JURY CHARGE

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State Bar of Texas
CIVIL APPELLATE PRACTICE 101
September 7, 2011
Austin, Texas

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I. INTRODUCTION.

A long time ago, way back in the early 1990s, the Texas Supreme Court acknowledged a significant truth: "The rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyers." *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992).

In the nearly two decades since *Payne* was decided, it seems fair to say that the situation has not improved. "[T]he process of telling the jury the applicable law and inquiring of them their verdict [remains] 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." *Id*. at 240.

II. PRESERVATION REQUIREMENTS.

Rule of Appellate Procedure 33.1 establishes the general requirements for preservation of any appellate complaint. In broad terms, the rule requires a timely complaint and ruling by the trial court. Specifically, the rule provides as follows:

> *In General*. As a prerequisite to presenting a complaint for appellate review, the record must show that:
>
> (1) the complaint was made to the trial court by a timely request, objection, or motion that:
>
> (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
>
> (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and
>
> (2) the trial court:
>
> (A) ruled on the request, objection, or motion, either expressly or implicitly; or
>
> (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a). Thus, to preserve any complaint including a complaint about the jury charge, a party must make a timely, specific objection or request, obtain a ruling on the complaint, and comply with the rules of evidence and procedure. *E.g., Knapp v. Wilson N. Jones Mem. Hosp.*, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.).

While Texas Rules of Appellate Procedure Rule 33.1(a) should be viewed as a starting point for charge error preservation, it certainly cannot be understood as reflecting all that is required. Frankly, as the supreme court recognized in *State Department of Highways v. Payne*, preservation of charge complaints is much more complicated. A lawyer tasked with preparing and objecting to a jury charge will need to be very familiar with Rules 271 through 279 of the Rules of Civil Procedure. These rules are packed with information and requirements that should be well-understood before any lawyer appears before a trial court to discuss a jury charge.

A. It Is the Court's Charge, Not the Parties'.

Rule 271 of the Texas Rules of Civil Procedure establishes the sometimes overlooked proposition that the charge presented to the jury is the court's charge: "Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury." Certainly, the parties have significant responsibilities in offering and objecting to jury charge submissions, but it is the trial court, not the parties, that is ultimately tasked with preparation and delivery of the charge to the jury. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009) ("It is the trial court's prerogative and duty to instruct the jury on the applicable law.").

B. Objections and Requests Must Be Timely.

Texas Rule of Civil Procedure 272 provides in part that 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 outside the presence of the jury, which objections shall in every instance be presented . . . before the charge is read to the jury. All objections not so presented shall be considered as waived." TEX. R. CIV. P. 272. This rule requires the trial court to allow a "reasonable time" to review the court's charge and make objections. *Id.* Determining what amount of time is "reasonable" is for the trial court to decide within its considerable discretion. *See Bekins Moving & Storage Co. v. Williams*, 847 S.W.2d 568, 575 (Tex. App.—Texarkana 1997, no pet.) ("The time allowed for objections and requests is a matter within the discretion of the trial court and is reviewable only for a showing of abuse.").

In *Bekins Moving*, Bekins argued that the trial court abused its discretion in allowing it only 32 minutes to prepare objections to a 51 page charge. *Id.*

Bekins complained that it did not have enough time to examine the causes of action submitted and determine that elements were missing. *Id*. The court of appeals overruled the complaint, explaining that Bekins "actually received a copy of the proposed charge at the beginning of trial four days earlier. Although about twenty pages in the center section of the proposed charge were changed by the trial judge, her alterations consisted of a consolidation of damage issues for the remaining questions and resulted in a shorter jury charge." *Id*. The court concluded: "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." *Id*.

Rule 272 requires that all objections shall be presented to the court "before the charge is read to the jury." This requirement is mandatory and cannot be altered by the trial court, or by the agreement of the parties. *See Missouri Pac. R. Co. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973) ("[I]t was clearly an abuse of discretion for the trial court to approve the agreement in violation of Rule 272."); *Frost Crushed Stone Co. v. Odell Geer Const. Co.*, 110 S.W.3d 41, 47 (Tex. App.—Waco 2002, no pet.) ("Objections must be made before the charge is read to the jury."); *Methodist Hosp. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 884 (Tex. App.—Dallas 1991, writ denied) ("The trial court may not extend the time prescribed by rule 272 for the presentation of objections to its charge . . . .").

Objections that are not made timely are waived. *Missouri Pac. R. Co. v. Cross*, 501 S.W.2d at 873 ("Since all objections of both parties to the court's charge were dictated after the charge was read to the jury, we consider them as waived."); *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 627 (Tex. App.—Dallas 2004, pet. denied) ("If the party does not present the objections to the court before the court reads the charge to the jury, he waives his objection.").

C. Objections and Requests Are Not Interchangeable; Different Complaints Require Different Preservation.

One of the most confusing aspects of jury charge practice is determining whether an objection or a request is required to preserve error. As the supreme court has noted, given the complexity of the question and the significant downside associated with a wrong answer, "cautious counsel might choose to do both in all cases—request and object." *State Dep't of Highways. v. Payne*, 838 S.W.2d at 240. Certainly, if one is in doubt, the best solution is to both object to the charge that is being given and to request submission of the particular issue, instruction, or definition you want included.

1. Object to a defective instruction or definition that appears in the charge.

Rule 274 of the Texas Rules of Civil Procedure states that "[a]ny 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." The supreme court has made clear that "an objection is sufficient to preserve error in a defective instruction. A request of substantially correct language is not required." *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *see also Willis v. Donnelly*, 199 S.W.3d 262, 275 (Tex. 2006) ("A complaint about a defective jury instruction is waived 'unless specifically included in the objections' to the charge."). In *State Department of Highways v. Payne*, the supreme court held that even if a party's objection to a given charge were "insufficient," the complaining party "preserved error by requesting the trial court to inquire of the jury concerning [the defectively submitted element]." *Payne*, 838 S.W.2d at 239-40. *Payne* thus holds that a request can serve as an objection—at least in some cases. *Id*. But *Payne* does not expressly address or overrule cases which hold that an objection is required and a request will not suffice. *E.g., Hernandez v. Montgomery Ward*, 652 S.W.2d 923, 925 (Tex. 1983) ("A request for another charge is not a substitute for an objection."); *Texas Gen. Indem. Co. v. Moreno*, 638 S.W.2d 908, 914 (Tex. App.—Houston [1st Dist.] 1982, no writ) ("A request for submission is not an available alternative to an objection as a means of pointing out a defect in, or preserving a complaint to a submitted definition or instruction."). And the supreme court in 2006 reiterated that "[a] complaint about a defective jury instruction is waived 'unless specifically included in the objections' to the charge." *Willis*, 199 S.W.3d at 275.

2. Object to an erroneous question that appears in the charge.

Everything written above about defective definitions and instructions applies equally to defectively submitted questions. The supreme court has expressly held that regardless of who bears the burden of proof, an objection is the proper method of preserving a complaint about a defective question that is included in the charge. *Holubec v. Brandenberger*, 111 S.W.3d 32, 39 (Tex. 2003) (" Because the question actually submitted was defective, however, the Holubecs did not have to submit their own substantially correct question . . . . The Holubecs' objection was sufficient to preserve error."); *Religions*

of Sacred Heart v. City of Houston, 836 S.W.2d 606, 613-14 (Tex. 1992) ("This case involved a defectively submitted question. Therefore, only a specific objection was necessary.").

3. Request a definition or instruction that is omitted—and also object to the omission.

"Texas courts have repeatedly held that an objection and a proper request are required to preserve charge error if the trial court omits a question, definition, or instruction relied on by the requesting party." *Sears, Roebuck & Co. v. Abell*, 157 S.W.2d 886, 891 (Tex. App.—El Paso 2005, pet denied). "If the error is the omission of an instruction relied on by the requesting party, three steps are required by the Rules to preserve error: a proper instruction must be tendered in writing and requested prior to submission; a specific objection must be made to the omission of the instruction; and the court must make a ruling." *Id*.

As discussed above, the supreme court in *State Department of Highways v. Payne* held that a request served as an objection. *See Payne*, 838 S.W.2d at 238-39. If a request counts as an objection, then a second objection arguably should not be required to preserve a complaint about an omitted instruction or definition. But the El Paso court's decision in *Sears v. Abell* comes 13 years after *Payne*, and it still insists on both a request and a separate objection. There is no reason not to both object and request and thereby avoid a potential preservation argument.

While there may be some argument against having to object to an omitted definition or instruction, there is no escape from the requirement of tendering a request for the omitted instruction or definition. "Failure 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." TEX. R. CIV. P. 278. *See also, e.g., McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("A party is required to request and tender to the trial court a substantially correct instruction in writing when the jury charge . . . . If a party fails to do so, any error by the trial court in not submitting the instruction to the jury is waived.").

4. Request an omitted question on which you have the burden of proof—and also object to the omission.

The above discussion regarding omitted definitions and instructions applies equally to omitted questions on which you have the burden of proof. Rule 274 requires an objection on account of any omission in the charge. TEX. R. CIV. P. 274. Rule 278 requires a written request: "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 . . . ." TEX. R. CIV. P. 278. *See, e.g., ASEP USA, Inc. v. Cole*, 199 S.W.3d 369, 377 (Tex. App.—Houston [1st Dist.] 2006, no pet.) ("{W}here an appellant contends that the trial court improperly omitted a questions or instruction on an issue in the charge, the appellant must do more than just object to preserve the issue on appeal. . . . Thus, an appellant does not preserve the issue of an omitted instruction or question for appellate review unless the appellant: (1) tenders a written request to the trial court for submission of the question, (2) which is 'in substantially correct wording.'").

5. Object to an omitted question on which the opposing party has the burden of proof.

Rule 278 of the Texas Rules of Civil Procedure expressly provides that an objection alone will suffice to preserve a complaint about an omitted question "if the question is one relied upon by the opposing party." TEX. R. CIV. P. 278; *see Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 891 (Tex. App.—El Paso 2005, pet. denied) ("Rule 278 creates a limited exception if the question is relied on by the opposing party.").

D. Objections Cannot Be Adopted by Reference.

It is not uncommon in a multi-party suit for the parties to agree that an *evidentiary* objection by one is good for all. *See Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 556 (Tex. App.—Houston [1st Dist.] 1996, *aff'd*, 972 S.W.2d 35 (Tex. 1998). But in the context of *charge* objections, adoption by reference does not suffice.

Rule 274 states that "[n]o 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. Rule 274 has generally been interpreted to mean that one party cannot incorporate by reference its own objections to another portion of the charge. *See C.T.W. v. B.C.G.*, 809 S.W.2d 788, 793 (Tex. App.—Beaumont 1991, no writ).

But the prohibition of Rule 274 has also been extended to the adoption by one party of another party's charge objections. In *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768 (Tex. App.—Houston [1st Dist.] 2004, no pet.), defendant Tensor attempted to adopt-by-reference the charge objections of its codefendant Allied Signal. The court of appeals rejected Tensor's argument: "Rule 274, which governs objections to the jury charge, places responsibility on individual parties and thus contemplates action by individual parties." *Tensor*, 135 S.W.3d at 795. By

failing to make its own objections, Tensor did not make the trial court aware of its complaint and did not obtain the adverse ruling necessary to preserve error. *Id. See also Wright Way Const. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 420-21 (Tex. App.—Corpus Christi 1990, writ denied) ("Appellant Atlantic failed to preserve all error in the charge because it adopted Wright Way's objections by reference when it made its own objections.").

E. Objections Must Be Specific.

"A party objecting to a charge must point distinctly to the objectionable matter and the grounds of the objection." TEX. R. CIV. P. 274. "The purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for complaint." *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). Thus, the rule creates a two-pronged test: a party's objection must clearly identify the error, and it must explain the legal basis of the complaint. *See, e.g., Johnston v. Smith*, No. 13-05-0368-CV, 2008 WL 2208865, *5 (Tex. App.—Corpus Christi, May 29, 2008, no pet.) ; *Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 892 (Tex. App.—El Paso 2005, pet denied); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 793 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Lemaire v. Davis*, 79 S.W.3d 592, 599 (Tex. App.—Amarillo 2002, pet. denied). "An objection that does not meet both requirements is properly overruled and does not preserve error on appeal." *Castleberry v. Branscum*, 721 S.W.2d at 276.

"Rule 274 is strictly construed." *Sears, Roebuck*, 157 S.W.3d at 892. "A sufficiently specific objection enables the trial court to understand the party's precise grounds and to rule." *Tensor*, 135 S.W.3d at 793. An objection that an instruction "may confuse the jury" or "prejudice the defendant," without further explanation, is insufficient "since they do not explain why the instruction is legally incorrect or how it would confuse the jury or prejudice the defendant." *Castleberry v. Branscum*, 721 S.W.2d at 277. Furthermore, the specific objection made at trial must correspond with the complaint and argument made on appeal. *E.g., Knapp v. Wilson N. Jones Mem. Hosp.*, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.); *Issacs v. Bishop*, 249 S.W.3d 100, 113 n.13 (Tex. App.—Texarkana 2008, pet. denied).

F. Requests Must Be In Writing, Must Be Substantially Correct, and Must Be Refused by the Trial Court.

Rule 278 of the Texas Rules of Civil Procedure requires that a party making a charge tender do so "in writing" and in "substantially correct wording." TEX. R. CIV. P. 278. Rule 276 requires a trial court to endorse refused requests "Refused," and sign the same officially. TEX. R. CIV. P. 276.

1. Make your requests in writing.

As to the first of these Rule 278 requirements—that the tender be "in writing"—the courts have not been consistent in their enforcement. For instance, in *In re M.P.*, 126 S.W.3d 228, 230-31 (Tex. App.—San Antonio 2003, no pet.), the appellant orally requested an additional jury charge instruction, dictating his proposal to the court reporter. According to the San Antonio court of appeals, this was sufficient despite the lack of writing. Under the "common sense" approach of *State Department of Highways v. Payne*, 838 S.W.2d 235 (Tex. 1992), "M.P.'s counsel made the trial court aware of his request, timely and plainly, with his oral dictation in the record of his exact request . . . ."

But the opposite, strict end of the spectrum, can be seen in *Laas v. State Farm Mutual Auto Insurance Co.*, No. 14-98-00488-CV, 2000 WL 1125287 (Tex. App.—Houston [14th Dist.], Aug. 10, 2000, pet. denied). "Rule 278 mandates the manner in which requested issues shall be made, and merely dictating a requested issue into the record is not sufficient." *Laas*, 2000 WL 1125287 at *12.

Suffice it to say, given the potential risk of waiver, there is no reason not to put your requests in writing.

2. Make your requests correctly.

The second requirement—that the tender be in "substantially correct wording"—is obviously much harder. Here, it is not simply a procedural issue, but a substantive one.

The proposal must submit the law correctly. In *McIntyre v. Commission for Lawyer Discipline*, 247 S.W.3d 434 (Tex. App.—Dallas 2008, pet. denied), McIntyre submitted multiple questions in support of his excuse for his disciplinary rule violation. The problem was that McIntyre's proposals did not follow the language of the disciplinary rule in question. *McIntyre*, 274 S.W.3d at 445. This flaw was fatal to McIntyre's appeal: "We agree with the Commission that McIntyre's requested questions were not in substantially correct wording, as required by Texas Rule of Civil Procedure 278." *Id. But see Gutierrez v. People's Mgmt. of Tx. I, Ltd.*, 277 S.W.3d 72, 77-79 (Tex. App.—El Paso 2009, pet. denied) ("Further, the content of the questions, taken from a pattern jury charge book, appear to offer a legally-correct definition of adverse possession . . . . Appellants satisfied the requirement of submitting several substantially-correct

proposed jury questions . . . [and] properly preserved the alleged error . . . .").

Of course, even if you get the law right, you must still run the gauntlet of submitting the issue in the correct form. For instance, in *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 886-87 (Tex. App.—Austin 2008, no pet.), the appellant wanted to submit an "as is" defense and tendered a proposed liability question. But an "as is" defense is an inferential rebuttal, and therefore must be submitted "only in the form of instructions." *GJP, Inc.*, 251 S.W.3d at 887. "Because appellants submitted their 'as is' question as an improper inferential rebuttal question rather than as an appropriate instruction to the liability questions submitted to the court without objection, the trial court did not abuse its discretion in refusing the submission." *Id.*

3. Have your requests refused and signed by the trial court.

Rule 276 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." TEX. R. CIV. P. 276. Compliance with this rule—having the judge sign and endorse a requested submission as refused—preserves error. *Id.*; *Dallas Mkt. Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex. 1997). Consequently, the careful lawyer will ensure that each requested instruction, definition, or question that is excluded from the charge is labeled as "Refused," signed by the trial court, and filed with the court clerk.

The supreme court has held "that an endorsement by the trial court is not the exclusive means of preserving error for refusing a charge request." *Id*. at 387. But, the trial court's refusal of the requested instruction must be clear from the record. *Id*. In the *Dallas Market Center* case "the trial court admitted [on the record] that he had considered the requested question, but refused it, and has meant to endorse it but simply failed to do so, for which he was sorry." *Id*. In this situation, Dallas Market Center "clearly preserved" its complaint even without the presence of a signed question marked "refused" in the record.

III. ISSUES REGARDING BROAD-FORM SUBMISSION.

Broad-form submission is the starting point for jury charges in Texas. Tex. R. Civ. P. 277. "In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions." *Id.* But the supreme court has made it clear that broad-form submissions often are not feasible and granulated submissions are required instead.

Late in 1992, the supreme court handed down two cases that clarified the question of whether use of "granulated" submissions is harmful error. In *H.E. Butt Grocery Co. v. Warner*, the court held that an otherwise correct separate and distinct submission would not be reversed for failure to submit broad-form questions. *H.E. Butt Grocery Co. v. Warner*, 845 S.W.2d 258 (Tex. 1992). The court noted that the charge fairly submitted the disputed issues of fact containing the proper elements of the cause of action and incorporated the correct legal standard for the jury to apply. Thus, the court concluded that failure to submit requested broad-form questions and instructions was not "harmful error." *Id.* at 259.

The same day the supreme court decided *Warner*, it also handed down *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448 (Tex. 1992). There, the court confirmed that it is not reversible error to use separate and distinct special issues rather than broad-form questions and accompanying instructions. *Id*. at 457. Presaging its decision in *Crown Life Insurance Company v. Casteel*, the court noted that submission of alternative liability standards, particularly when the law is unsettled concerning one or more of the theories of recovery, would present an appropriate use of the old special issue practice. *Id*. at 455 n.6.

In 2000, the supreme court (for the first time since enactment of Rule 277) held that the use of broad-form submission was erroneous and constituted reversible error. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). In the past decade, the appellate courts, including the supreme court, have repeatedly reversed broad-form submissions in favor of separate, granulated submissions. While broad-form submissions remain viable for straightforward submissions of a single liability theory, their use in almost any other circumstance should be carefully considered by both sides.

A. Broad-Form Is Not Feasible when Comingling Valid and Invalid Liability Theories.

In *Casteel*, the supreme court determined that "it may not be feasible to submit a single broad-form liability question that incorporates wholly separate theories of liability." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Thus, when "a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id*. at 388. Although Rule 277 says broad form is clearly the preferred method of submission,

"when the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined." *Id.; see also Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992).

Prior to *Casteel*, courts rarely saw "extraordinary circumstances" that made broad-form infeasible. "The fact that a jury question contains more than one factual predicate to support an affirmative answer to a controlling question, or more than one element of a cause of action, does not render it defective." *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 509 (Tex. App.—Houston [14th Dist.] 1993, writ dism'd); *see Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 682 n.2 (Tex. 1992); *Scott v. Atchison, Topeka, & Sante Fe Ry. Co.*, 572 S.W.2d 273, 278-79 (Tex. 1978) (broad-form "can be accomplished very simply by listing the relevant acts or omissions [those raised by both pleadings and evidence)] in a broad ultimate fact issue. . . . [or] by a complementary instruction.

After *Casteel*, the commingling of valid and invalid theories of liability within a single broad-form question represents reversible error—although the trial court may not know of or agree with the invalidity at the time of submission. Because the jury was not asked separately about each of the plaintiff's 13 theories of liability in *Casteel*, the supreme court concluded that the jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. *Casteel*, 22 S.W.3d at 387-88. *Compare Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). As a result, the court held that "when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Casteel*, 22 S.W.3d at 338.

In deciding *Casteel*, the supreme court did not apply a harmless error analysis to the broad-form submission. Instead, the court based its reversal on its inability to determine whether the erroneous submission had produced an improper verdict. *Id*. The court explained:

> [W]hen a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of the 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. (emphasis original).

Since the holding in *Casteel*, harmful error may be found to exist when the appellate court cannot determine whether the same ten jurors followed the same path to a verdict, based upon a legally valid theory with support in the evidence. In preparing and objecting to the charge, the lawyers for both sides should carefully examine the submitted issues to determine whether a complaint can be raised that any submitted issue comingles potentially valid and invalid theories.

B. Broad-Form Is Not Feasible for Lump-Sum Damages When Some Damage Elements Are Supported by No Evidence.

Before *Casteel*, courts routinely upheld damages awarded in a lump-sum as long as the evidence supported the total. *See, e.g., Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921-22 (Tex. App—Beaumont 1999, pet. denied.) ("to successfully challenge a multi-element damage award on appeal, an appellant must address all of the elements and show the evidence is insufficient to support the entire damage award"). But, following *Casteel*, the supreme court rejected the approach of these cases and clarified that a broad-form damage finding may be reversible if any single element of damages lacks evidentiary support. *See Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). *See also* Shae L. Harrison, *Cash or Charge*? *How to Frame Broad-Form Damage Questions after Harris County v. Smith*, 56 BAYLOR L. REV. 707 (2004).

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the trial court submitted two broad form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. Harris County objected to the questions and asked the trial court to submit each element separately. *Id*. at 231. After the court denied the request for separate submissions, Harris County objected on the ground that one listed element in each question was supported by no evidence. *Id*. at 231-32. The trial court overruled the objections. *Id*. On appeal, the court of appeals concluded there was no evidence of the challenged elements, but held the submission error was harmless "because there was ample evidence on properly submitted elements of damage to support the jury's awards to both plaintiffs." *Id*. at 232. The supreme court reversed, relying on *Casteel* and holding that "the trial court erred in

overruling [the defendant's] timely and specific objection to the charge, which mixed valid and invalid elements of damage in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id*. at 234: *see also City of Garland v. Dallas Morning News*, No. 05-01-01994-CV, 2002 WL 31662724 (Tex. App. —Dallas, Nov. 27, 2002, no pet.) (not designated for publication).

The Fourteenth Court of Appeals applied the teaching of *Harris County v. Smith* in *Lozano v. Lozano*. In *Lozano*, the defendants objected to a multi-element damages question with a single answer blank on "several grounds," including the ground that "there was no evidence from which the jury could assess an amount of money for medical care." *Lozano v. Lozano*, No. 14-96-01555-CV, 2003 WL 22076661, *4 (Tex. App.—Houston [14th Dist.], Sept. 9, 2003, no pet.). According to the defendants, "[t]he only evidence with regard to future medical care or future health care services were [sic] by a psychologist who is not a medical doctor and cannot prescribe medicine." *Id*.

The court of appeals did not agree with the defendants that a psychologist's testimony cannot support an award for future medical care—the argument the defendants advanced in the trial court to support their no evidence objection. Nonetheless, the court concluded there was no evidence to support an award of future medical care because the psychologist's testimony about the need for psychological care in the future was "speculative." *Id*. at *5-6. Without mentioning whether the defendants ever objected to the form of the charge or asked for separate damages blanks, the court then concluded, "[b]ecause the trial court failed to segregate damages, the case must be remanded on all damages if we find reason to remand on one element of damages." *Id*. at *6. The court then remanded the entire case, including liability, because "[t]he court may not order a separate trial solely on unliquidated damages if liability is contested." *Id*.

Applying *Casteel*, the Amarillo Court of Appeals has also held that "in the face of a timely and specific objection, submission of a single broad-form damage question incorporating multiple measures of damages, some valid and some invalid, is harmful error when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." *Iron Mtn. Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.).

C. Broad-Form Is Not Feasible for Multiple Liability Apportionment Questions.

In *KPH Consolidation, Inc. v. Romero*, the trial court submitted two separate liability questions—one asking the jury to decide the Hospital's negligence and one asking the jury to decide the Hospital's malice in medical credentialing. The Hospital did not challenge the jury's negligence finding. The Hospital did challenge the malicious credentialing claim, and the court of appeals concluded that there was no evidence the Hospital acted with conscious indifference. *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135, 146-55 (Tex. App.—Houston [14th Dist.] 2003), *aff'd*, *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005).

After concluding that no evidence supported the credentialing claim, the court reversed the judgment and remanded the entire case, despite the jury's unchallenged negligence finding. *Id*. at 155-60. The court did so because the jury had answered a single apportionment question and indivisible damages questions predicated on an affirmative answer to either liability theory. *Id*. The court found it "hard to believe that the 40% liability the jury attributed to the Hospital in question 3 was not based (1) partly on the liability it found for negligence (question 1), and (2) partly on the liability it found for malicious credentialing (question 2)." *Id*. at 159. The court likewise concluded that "the jury must have based part of the actual damages on negligence and part on malicious credentialing." *Id*. at 160. The court therefore, "reversed and remanded for a new trial on negligence and damages." *Id*.

The supreme court affirmed the court of appeals. *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005). Writing for the court, Justice Hecht explained, "[h]aving found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility. While in other instances a jury may simply ignore a factor in the charge that lacks evidentiary support, there are other instances—and this case is one—where the jury is as misled by the inclusion of a claim without evidentiary support as by a legally erroneous instruction." *Id*. 227. Citing federal appellate decisions, Romero makes clear that "unless the appellate court is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error is reversible."*Id*. at 227-28.

Justice Hecht dismissed the Romeros' argument that jury charge practice will be made more difficult, suggesting the lack of evidentiary support for a question is obvious:

> If at the close of evidence a party continues to assert a claim without knowing whether it is recognized at law or supported by the

> evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether. The Romeros' argument assumes that it is so commonplace to come to the end of a jury trial and have no idea what claims are still legally and factually valid that the only safe course to avoid retrial is to parse out every issue in a separate jury question. Nothing in our review of thousands of verdicts rendered by juries across the State suggests that there is any validity to the assumption.

Id.

Dan Pozza has offered a critique of Justice Hecht's analysis. He explains:

> This, of course, is a retrospective observation (i.e., looking back and analyzing thousands of cases after appellate review). Looking towards the appeal of one's case prospectively (i.e., at the charge conference), is much more daunting, ambiguous and rarely as obvious.
>
> Looked at from this perspective (the only perspective that counts: the individual case now at the stage of the charge conference) the choice presented recalls the legendary Tobias Hobson (1554-1631), the Cambridge carrier who gave his customers a choice between the next horse or none at all. A Hobson's choice comes down to us through history as the option of taking what is offered or nothing; in other words, no choice.
>
> Parsing out into separate questions every objected to issue about which one is at all insecure is the only safe thing to do. It is the advice many appellate specialists are giving their trial lawyers. I do not think it unfair to ask whether there is any real difference between a Romero Choice and a Hobson's Choice.

Dan Pozza, *The Future of Broad Form Submission after Harris County v. Smith (A Critique)*, in the State Bar of Texas CLE Program, 28th Annual Advanced Civil Trial Course, Chapter 32 (2005).

Most appellate specialists—faced with producing a jury charge—likely would agree with Mr. Pozza. The supreme court's commentary on how lawyers confront charge practice makes it seem easier than it really is. The supreme court may review cases on a cold record and opine about charge practice. However, in the crucible of the charge conference, it is hard to know if claims will be "legally and factually valid" until the appellate court says so on appeal. Deciding whether the record will support a claim on appeal is not something that lends itself to easy prediction. The lesson of *Romero* is a hard one: if a case is after-the-fact reversed on a legal sufficiency point, you should have known that earlier and, in the words of the court, "abandon[ed] the claim altogether."

D. Broad-Form Is Feasible for Submission of a Single Liability Theory.

The supreme court has not yet expressly considered whether the holding of *Casteel* applies to the failure of a single theory of a broad-form multi-liability question on sufficiency-of-the-evidence grounds. In *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 n.1 (Tex. 2000), the supreme court noted that "the City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether our decision in *Crown Life Insurance Co.*, should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question before us." *See also In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (refusing to review complaint on broad-form submission without objection to form or to evidentiary support of any theory submitted). Nonetheless, the court's decision in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) arguably presages the result the court will reach, should the question be presented.

In *Columbia Medical Center of Las Colinas v. Bush*, 122 S.W.3d 835, 857-59 (Tex. App.—Fort Worth 2003, pet. denied), the defendant argued that the trial court improperly submitted a single broad-form negligence question that allowed the jury to consider multiple acts of alleged negligence, some of which were supported by no evidence. The court of appeals rejected the defendant's argument, reasoning that "[t]he broad-form negligence special question submitted in this case simply does not present *Casteel*/*Harris County* error." *Id*. at 858. The court distinguished *Casteel* on the ground that it involved multiple theories of liability, while the case before it involved only one theory of liability: negligence. *Id*. at 858-59. The court distinguished *Harris County* on the ground that the trial court in that case had "instructed the jury in making a lump-sum damage award to consider a specific element of damages on which no evidence was presented." *Id*. at 859. In the *Columbia Medical Center* case, however, "the trial court did not instruct the jury to consider or to not consider any specific act of negligence." *Id*.

The court also recognized the full retreat from broad-form submissions the defendant proposed, requiring that each pleaded act of negligence must be separately submitted or separately excluded in the charge. *Id*. The court recognized the policy choice: do we continue with broad-form submissions or do we return to distinct and separate submissions, "avoiding all intermingling."

The supreme court denied the defendant's petition and chose not to comment directly on the propriety of allowing the jury to consider multiple allegations of negligence—some of which have no evidentiary support—in a single broad-form question.

Since refusing Columbia Medical Center's petition, the supreme court has recognized the same distinction the Fort Worth Court of Appeals drew between issues that combine multiple theories of liability and issues that submit only a single liability theory, albeit broadly. In *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 434 (Tex. 2005), the supreme court acknowledged that "[u]nder broad-form submission rules, jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result." That is "jurors may find against a defendant without agreeing on which precise acts were negligent" and they may equally "find the opposite without agreeing on the precise reason." *Id*.

Applying this rationale, the supreme court in *Bed, Bath & Beyond v. Urista*, 211 S.W.3d 753, 756-58 (Tex. 2006), held that harm could not be presumed from the submission of an erroneous unavoidable accident instruction. The court distinguished both *Casteel* and *Harris County v. Smith* on the ground that they involved multiple theories of liability and multiple elements of damages. *Id*. at 756-57. The *Bed, Bath & Beyond* submission involved only a single theory, and reviewing the entire record the court could not conclude that the erroneous instruction "caused the case to be decided differently than it would have been otherwise." *Id*. at 758.

Several courts of appeals have likewise held that *Casteel's* harm analysis does not apply to submission of a single liability theory. For example, *Powell Electric Systems, Inc. v. Hewlett Packard Co.*, __ S.W.3d __, 2011 WL 1598758 (Tex. App.—Houston [1st Dist.] April 28, 2011, n.p.h.) involved broad form liability questions for breach of contract and breach of warranty. The court explained that "[a] trial court errs by submitting to the jury theories of liability that are not legally viable—*e.g.*, liability theories that have not been pled, are not supported by the legally sufficient evidence, or are not supported by operative law." 2011 WL 1598758 at *7. But the court recognized the distinction between a single theory of liability that includes multiple factual allegations and separate multiple theories of liability. *Id*. at *7-9. The court concluded: "Because 'Question 1' submitted only a single theory of liability [breach of contract] and the trial court did not otherwise instruct the jury to consider erroneous matters, we conclude that the trial court did not err by submitting an invalid theory of liability in 'Question 1.'" *Id*. at *9.

Rough Creek Lodge Operating, L.P. v. Double K Homes, Inc., 278 S.W.3d 501, 508-09 (Tex. App.—Eastland 2009, no pet.) involved a single breach of contract theory of liability. *Id*. While the court acknowledged that the "liability question could have been rephrased," the court held that "to accept Rough Creek's argument that this was harmful would require either that we disregard *Urista* and presume harm, or that we disregard Rule 277 and encourage granulated submissions." *Id*. at 509. The court was not inclined to do either: "While we do not know the jury's exact thought process, we do know that there is sufficient evidence to support its determination that Rough Creek breached its agreement with Double K." *Id*.

Formosa Plastics Corp. v. Kajama International, Inc., 216 S.W.3d 436, 455 (Tex. App.—Corpus Christi 2006, pet. denied) considered a broad-form fraud submission. The Corpus Court succinctly stated: "*Casteel* applies to multiple theories of liability; by contrast, the instant situation involves only one—fraud. Contrary to Formosa's contention, *Casteel* does not require a granulated submission as to multiple acts under a single theory of liability." *Id*. at 455.

E. Preservation of Complaints Regarding Broad-Form Submission.

To date, the courts have not reached a consensus on the method of preserving a complaint that a particular broad-form submission makes it impossible to know whether the jury's findings are based on valid or invalid grounds. Specifically, the courts are divided on whether the complaining party must object to the form of a broad-form question and specifically complain that the broad-form submission is not feasible or whether the complaining party need only object to the substantive defect in the question, such as that one theory is supported by no evidence. While finding it unnecessary to decide the question in *Romero v. KPH Consolidation, Inc.*, the supreme court quoted the Fifth Circuit's acknowledgement that "the issue whether an objection must be made to the form of the submission [is] "a close and difficult question.'" *Romero*, 166 S.W.3d at 229 n.55 (quoting *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988)).

The difficulty of the question has led to inconsistent results.

1. Substantive objections to liability or damages questions.

Several opinions from the appellate courts have indicated that a simple no-evidence objection will suffice to preserve a complaint in the *Casteel/Romero* line of cases. For example, in *Casteel* itself, the supreme court wrote that "Crown preserved error by obtaining a ruling on its timely objection to the question on the ground that Casteel did not have standing to pursue any DTPA-based Article 21.21 claims because he was not a consumer." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 787-88 (Tex. 2000).

With the error thus preserved, the court did its now-familiar harm analysis:

> 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.

Similarly in *Harris County v. Smith*, the supreme court described Harris County's objection in the following terms:

> Harris County pointed out to the trial court that particular elements of damage had no support in the evidence and should not be included in the broad-form question. The objection was timely and specific. It was also correct, and the trial court clearly erred when it did not sustain the objection and correct the charge.

Harris County v. Smith, 96 S.W.3d 230, 232 (Tex. 2002).

This objection on no-evidence grounds was enough because:

> [a] timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, therefore preserves the error for appellate review.

Id. at 236.

In *Missouri Pacific Railroad Co. v. Limmer*, the Houston Fourteenth Court of Appeals specifically held that an objection to the submission of an apportionment question was not required in order to be entitled to a *Casteel* harm analysis. *Missouri Pac. R.R. Co. v. Limmer*, 180 S.W.2d 803, 821-23 (Tex. App. — Houston [14th Dist.] 2005), *rev'd on other grounds*, 299 S.W.3d 78 (Tex. 2009). The court of appeals held that the Railroad had preserved error by objecting to the submission of the liability question as submitting an invalid theory. *Id.* at 822. According to the court, "the Texas Supreme Court and [the Fourteenth] court have held that the *Casteel* harm analysis applies to charge error even if the parties did not object to the form of the jury charge." *Id.* Once the court of appeals concluded that the liability question was invalid, the court reversed the plaintiff's judgment and remanded for a new trial because it could not be "reasonably certain" that the jury had not been "significantly influenced" by the invalid theory in apportioning liability. *Id.* at 828.

The Eastland Court of Appeals has followed the Fourteenth Court's holding in *Missouri Pacific v. Limmer*: "The court concluded in *Limmer* that an objection to the submission of a theory of recovery in the court's charge is sufficient to preserve error for the purpose of conducting a *Casteel* harmful error analysis of a broad-form question that combines valid and invalid theories of recovery. We agree." *Schrock v. Sisco*, 229 S.W.3d 392, 395 (Tex. App.—Eastland 2007, no pet.). In *Schrock*, the defendant challenged the jury's award of exemplary damages, but he had not objected to the form of the exemplary damages question. *Id.* The court of appeals found it sufficient that the defendant had objected "to the submission of intentional infliction of emotional distress in this case." *Id.* "It is reasonable to conclude that his objection to a cause of action as an invalid theory of recovery applied to each question in the court's charge that contained that cause of action an element. Accordingly, we conclude that Schrock sufficiently preserved error to invoke the harm analysis employed in *Casteel*." *Id.* at 396-96.

But not every court agrees with the Houston and Eastland courts' resolution of this issue.

2. Form-of-the-charge objections.

In *Wackenhut Corrections Corp. v. de la Rosa*, the Corpus Christi Court of Appeals comes to a conclusion opposite that of the Houston and Eastland courts. *See Wackenhut Corrections Corp. v. de la Rosa*, 305 S.W.3d 594, 619-21 (Tex. App.—Corpus Christi 2009, no pet.). The Corpus Court explained Wackenhut's argument for reversal as follows:

> Wackenhut argues that at least one of the liability questions was improper because the questions submitted incorrect theories of liability or were not supported by the evidence. It argues that even if one of the questions was properly submitted, the judgment cannot be affirmed based on the jury's answer to a proper question because

> the apportionment of liability question was conditioned on an affirmative finding in any one of the liability questions. Thus, it argues that we must reverse because the jury's answers to the apportionment question could have been influenced by an improper theory.

Id. at 619.

The court of appeals did not bother to consider the substance of Wackenhut's challenges. The court instead wrote that even "[a]ssuming that at least one liability question was not supported by the evidence, Wackenhut must show that the error in the apportionment question was preserved and that it was harmed by the submission." *Id*. And the court held that Wackenhut had not preserved its complaint. *Id*.

The Corpus Court explained that "Wackenhut never objected or asked for separate comparative questions at the charge conference, and it never alerted the trial court that the apportionment question commingled valid and invalid theories." *Id*. at 620. Likewise, "Wackenhut never alerted the trial court that the malice, gross negligence, or exemplary damages questions were improperly conditioned on invalid theories." *Id*. at 620 n.28. Wackenhut made the argument the Houston and Eastland courts accepted, arguing "that an objection that a question is not supported by the evidence also preserves an objection to any question that is later conditioned on the question because 'there would be no problem with apportionment question if the unsupported theory had not been submitted.'" *Id*. at 621. The Corpus court was not persuaded. It refused to address Wackenhut's complaint about the jury's apportionment finding because although "Wackenhut did object that all the liability questions were not supported by the evidence, it never pointed out to the trial court that the conditioning instruction in Question 4 created a problem, and in fact, it expressly agreed to the conditioning instruction in Question 4." *Id*.

Other courts, and the supreme court itself, have concluded that a no-evidence objection by itself is not enough to preserve error. For example, the Fort Worth court has required a form objection to preserve a *Casteel*-type complaint:

> Appellants did not object in any respect to the form of the damages question, did not contend that some proper element of damages was improperly commingled in a list . . . and did not plainly inform the trial court that any specific element of damages . . . should not be included in the broad-form submission.

Tesfa v. Stewart, 135 S.W.3d 272, 275-76 (Tex. App.—Fort Wirth 2004, pet. denied).

And the Texas Supreme Court has indicated a preference for a form objection over a no-evidence objection to preserve a *Casteel*-style complaint about the charge:

> To preserve a complaint, a party must make "[a] timely objection, plainly informing the court that a specific element . . . should not be included in a broad-form question because there is no evidence to support its submission . . . . Because Puig did not make a specific and timely objection to the broad-form charge, he did not preserve a claim of harmful charge error.

In re A.V., 113 S.W.3d 355, 362-63 (Tex. 2003). *See also In re B.L.D.*, 113 S.W.3d 340, 349-50 (Tex. 2003) ("This Court has recently emphasized that complaints of error in broad-form submission must be preserved by objection at trial.").

IV. QUESTIONS REGARDING PROPER SUBMISSION OF APPORTIONMENT QUESTIONS.

It is beyond the scope of this paper to address the myriad substantive questions surrounding what parties and claims should be included in an apportionment question or questions in the jury charge. (But those are questions a lawyer should not overlook in preparing and objecting to the charge.) Nonetheless, here are two issues that impact many cases and deserve attention at the charge stage.

Section 33.003 of the Civil Practice and Remedies Code provides:

> (a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:
>
> (1) each claimant;
>
> (2) each defendant;

> (3) each settling person; and
> (4) each responsible third party who has been designated under Section 33.004.
>
> (b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

TEX. CIV. PRAC. & REM. CODE § 33.003(a) and (b).

A. Does Section 33.003 Require the Submission of Multiple Apportionment Questions?

Section 33.003 states that the trier of fact shall determine the percentage of responsibility for each person "as to each cause of action." TEX. CIV. PRAC. & REM. CODE § 33.003(a). Read literally, the language requires a separate percentage of responsibility question for each cause of action a plaintiff alleges. So, for example, a case involving claims for negligence, design defect, marketing defect, and DTPA violations would require at least four percentage of responsibility questions. *See Issacs v. Bishop*, 249 S.W.3d 100, 109 (Tex. App.—Texarkana 2008, pet. denied) ("The statute explicitly requires proportionate responsibility to be determined as to each cause of action.").

In his concurring opinion in *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008), Chief Justice Jefferson remarked that "chapter 33 requires a finding of proportionate responsibility on each claim" and points out that the single apportionment question submitted in that case "immediately followed the negligence question, and was directed only to it." 257 S.W.3d at 709-10. As to the separate breach of implied warranty claim, the Chief Justice acknowledged: "The breach of implied warranty question was Question No. 9, and there was no apportionment question asking about percentages of responsibility regarding that claim." *Id*. at 710. Although acknowledging that there was no percentage of responsibility question associated with the breach of warranty claim, Chief Justice Jefferson joined the rest of the court in concluding that the apportionment of 60% responsibility to the decedent with respect to the negligence claim also barred the plaintiff's recovery for breach of warranty. *Id*.

In effect, the supreme court simply assumed that the jury would have assigned exactly the same percentage of responsibility to each party regarding each cause of action. Perhaps that assumption was reasonable, but perhaps not. Is a jury required to assign the same percentage of responsibility to each person under each cause of action? Frankly, that seems unlikely. But if a jury is not required to assign the same percentage of responsibility to each party, it seems the supreme court was perhaps a bit quick to simply apply a percentage of responsibility finding for one cause of action to another separate cause of action.

Chief Justice Jefferson also noted that "it seems to me that, in most cases, the parties could agree to submit a single apportionment question to cover multiple theories of liability, provided that each theory has a common factual basis to which the questions refer." *Id*. at 710 n.2. In drafting and objecting to the jury charge, each party should carefully consider whether one or multiple apportionment questions is permissible, advisable, and/or agreeable. Any number of considerations will impact this analysis. *See Issacs v. Bishop*, 249 S.W.3d at 109 ("While a single submission would be simpler, if it can be done fairly and accurately, here such a submission would not be fair or accurate . . . . The trial court did not abuse its discretion by deciding not to give a single, unified proportional responsibility charge covering all causes of action.").

B. How Does Section 33.003 Operate In Cases Involving Vicarious Liability?

Section 33.003 states that the trier of fact shall determine the percentage of responsibility for "(1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party." TEX. CIV. PRAC. & REM. CODE § 33.003(a). Given this statutory command, it should come as no surprise that courts have struggled to decide how to submit a proper percentage responsibility question in cases involving vicarious/derivative liability theories. In the easy case—involving what everyone agrees is purely vicarious liability—there will likely be no fight over submission of the apportionment question, If, for example, an employer is sued only under a respondeat superior theory in order to hold the employer liable for an employee's tort, then the employer will not be submitted in a negligence question and will not be included in a proportionate responsibility question. *See Pierre v. Swearingen*, 331 S.W.3d 150, 154-55 (Tex. App.—Dallas 2011, no pet.). But, what if the employer is additionally sued for negligent hiring, negligent training, or negligent entrustment? Now, the employer is going to be submitted in a negligence/liability question. So, should the employer be included in the apportionment question along with the employee? Is the jury required/allowed to compare the responsibility of the employer and employee?

These questions have not been definitively resolved. *See, e.g., Bedford v. Moore*, 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.) (negligent hiring or entrusting employer should be included in the apportionment question); *Rosell v. Central West Motor*

Stages, Inc., 89 S.W.3d 643 (Tex. App.—Dallas 2002, pet. denied) (negligent hiring employer need not be included in proportionate responsibility question). In drafting or objecting to the charge, a lawyer should carefully consider the nature of each defendant's liability (is it purely vicarious, or is it based on an independent duty) and be prepared to object to or defend each defendant's inclusion in or exclusion from the apportionment question.

V. THE PATTERN JURY CHARGES ARE A STARTING POINT; THEY ARE NOT INFALLIBLE.

The Texas Pattern Jury Charges are based on "what [the PJC Committee] perceives the present law to be." TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS (2008) at xxvii. But, "[o]f course . . . the Committee may have erred in its perceptions and . . . its recommendations may be affected by future appellate decisions and statutory changes." *Id.* Or, put more bluntly by the Dallas Court of Appeals, "[t]he 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). *But see H.E. Butt Grocery Co. v. Bilotto*, 928 S.W.2d 197 (Tex. App.—San Antonio) (en banc), *aff'd*, 985 S.W.2d 22 (Tex. 1998) ("Although we are aware that the Texas Pattern Jury Charges are not 'law,' they are heavily relied upon by both the bench and bar . . . . [T]he trial court followed the wording of the appropriate Pattern Jury Charge, a widely accepted source throughout the legal community. We cannot say, therefore that the submission . . . amounted to 'a clear failure by the trial court to analyze or apply the law.'").

The necessity of proper objections and tenders, even in the face of an existing PJC definition, is illustrated by the case of *Ford Motor Co. v. Ledesma*, 242 S.W.3d 31 (Tex. 2007). In the 2006 edition of the PJC, "producing cause" was defined as "an efficient, exciting, or contributing cause that, in a natural sequence, produces the [occurrence or injury]. There may be more than on producing cause." TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS (2006) at PJC 70.1. The trial court followed the 2006 instruction.

Ford disagreed, and proposed a definition that included the requirement that a producing cause be "a substantial factor in bringing about an event, and without which the event would not have occurred." *Ledesma*, 242 S.W.3d at 45. On appeal, the supreme court accepted Ford's proposal, holding that the PJC's definition was "incomplete and, more importantly, provides little concrete guidance to the jury." *Id.* at 46. "[Ford's definition] is the definition that should be given in the jury charge." *Id.*

Following the supreme court's decision in *Ford v. Ledesma*, the new PJC has a new definition: "producing cause means a cause that was a substantial factor in bringing about the [occurrence or injury], and without which the [occurrence or injury] would not have occurred. There may be more than one producing cause." TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS (2008) at PJC 70.1.

Similarly, it is important to note that the PJC's forms may be incomplete. For instance, in *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009), one of the factual issues in dispute was the plaintiff's chance of survival at the time of her cancer diagnosis. The law "bars recovery by a patient if a condition preexists the negligence of a health care provider and at the time of the negligence, the condition resulted in the patient having a 50% or less chance of cure or survival." *Columbia Rio Grande Healthcare*, 284 S.W.3d at 860. Although the PJC made no mention of the 50% requirement, defendant Columbia proposed a 50% instruction. The trial court refused Columbia's proposal. On appeal, the supreme court held that this was "an abuse of discretion" which "was reasonably calculated to and probably did cause the rendition of an improper judgment." *Id.* at 861-62.

VI. OBJECTIONS TO CONFLICTING JURY FINDINGS.

As we describe above, despite Rule 277 and the supreme court's admonition that broad form submissions must be used whenever possible, granularity is the new black in the world of jury charge fashion. And with the ever increasing number of separate liability, apportionment, damages, and exemplary damages questions, the potential for conflicting jury answers is ever increasing too.

In the event of conflicting jury answers, the key for the jury charge practitioner is timing. Regardless of what objections were made before the charge was given to the jury, a party must raise the issue of conflicting answers after the answers are given and before the jury is discharged. *Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 861 (Tex. App.—Fort Worth 2003, pet. denied) ("This complaint is not preserved for our review because Appellants did not raise any contention concerning conflicting jury findings before the jury was discharged."); *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 24 (Tex. App.—Houston [14th Dist.] 2006, no pet.) ("To

preserve error that the jury's findings are inconsistent, the complaining party must raise an objection in the trial court before the jury is discharged.").

Once the conflict issue is raised, the trial court "shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations." TEX. R. CIV. P. 295.