero involved a claim that a hospital negligently delayed a blood transfusion for the plaintiff when he was in surgery and a claim for malicious credentialing of a surgeon. *Id.* The two claims were submitted separately to the jury, but then the jury was asked to apportion liability between the hospital, two physicians and a nurse. *Id.* at 215. The apportionment of liability question asked:

> What percentage of the conduct that caused the occurrence or injury do you find attributable to each of those found by you, in your answer to Question 1 and/or 2 to have caused the occurrence or injury? *Id.* at 225.

The jury answered both liability claims in the affirmative, but on appeal, it was undisputed that there was no evidence of malice necessary to support the negligent credentialing claim. *Id*. at 244. At the same time, the hospital did not challenge the finding that it was negligent. *Id.* The Texas Supreme Court considered whether the jury's apportionment of 40% of the fault to the hospital required reversal and found that it should be reversed under *Casteel* because it was "reasonably certain that the jury was significantly influenced by the erroneous inclusion of the factually-unsupported malicious credentialing claim in the apportionment question." *Id*. at 227-228.

The Texas Supreme Court has since declined to extend the presumed harm from *Casteel* to the improper submission of an inferential rebuttal instruction finding that they do not implicate concerns raised in *Casteel* or *Harris County* of broad-form questions with multiple theories of liability or damage. *Bed, Bath & Beyond, Inc., v. Urista*, 211 S.W.3d 753, 756-57 (Tex. 2006).

III. THE CHARGE CONFERENCE

A. Be Prepared and Understand Your Role

Just as every judge is different, every charge conference is different. I have been in conferences that lasted for thirty minutes and conferences that went well into the night and into the weekend. The key to a successful charge conference is being prepared and understanding the law. Your goal is to have the court see you as a resource for the court. Judges do not like to be reversed. If you can convince the court that you will not lead it into error, but that your opponent might, you have done your job. Make sure that you have all the tools you need to be able to make changes to the charge. Bring a jump drive, a computer, copies of the pattern jury charges, case law and maybe even a portable printer. Once a judge is ready to read the charge to the jury, they do not like to wait. And if you are not the attorney making the closing arguments, you will have a trial attorney pacing the floor and rushing you to get the charge finished.

In order to participate in the charge conference, and preserve error, you need to understand the rules. The rules for error preservation regarding the court's charge extend well beyond Rule 33.1 of the Texas Rules of Appellate Procedure. You need to understand Rules 271-279 of the Texas Rules of Civil Procedure and the recent cases interpreting them.

B. Timing of Objections

Rule 272 of the Texas Rules of Civil Procedure requires:

> The charge shall be in writing, signed by the court, and filed with the clerk, and shall be part of the record in the cause. It shall be submitted to the parties or their attorneys for their inspection, and a reasonable time be given them in which to examine and present objections thereto outside of the presence of the jury, which objections shall in every instance 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. All objections not so presented shall be considered as waived. Tex. R. Civ. P. 272.

Rule 272 makes it clear that if a party does not make an objection to the court before the court reads the charge to the jury, the objection is waived. *Mitchell v. Bank of Am., NA*., 156 S.W.3d 622, 627 (Tex. App.—Dallas 2004, pet. denied). In addition, the objecting party must "point out distinctly the objectionable matter and the grounds for the objection." Tex. R. Civ. P. 274.

But the Texas Supreme Court lessened this standard somewhat in *State Dept. of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992), in which it recognized that:

> The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer. Today, it is fair to say that the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial. The preparation of the jury charge, coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. *Id.*

In an attempt to make preservation of charge error simpler, the Court held 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." *Id.* at 241.

In *Cruz v. Andrews Restoration, Inc*., 364 S.W.3d 817, 829 (Tex. 2012), the Texas Supreme Court held that filing a pretrial charge that included a subpart to a question that was later omitted did not preserve the issue for appeal because it would not assume that the trial court was aware of the issue. *Id.* at 831 ("[f]iling a pretrial charge that includes a question containing that subpart, when no other part of the record reflects a discussion of the issue or objection to the question ultimately submitted, does not sufficiently alert the trial court to the issue."). But in *Alaniz v. Jones & Neuse, Inc*., 907 S.W.2d 450, 452 (Tex. 1995) (per curium) the court held that filing a pretrial charge with a question and making an objection at a charge conference may be sufficient.

The recent case of *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917 (Tex. 2015) (per curium) suggests that the Court will continue to apply *Payne* and find charge error is preserved even when there is not strict compliance with the rules. *Gutierrez* involved a collision between a car and a bus. *Id.* at 918. Before trial, the plaintiff filed a "Motion for Spoliation of Evidence" asking that the bus company be sanctioned for destroying a videotape of the accident. *Id*. at 919. The company filed a written response that asserted there was no evidence of intentional or negligent spoliation and that any evidence of spoliation should be excluded. *Id*.

During trial, the court ruled that the company had negligently spoliated evidence and ordered the inclusion of the spoliation instruction in the charge. *Id.* But at the formal charge conference, the company did not object to the spoliation instruction. *Id.* In fact, it approached the bench and objected after the charge, with the instruction, was read to the jury. *Id.* The record reflected that the trial court acknowledged the objection. *Id.* Relying on Rule 272, the court of appeals affirmed the submission of the instruction finding that the complaint was waived. *Id*. The Texas Supreme Court reversed, relying upon *Payne* and found the pretrial motions demonstrated "the trial court was aware of, and rejected, Wachenhut's objection to the inclusion of a spoliation instruction before the charge was read to the jury." *Id*. at 920. It appears that the Texas Supreme Court will continue to apply *Payne* and find error is preserved when the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling and that the "more specific requirements of the rules should be applied, while they remain, to serve rather than to defeat this principle." *Payne*, 838 S.W.2d at 241. But the cautious practitioner will not rely on pretrial filings and will object before the charge is read to the jury.

Rule 272 states that a party should have a "reasonable time" to object to the charge. The court has wide discretion in the amount of time that it allows for objections to the charge. *Bekins Moving & Storage Co. v. Williams*, 947 S.W.2d 568, 575 (Tex. App.—Texarkana 1997, no pet.) (holding that thirty minutes for reviewing and objecting to a fifty-one page charge, most of which had been in counsel's possession for four days and which had only been changed to consolidate some damage issues, was adequate). The court has the discretion to set a deadline for objections to the charge. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014). Because the court only needs to provide the parties with a "reasonable time" and has wide discretion, I recommend having your objections ready to submit in writing in case you do not have enough time to dictate your objections. In addition, if your opponent comes to the charge conference with new questions, instructions or definitions, you will want to reserve your time to dictate objections to newly tendered matters.

C. Do You Object or Request?

One of the most confusing aspects of charge practice is whether to object or request a submission, or both. Generally, you object to anything included in the charge that is incorrect, regardless of who has the burden of proof. And you must request a jury instruction or definition if you complain that it has been omitted. If your complaint is that a jury question has been omitted—and you have the burden of proof on the issue—you must request the inclusion of the question in the charge.

1. Object to Defective Questions, Instructions and Definitions.

You should object to anything that is included in the charge that is incorrect or defective whether it is a question, instruction, or definition. Rule 274 states that a "party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading is waived unless specifically included in the objections." 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 for substantially correct language is not required); *Religious of Sacred Heart v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992) (objection is proper method for preserving complaint of defective issue submission regardless of who has the burden of proof).

In *Payne*, however, the Texas Supreme Court held that even if the appellant's objection was insufficient, as the appellee claimed, the trial court was made aware of the issue of whether there was a special defect or a premise defect because the appellant asked for a question to be submitted on the issue in the charge. *Payne*, 838 S.W.2d at 239. There is therefore some authority for the proposition that a request to a defect in the charge might preserve error. But the Court never ruled that the objection in *Payne* was actually "insufficient" to apprise the trial court of its error. In addition, the Court has never overruled Rule 274 or reversed *Hernandez v. Montgomery Ward & Co*., 652 S.W.2d 923 (Tex. 1983). In *Hernandez*, the Court reiterated that objections to the charge and requests for submission of issues are not "alternatively permissible methods for complaining of the charge" and a "request for another charge is not a substitute for an objection." *Id.* at 925 (*citing Texas Employers' Ins. Ass'n v. Jones*, 393 S.W.2d 305 (Tex. 1965)). The best practice is to assert an objection.

2. Request and Tender an Omitted Instruction or Definition.

Rule 278 of the Texas Rules of Civil Procedure states that the "[f]ailure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." If you want to complain on appeal about the omission of an instruction or definition from the jury charge, you need to: (1) object to its omission, (2) tender a substantially correct instruction or definition, and (3) obtain a ruling. *Sears, Roebuck & Co. v. Abel*, 157 S.W.2d 886, 891 (Tex. App.—El Paso 2005, pet. denied). "[S]ubstantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, and that is not affirmatively incorrect." *Modica v. Howard*, 161 S.W.2d 1093, 1094 (Tex.Civ.App.—Beaumont 1942, no writ) (citing Chief Justice Alexander's lecture before the judicial section of the State Bar of Texas, July 3, 1941). By way of example, a requested instruction or definition is "affirmatively incorrect" if it assumes material controverted facts. *Johnson v. Zurich General Accident & Liability Ins. Co.*, 146 Tex. 232, 205 S.W.2d 353 (1947).

Rule 276 of the Texas Rules of Civil Procedure states that "[w]hen an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially." If the trial judge modifies the instruction, question, or definition, the judge shall endorse it "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same. Tex. R. Civ. P. 276. This is conclusive proof that the party seeking the instruction, question, or definition presented it at the proper time, excepted to its refusal or modification, and that all the requirements of the law were observed. *Id.* Based on this language, to preserve error, you must actually hand the instruction, question, or definition to the judge and have the judge endorse it as required under the Rule.

If the court did not endorse your instruction, question, or definition as required by Rule 276, there is still a method to preserve error. In *Dallas Market Center Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex. 1997) (*overruled on other grounds by Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex. 2000)), the Texas Supreme Court held that an endorsement was not the only way to preserve error where the court's refusal is "otherwise clear from the record." In *Liedeker*, the trial court acknowledged and agreed to endorse the requested questions, but did not actually do so. *Id.* at 385. The Texas Supreme Court recited the Rule, but held that it does not require that "the 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." *Id.* at 386. The Court then collected numerous cases demonstrating that an endorsement was not the only way to preserve error. *Id.* at 386-87. To hold otherwise, where the trial court's refusal is clear from the record would promote "form over substance" and be "ill advised." *Id.* At 387.

3. Object to the Omission of Questions on Which You Have the Burden of Proof and Tender the Questions to Be Submitted.

Rule 278 states that:

> Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Tex. R. Civ. P. 278.

You should therefore object to the omission of a question on which you have the burden of proof and tender the question for inclusion in the charge, but you only have to object to the exclusion of a question on which you do not have the burden of proof. Obviously, if you are unsure if you have the burden of proof you should do both. Rule 278 also states that a "judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question." Although this language is somewhat confusing, this portion of the rule reaffirms that the court should submit broad-form questions "whenever feasible" and that a judgment will not get reversed if the court submitted the controlling issues to be decided by the jury. *Select Ins. Co. v. Patton*, 506 S.W.2d 677, 686 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

D. Create a Clear Record

It is imperative that you create a clear record at the charge conference. Many judges will conduct an informal charge conference first, without a reporter present. You should not object to an informal conference, as it can be very productive in the preparation of the charge. But you need to make sure that before the charge is read to the jury, you have a formal charge conference on the record. Tex. R. Civ. P. 272. If you have not participated in a formal charge conference before, I suggest that you do two things. First, try to attend a conference to familiarize yourself with the process. Second, read the record of a charge conference. You will see how difficult it can be to make sure you have a clear record for the appellate court. It is critical to make a clear record that demonstrates to the appellate court what question, definition or instruction it is that you are referring. I also usually write out the specific objections that I have to each question, instruction and definition. And if there is case law supporting my position, I make sure that I have the full citation to dictate into the record. It is also critical that you make sure that if the court refuses or modifies your question, instruction or definition that you have the court endorse it and sign it. Tex. R. Civ. P. 276. Remember that the rules do not allow you to adopt any objection to one part of the charge to another. Tex. R. Civ. P. 274. Although the court (and maybe the trial lawyer that is about to give the closing argument) may try to rush you through the formal charge conference, do not let it happen. You need to go through each issue thoughtfully and make a clear record. If you believe the court has not provided you with sufficient time, assert a specific objection that you were not given adequate time under Rule 272.

IV. THE CHARGE ON APPEAL

In most cases, the court will conduct a traditional harm analysis; error in the jury charge is reversible only if the error was reasonably calculated to and probably did cause the rendition of an improper judgment. Tex. R. App. P. 66.1(a); *Gutierrez*, 453 S.W.3d at 921 (*citing Brookshire Brothers, Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)).

As discussed above, that analysis is different in the *Casteel* type cases, where the Texas Supreme Court has presumed harm. *Casteel*, 22 S.W.3d at 381; *Harris County*, 96 S.W.3d at 234-35; *Romero*, 166 S.W.3d at 227 (jury was allowed to apportion responsibility based on factually unsupported liability finding that prevented the appellant from properly presenting the case to the court of appeals).

The omission of a question from the charge may be harmless when the jury's findings to other questions are sufficient to support the judgment. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); *Heritage Gulf Coast Properties, Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 656 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (*citing Shupe*). If the court finds that there was an erroneous question submitted in a charge, it may render judgment or remand the case for a new trial. The outcome depends on whether the question is material. In *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154 (Tex, 1994), the Texas Supreme Court discussed whether the error in an instruction that was submitted to the jury with a liability question made the question "immaterial" or "merely defective." If the question is immaterial, the trial court can render judgment notwithstanding the verdict. *Id.* at 155. Where a question or instruction is merely defective, the party is entitled to only a new trial. *Id.* A jury question is "merely defective" if the party "'plainly attempts' to request a jury finding of a recognized cause of action." *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134, 140 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (*citing Spencer*, 876 S.W.2d at 157). An immaterial question is a question that should not have been submitted or was properly submitted, but has been rendered immaterial by other findings. *Id.* (*citing C&R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966)). A question of law that should never have been submitted to a jury may also be immaterial. But if the question is not immaterial and defective, the case must be remanded for a new trial. *Id.*

When the court refuses to submit a requested instruction, the issue on appeal is whether the request was reasonably necessary to allow the jury to render a proper verdict. *Shupe*, 192 S.W.3d at 579; *Heritage Gulf Coast Properties*, 416 S.W.3d at 656. If the court submits an instruction that should not have been included, the issue on appeal is whether the instruction would nudge the jury. *Lone Star Gas and Co v. Lemond*, 897 S.W.2d 755, 766 (Tex. 1995); *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723-24 (Tex. 2003).

This is the same standard where the court refuses to submit a requested definition. In that case, the issue on appeal is whether the request was reasonably necessary to enable the jury to render a proper verdict. *E.g.*, *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828, 843 (Tex. App.—Fort Worth 2006, no pet.); *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.—Beaumont 1999, pet. denied).