AUSTIN BAR ASSOCIATION, CIVIL LITIGATION SECTION

"ULTIMATE TRIAL NOTEBOOK"

ERROR PRESERVATION: *DON'T WAIVE YOUR APPEAL*

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I. INTRODUCTION[1]

This paper attempts to address the most common pitfalls in preserving error that a lawyer is likely to face prior to and during the trial of a civil case in Texas state court. It hopes to provide that lawyer with a list of concise checklists to use as a reference in making sure that potential complaints of error are preserved for a possible later appeal. To that end, it focuses on the points in such a trial where preservation of error is necessary, that recur frequently, and that seem to be the most common trouble spots. It is not, and is not meant to be, an exhaustive survey of the many rulings on which error must be preserved.

Nor does this paper attempt to assist the lawyer in persuading the trial court to rule in his favor. It assumes, in fact, that the court will not. Academic discussion has been kept to a minimum. And, where the authorities suggest disagreement about the steps necessary to preserve an appellate complaint, the checklists seek to take the most cautious approach.

II. THE BASIC RULES

Except for the rare case of "fundamental error," such as a lack of subject matter jurisdiction, a complaint that was not preserved in the trial court cannot be presented on appeal. *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012); *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982); *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

The basic requirements for preserving error in the trial court are listed in Texas Rule of Appellate Procedure 33.1(a). To assert a complaint on appeal, the record from the trial court 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)(emphasis added).

This rule, and the relevant case law, thus establish three essential elements to preserving error—each of which must be in the record.

A. Make a Timely Objection, Request, or Motion

The issue must be presented to the trial court while it still has an opportunity to correct or avoid the error. *Dryer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993). The not-uncommon practice of making offers of proof while the jury deliberates, for example, is an empty gesture because it is then too late for the trial court to admit the evidence. TEX. R. EVID. 103(b); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.—Tyler 1993, no writ); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 274-75 (Tex. App.—Amarillo 1988, writ denied).

1. Specifically identify the error and the basis for your objection.

The issue presented to the trial court must be specific enough to allow the court to make an informed ruling and to give the opposing party a chance to cure the problem, if a cure is possible. *McKinney v. Nat'l*

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Eileen K. Wilson, *The Jury Charge*, State Bar of Texas Appellate Boot Camp (Sept. 6, 2006)
David E. Keltner, Matthew D. Stayton, *Preservation of Error*, University of Texas 16th Annual Conference on State and Federal Appeals (June 1-2, 2006)
Judge Randy Wilson, *A View From the Bench: Why Can't Lawyers Preserve Objections?*, 69 Texas Bar Journal 316 (April 2006)
Judge David Hittner, Lynne Liberato, *Summary Judgments in Texas*, 47 S. Tex. L. Rev. 409 (Spring 2006)
*O'Conner's Texas Rules * Civil Trials* (2006)
Karen S. Precella, *The Court's Charge: An Update*, University of Texas 15th Annual Conference on State and Federal Appeals (June 2-3, 2005)
Tim Patton, *Summary Judgments: Recent Developments and Unsettled Areas*, University of Texas 15th Annual Conference on State and Federal Appeals (June 2-3, 2005)
Wade C. Crosnoe, *Preserving Summary Judgment Error for Appeal*, Travis County Bar Association Appellate Section presentation (Sept. 16, 2004)
Peter M. Kelly, *Preservation of Error (State): Pre-trial and Trial*, State Bar of Texas Nuts and Bolts of Appellate Practice (September 19, 2001)

Union Fire Ins. Co., 772 S.W.2d 72, 74 (Tex. 1989). Overly-generalized objections do not preserve error. *Lassiter v. Shavor*, 824 S.W.2d 667, 668 (Tex. App.—Dallas 1992, no writ).

Make sure that you raise every legitimate basis for your objection in the trial court. On appeal, you will not be able to add any complaint that was not presented below. *Sefzik v. Mady Dev., L.P.*, 231 S.W.3d 456, 464 (Tex. App.—Dallas 2007, no pet.); *Rhodes v. Batilla*, 848 S.W.2d 833, 847 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Exxon v. Allsup*, 808 S.W.2d 648, 655 (Tex. App.—Corpus Christi 1991, writ denied); *Pfeffer v. S. Tex. Laborers' Pension Trust Fund*, 679 S.W.2d 691, 693 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

In theory, the basis for an objection that is "apparent from the context" does not have to be explicitly stated. TEX. R. APP. P. 33.1(a)(1)(A). But relying on this theory is hazardous and should be avoided. *Haney v. Purcell Co., Inc.*, 796 S.W.2d 782, 789 (Tex App.—Houston [1st Dist.] 1990, writ denied); *Burleson v. Finley*, 581 S.W.2d 304 (Tex. App.—Austin 1979, writ ref'd n.r.e.).

2. Obtain a ruling.

Simply making the objection does not preserve error; the court must rule on it. *Matter of S.B.C.*, 805 S.W.2d 1, 10 (Tex. App.—Tyler 1991, writ denied); *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack*, 491 S.W.2d 714, 719 (Tex. Civ. App.—Corpus Christi 1973, writ dismissed); *Webb v. Mitchell*, 371 S.W.2d 754, 760 (Tex. Civ. App.—Houston 1963, no writ).

It may arguably be enough that the trial court makes a ruling "implicitly." TEX. R. APP. P. 33.1(a)(2)(A). But, again, relying on this theory is hazardous. It is not easy to predict with confidence when an appellate court will find that an issue was implicitly ruled upon, rather than left unresolved or ambiguous. Vague or dismissive comments, such as telling counsel to "move along" or deferring the matter for later, are not rulings that preserve error. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991). Note also that certain types of rulings, such as the denial of a motion for summary judgment, have to be in writing.

If the trial court refuses to rule, an objection must be made to that refusal. TEX. R. APP. P. 33.1(a)(2)(B); *Martin v. Commercial Metals Co.*, 138 S.W.3d 619, 623 (Tex. App.—Dallas 2004, no pet.). (There do not seem to be any cases indicating the need to then object to the trial court's refusal to rule on *that* objection.)

To these three traditional elements of error preservation, practicality requires the addition of a fourth.

B. Make sure the record will show harm.

It will do no good to preserve error as a technical matter if, on appeal, the record does not show that the error "probably caused the rendition of an improper judgment" or, in the alternative, "probably prevented the appellant from properly presenting the case to the court of appeals." TEX. R. APP. P. 44.1(a). In the absence of such a record, the error—even if correctly preserved—will not support reversal. *Id.*

The relationship between preserving the error and ensuring the record shows harm from that error varies a great deal. In some contexts, such as with challenging a potential juror for cause, it is necessary to build a record showing harm at the same time the error is preserved; indeed, the cases treat that as one of the steps required to preserve the error, and if those steps are followed, harm is presumed. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005)(harm presumed when objecting party shows exhaustion of peremptory strikes and identifies one remaining juror whom it would have removed). On the other hand, in cases involving objections to summary judgment evidence, there is little the objecting party can do in the trial court to build a record showing harm, since a grant of summary judgment will be reviewed *de novo* on the papers alone. *Buck v. Palmer*, 381 S.W.3d 525, 527 (Tex. 2012); *Mid-Century Ins. Co. of Texas v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

Most appellate issues fall somewhere in between, requiring a record that shows harm but not requiring that such a record be made at the time the error is preserved. Among these, of course, are complaints about the court's evidentiary rulings during trial. Whether the improper admission or exclusion of evidence caused harm warranting reversal is evaluated in light of the entire record. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *Interstate Northborough P'ship v. State* 66 S.W.3d 213, 220 (Tex. 2001); *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

With issues such as this, the lawyer who wishes to preserve an appellate complaint on the admission or exclusion of a critical piece of evidence should try to build a record throughout the trial that will show harm from that ruling—such as by objecting to further evidence that builds or relies upon the objectionable piece previously admitted, or by re-tendering the excluded evidence when there is a relevant change in the direction of the trial. The important point is to keep in mind that it will be necessary to show harm from that ruling on appeal.

Depending upon the nature and procedural context of the objection, request, or motion, there are variations

in how these principles are applied in preserving error. But the entire body of law on this subject rests on having these four essential elements in the record for the appellate court to review. You will have a good basic roadmap, and will not go far wrong, if you keep these four steps in mind:

1. **Make a timely objection.**
2. **Identify the error and the basis for your objection.**
3. **Get a ruling.**
4. **Show harm.**

What follows are specific applications of these principles.

III. PRESERVING ERROR IN SUMMARY JUDGMENT PROCEEDINGS

As a general rule, because it does not dispose of all the parties and issues and is therefore not a final judgment, an order denying summary judgment is not appealable. *Hood v. Amarillo Nat'l Bank*, 815 S.W.2d 545, 547 (Tex. 1991). As a result, it is normally just the party opposing the summary judgment who needs to be concerned about preserving error for a potential appeal. The following are the four main trouble areas in which the non-movant needs to do that.

A. Timing

A motion for summary judgment and any supporting evidence must be on file at least 21 days before the hearing on that motion. TEX. R. CIV. P. 166a(c). This is extended to 24 days if the motion is served on the non-movant by mail. *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994); *Davis v. West*, 317 S.W.3d 301, 313 (Tex. App. – Houston [1st Dist.] 2009, no pet.). The deadline can be shortened by the court or, presumably, by agreement of the parties. TEX. R. CIV. P. 166a(c).

If the non-movant receives less than the required notice of the hearing, an objection or motion for continuance must be filed to preserve the complaint. *Morrone v. Prestonwood Christian Acad.*, 215 S.W.3d 575, 585 (Tex. App.—Eastland 2007, pet. denied); *Delta (Delaware) Petroleum & Energy Corp. v. Houston Fishing Tools Co.*, 670 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1983, no writ). Participating in the hearing without objection waives the issue for appeal. *Fertic v. Spencer*, 247 S.W.3d 242, 247-48 (Tex. App.—El Paso 2007, pet. denied); *Sanders v. Capitol Area Council*, 930 S.W.2d 905, 911 (Tex. App.—Austin 1996, no writ); *Negrini v. Beale*, 822 S.W.2d 822, 823 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Hudenburg v. Neff*, 643 S.W.2d 517, 518 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), *cert. denied*, 464 U.S. 937 (1983).

Untimely filed evidence is treated differently than an untimely filed motion. Appellate courts presume the trial court did not consider evidence that was not timely filed unless the record affirmatively shows the court accepted or considered it.[2] *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996);; *SP Terrace, L.P. v. Meritage Homes of Texas, LLC*, 334 S.W.3d 275, 282 (Tex. App. – Houston [1st Dist] 2010, no pet.); *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 n.6 (Tex. App.—Austin 1995, no writ).

The same presumption applies to an untimely response to the motion for summary judgment; it is presumed that the response was not considered unless the record shows the trial court granted leave to file it. *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490-91 n.1 (Tex. 1988); *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985). The non-movant's response to a motion for summary judgment, and supporting evidence, must be on file at least seven days before the hearing. TEX. R. CIV. P. 166a(c) A non-movant who files a response or evidence after that time must request and obtain leave to file it, or will not be able to rely upon that response or evidence on appeal. *E.B.S. Enterprises, Inc. v. City of El Paso*, 347 S.W.3d 404, 408 (Tex. App. – El Paso 2011, pet. denied).

In responding to a traditional motion for summary judgment, preserving a complaint about the need to conduct more discovery requires the non-movant to file either an affidavit explaining the need to gather more evidence or a verified motion for continuance. TEX. R. CIV. P. 166a(g), 251, 252; *Tenneco Inc. v. Enter. Prods Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *W.W. Webber, L.L.C. v. Harris Cty Toll Road Auth.*, 324 S.W.3d 877, 880 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The motion for continuance should specifically identify the necessary discovery or the needed evidence. *Duerr v. Brown*, 262 S.W.3d 63, 78-79 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Gabaldon v. Gen. Motors Corp.*, 876 S.W.2d 367, 370 (Tex. App.—El Paso 1993, no writ).

The non-movant's obligations in response to a premature no-evidence motion may be less clear. At least some courts have held the non-movant to the same obligation of filing an affidavit or verified motion for continuance in order to preserve such a complaint. *Watson v. Dallas Indep. Sch. Dist.*, 135 S.W.3d 208, 227 (Tex. App.—Waco 2004, no pet.); *Tempay, Inc. v.*

[2] A note of caution in drafting the court's order is therefore appropriate whenever a summary judgment is granted or denied in the face of late-filed evidence. If the late-filed evidence supports the court's ruling, the prevailing party will want the order to state that the court considered it. On the other hand, if the late-filed evidence conflicts with the court's ruling, the prevailing party will be better off if the order either says nothing about that evidence or denies leave to file it.

TNT Concrete & Constr., Inc., 37 S.W.3d 517, 520-21 (Tex. App.—Austin 2001, pet denied); *Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). But at least one decision has suggested this may not be necessary. *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 n.2 (Tex. App.—Austin 1998, no pet.)(suggesting, *in dicta*, that non-movant can either object to inadequate time for discovery or file a motion for continuance). Obviously, the safest course is to file such an affidavit or verified motion.

To preserve a complaint about *inadequate notice of the hearing*, you should therefore file a written objection or motion for continuance asserting your right to receive 21-days' notice. To preserve a complaint about *inadequate time to gather evidence*:

1. **File a motion for continuance asking for more time to conduct discovery or to gather evidence before filing your response.**
2. **Support the motion with an affidavit.**
3. **In that affidavit, explain your need to conduct discovery or to gather evidence for your response.**
4. **Specifically identify the discovery you need to conduct or the evidence you need to gather.**
5. **Obtain a ruling on your motion.**

B. Grounds

A motion for summary judgment must expressly state the grounds on which it is based; if the motion is granted, the movant can assert no other ground on which to defend the summary judgment on appeal. TEX. R. CIV. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340-41 (Tex. 1993); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *Travis v. City of Mesquite*, 830 S.W.2d 94, 100 (Tex. 1992).

The grounds for summary judgment must be expressly stated in the motion itself, not in the supporting brief or in the evidence filed with the motion. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 340-41. The party opposing summary judgment can raise this complaint for the first time on appeal. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 342.

For a traditional motion for summary judgment, the grounds are sufficiently specific if they give the non-movant "fair notice" of the basis on which summary judgment is sought. *Zarzosa v. Flynn*, 266 S.W.3d 614, 620 (Tex. App.—El Paso 2008, no pet.); *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 633-34 (Tex. App.—Fort Worth 2003, pet. denied); *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied). To preserve a complaint that the grounds for the motion are ambiguous or unclear, the non-movant must file special exceptions and obtain a ruling on them at or prior to the hearing. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 342-43; *City of Roanoke v. Town of Westlake*, 111 S.W.3d at 634. Failure to object to the lack of specificity in the motion for summary judgment waives that complaint for appeal. *Sanders v. Capitol Area Council*, 930 S.W.2d 905, 910 (Tex. App.—Austin 1996, no writ).

A no-evidence motion, on the other hand, must clearly identify the precise element(s) of the non-movant's claim for which there is no supporting evidence. TEX. R. CIV. P. 166a(i). A "no evidence" motion that fails to do so is fundamentally defective and cannot be salvaged later with the contention that the briefing or other context gave the non-movant "fair notice" of what was being challenged. *Holloway v. Tex. Elec. Utility Constr., Ltd.*, 282 S.W.3d 207, 215 (Tex. App.—Tyler 2009, no pet.); *Fieldtech Avionics & Instruments, Inc., v. Component Control.com, Inc.*, 262 S.W.3d 813, 824 (Tex. App.—Fort Worth 2008, no pet.); *Mott v. Red's Safe & Lock Servs., Inc.*, 249 S.W.3d 90, 97-98 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

A motion for summary judgment that is based on a pleading deficiency, such as the plaintiff's failure to state a cause of action, should not be granted without first allowing the non-movant an opportunity to replead (unless it is such that it cannot be cured by amendment). *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998). But a complaint that the non-movant did not get an opportunity to replead is waived unless it is made in the trial court. *Kassen v. Hatley*, 887 S.W.2d 4, 13-14 n.10 (Tex. 1994).

To preserve a complaint about a motion for summary judgment that asserts imprecise grounds, file special exceptions and obtain a ruling on them prior to or at the summary judgment hearing.

To preserve a complaint that the motion asserts a pleading deficiency that you can cure:

1. **Include in your response a request that you be given an opportunity to replead to cure the deficiency.**
2. **If the court grants the motion without permitting you to re-plead, then:**
3. **File a motion for reconsideration (or motion for new trial)**

objecting to the denial of an opportunity to replead.
4. **Tender the revised pleading.**
5. **Get a ruling on your motion.**

C. Response

It is not strictly necessary to file a response to a traditional motion for summary judgment, because such a motion cannot be granted merely by default. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 343; *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979); *Tello v. Bank One*, 218 S.W.3d 109, 118-19 (Tex. App.—Houston [14th Dist.] 2007, no pet.). If the grounds the movant asserted for summary judgment were insufficient as a matter of law, the non-movant can raise that complaint on appeal whether a response was filed or not. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 343; *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d at 678; *Castellow v. Swiftex Mfg. Corp*., 33 S.W.3d 890, 895 (Tex. App.—Austin 2000, no pet.), *rev'd on other grounds sub nom, Lawrence v. CDB Servs, Inc.*, 44 S.W.3d 544 (Tex. 2001); *City of Wilmer v. Laidlaw Waste Sys. (Dallas), Inc.*, 890 S.W.2d 459, 467 (Tex. App.—Dallas 1994), *aff'd*, 904 S.W.2d 656 (Tex. 1995).

But this would be a dangerous course of action. Unless the summary judgment is legally insufficient on its face, any issue the non-movant contends would defeat that motion must be expressly presented in a written answer or other response or it cannot be raised on appeal. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d at 343; *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d at 678; TEX. R. CIV. P. 166a(c). And objections to the form of affidavits or other evidence cannot be considered on appeal unless specifically pointed out by objection in the trial court, thereby allowing the moving party a chance to cure the deficiency by amendment. TEX. R. CIV. P. 166a(f); *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461, 468 (Tex. App.—Texarkana 2004, pet. denied); *Wyatt v. McGregor*, 855 S.W.2d 5, 17 (Tex. App.—Corpus Christi 1993, writ denied).

As a result, if no response is filed to a traditional motion for summary judgment, the only issues on appeal will be whether the movant's grounds and proof were insufficient as a matter of law. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337 (Tex. 1993); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Equisource Realty Corp. v. Crown Life Ins. Co*., 854 S.W.2d 691 (Tex. App.—Dallas 1993, no writ).

The law is quite different for a properly-framed "no evidence" motion for summary judgment that clearly points to an essential element of the non-movant's claim or defense for which there is allegedly no evidence. The failure to file a response to such a motion is fatal.[3] TEX. R. CIV. P. 166a(i); *Bryant v. Jeter*, 341 S.W.3d 447, 451 (Tex. App. – Dallas 2011, no pet.); *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Jackson v. Fiesta Mart, Inc*., 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.). A proper no-evidence motion requires the non-movant to produce "summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). If the non-movant files no response, the trial court "*must* grant the motion." TEX. R. CIV. P. 166a(i)(emphasis added).

Unless one simply enjoys the thrill of being reckless, a written response should always be filed to any motion for summary judgment.

D. Evidence

Although affidavits and deposition excerpts take the place of live testimony in a summary judgment proceeding, the facts they assert must be in a form that would make them admissible if the affiant were presenting them from the witness stand at trial. TEX. R. CIV. P. 166a(f); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *All American Telephone, Inc. v. USLD Communications, Inc*., 291 S.W.3d 518, 528 (Tex. App. – Fort Worth, 2009, pet. denied); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ). An affidavit must describe the basis on which the affiant has personal knowledge of the facts to which it attests. *Ryland Group, Inc., v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Radio Station KSCS v. Jennings*, 750 S.W.2d 760 (Tex. 1988); *Wolfe v. C.S.P.H., Inc*., 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.). Conclusory statements or assertions of subjective belief about the facts are not evidence. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008); *Ryland Group, Inc. v. Hood*, 924 S.W.2d at 122; *Fieldtech Avionics & Instruments, Inc., v. Component Control.com, Inc*., 262 S.W.3d 813, 824 (Tex. App.—Fort Worth 2008, no pet.); *Shelton v. Sargent*, 144 S.W.3d 113, 126 (Tex App.—Fort Worth 2004, pet. denied); *Campbell v. Fort Worth Bank & Trust*, 705 S.W.2d 400, 402 (Tex. App.—Fort Worth 1986, no writ).

An objection to summary judgment evidence must be in writing, and a ruling on the objection must be obtained. TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by *written* motion, answer or other response shall not be considered on appeal as grounds for reversal.")(emphasis added);

[3] A no-evidence motion for summary judgment may be combined with a traditional motion for summary judgment and is neither defective nor turned into a traditional motion by the attachment of evidence. *Binur v. Jacabo*, 135 S.W.3d 646, 650-51 (Tex. 2004).

Grand Prairie Indep. Sch. Dist. v. Vaughn, 792 S.W.2d 944, 945 (Tex. 1990).

Defects in the "form" of summary judgment affidavits or other proof must be raised in the trial court and the movant given an opportunity to cure them:

> Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

TEX. R. CIV. P. 166a(f). *See also Trusty v. Strayhorn*, 87 S.W.3d 756, 763 (Tex. App.—Texarkana 2002, no pet.).

But since the Rule requires objections only to defects in form, an objection to a defect in the *substance* of the summary judgment evidence can be raised for the first time on appeal. *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied); *Scripps Tex. Newspapers v. Belalcazar*, 99 S.W.3d 829, 834 (Tex. App.—Corpus Christi 2003, pet. denied); *Rizkallah v. Conner*, 952 S.W.2d 580, 584-85 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Bauer v. Jasso*, 946 S.W.2d 552, 556-57 (Tex. App.—Corpus Christi 1997, no writ).

This has given rise to a body of confusing and inconsistent case law attempting to define the distinction between a defect of form and a defect of substance. The following have been held to be defects in the form of the affidavit, requiring objection in the trial court:

- The lack of a jurat or other evidence showing the affidavit was sworn before an authorized officer. *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316-17 (Tex. 2012).
- Hearsay. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 925 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Einhorn v. LaChance*, 823 S.W.2d 405, 410 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.).
- Failure to show the affiant competent to testify on the matters set out. *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962); *Atchley v. NCNB Texas Nat'l Bank*, 795 S.W.2d 336, 337 (Tex. App.—Beaumont 1990, writ denied).
- Exhibits not certified or authenticated. *Ellen v. Brazos County Bail Bond Bd.*, 127 S.W.3d 42, 46 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Watts v. Hermann Hosp.*, 962 S.W.2d 102, 105 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *In re Estate of Thompson*, 873 S.W.2d 113, 114 (Tex. App.—Tyler 1994, no writ).
- A deposition transcript that was not verified or authenticated. *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.).

The following have been held defects of substance, allowing the complaint to be raised for the first time on appeal:

- Conclusory statements. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, 225-26 (Tex. App.—El Paso 2002, no pet.); *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.—Texarkana 2000, no pet.); *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.).
- The failure to positively and unqualifiedly state that the facts given are true. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996).

However, the distinction between a defect of form and a defect of substance is not always clear. For example:

- Some decisions hold that the failure of an affidavit to show that it is based on personal knowledge is a defect in form, requiring objection. *Grand Prairie Indep. Sch. Dist. v. Vaughn*, 792 S.W.2d 944, 945 (Tex. 1990); *Rizkallah v. Conner*, 952 S.W.2d 580, 584-85 (Tex. App.—Houston [1st Dist.] 1997, no pet.).
- While others suggest this is a defect in substance that can be raised for the first time on appeal. *City of Wilmer v. Laidlaw Waste Systems (Dallas), Inc.*, 890 S.W.2d 459, 467 (Tex. App.—Dallas 1994), *aff'd*, 904 S.W.2d 656 (Tex. 1995); *Dailey v. Albertson's, Inc.*, 83 S.W.3d 222, 226 (Tex. App.—El Paso 2002, no pet.)
- The failure to attach an exhibit containing facts upon which the affidavit relies may be a defect in form, requiring objection in the trial court. *Sunsinger v. Perez*, 16 S.W.3d 496, 501 (Tex. App.—Beaumont 2000, pet. denied); *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Noriega v. Mireles*, 925 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1996, writ denied).
- Or it may be held a defect in substance that can be raised for the first time on appeal. *Brown v. Brown*, 145 S.W.3d 745, 752 (Tex. App.—Dallas 2004, pet. denied); *Galindo v. Dean*, 69 S.W.3d 623, 627 (Tex. App.—Eastland 2002, no pet.); *Rodriguez v. Tex. Farmers Ins. Co.*,

903 S.W.2d 499, 506 (Tex. App.—Amarillo 1995, writ denied); *Knetsch v. Gaitonde*, 898 S.W.2d 386, 390 (Tex. App.—San Antonio 1995, no writ); *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 444-45 (Tex. App.—El Paso 1994, writ denied).

As a result, the prudent lawyer will err on the side of caution and treat all deficiencies in the summary judgment evidence as defects in form and will object accordingly.

Not only must the objection be in writing, but the traditional requirement has been that the trial court's ruling on the objection must also be in writing, or the objection was deemed waived. *S & I Management, Inc. v. Sungju Choi*, 331 S.W.3d 849, 855 (Tex. App. – Dallas 2011, no pet.); *Washington v. McMillan*, 898 S.W.2d 392, 397 n.4 (Tex. App.—San Antonio 1995, no writ); *Camden Mach. & Tool, Inc. v. Cascade Co.*, 870 S.W.2d 304, 310 (Tex. App.—Fort Worth 1993, no writ).

Indeed, cases have held that entering the court's ruling on the docket sheet is insufficient, as is stating it on the record. *Eads v. Am. Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App.—Waco 1992, no writ)(docket sheet entry insufficient); *Harris County Child Welfare Unit v. Caloudas*, 590 S.W.2d 596, 598 (Tex. App.—Houston [1st Dist.] 1979, no writ)(same)*; Manoogian v. Lake Forest Corp.*, 652 S.W.2d 816, 819 (Tex. App.—Austin 1983, writ ref'd n.r.e.)(statement on the record insufficient).

Texas Rule of Appellate Procedure 33.1, which became effective in September 1997, would appear to relax the earlier requirement (under superseded TRAP 52(a)) for an express, written ruling since the rule now states that error is preserved if the trial court "ruled on the request, objection, or motion *either expressly or implicitly*." TEX. R. APP. P. 33.1(a)(2)(A) (emphasis added).

But the courts of appeal do not agree on whether—or on the extent to which—this new language eliminates the need for an explicit, written ruling on objections to summary judgment evidence. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 206 (Tex. App.—Dallas 2005, no pet.)(describing a "split of authority" on this point).

The Fort Worth Court of Appeals, for example, has seemed willing to infer implicit rulings on objections from the trial court's grant of the summary judgment motion. *See, e.g., Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App.—Forth Worth 1998, no pet.)(order granting summary judgment implicitly overruled non-movant's objections to movant's summary judgment evidence); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 2002, pet. denied)(order granting summary judgment with statement that court had reviewed "all competent summary judgment evidence" implicitly sustained objections to the non-movant's evidence); *see also Mowbray v. Avery*, 76 S.W.3d 663, 689 n.45 (Tex. Civ. App.—Corpus Christi 2002, pet. denied)(order granting summary judgment with statement that court would "take judicial notice of and consider the records as Defendants request" implicitly overruled objections).

Most courts of appeal, however, are inclined the other way. They appear unwilling to infer rulings on evidentiary objections unless, perhaps, the ruling is unavoidably compelled by the result the trial court reached on the summary judgment motion itself. *See, e.g., Well Solutions v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.)(rejecting *Blum* and *Frazier* because "rulings on a motion for summary judgment and objections to summary judgment evidence are not alternatives" because the ruling on one does not compel the result on the other); *Allen v. Albin*, 97 S.W.3d 655, 662-62 (Tex. App.—Waco 2002, no pet.)(adopting same reasoning); *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (appellate court was "unable to determine from this record whether the objections were sustained or overruled"); *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562, 567 (Tex. App.—Texarkana 2000, pet. denied)("challenged evidence remains part of the summary judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record."); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, no pet.)(same).

In light of all this uncertainty, you should do the following to preserve a complaint about evidence your opponent has filed in support of, or in opposition to, a motion for summary judgment:

1. **File written objections to the evidence.**
2. **Include every legitimate objection to the evidence (i.e., treating all deficiencies as defects in "form").**
3. **Get the court to rule on your objections *in writing*.**

For objections made against *your* summary judgment evidence, be aware of the line of cases holding that a failure to respond to the objections, or to complain when the trial court sustains them, will mean you have waived any right to oppose those objections on appeal. *Sw. Bell Tel. Co. v. Combs*, 270 S.W.3d 249, 273 (Tex. App.—Amarillo 2008, pet. denied); *Cantu v. Horany*, 195 S.W.3d 867, 871 (Tex. App.—Dallas 2006, no pet.); *Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270 (Tex. App.—El Paso 2004, no

pet.). The rationale for these decisions appears to be that such a response, or subsequent complaint, serves the same role as an offer of proof during trial—it gives the trial court an explanation of the purpose for which the proponent of the evidence is offering it and why the proponent believes the evidence admissible. *See Cmty. Initiatives, Inc. v. Chase Bank*, 153 S.W.3d at 281.

Accordingly, when your opponent objects to *your* summary judgment evidence, you should do the following:

1. **File a written response to the objections.**
2. **In that response, explain the purpose for which the evidence is being offered and**
3. **Explain why the evidence is admissible.**
4. **Or, if the court has already sustained the objections to your evidence, file a written motion for reconsideration.**
5. **In that motion, explain the purpose for which the evidence is being offered and**
6. **Explain why the evidence is admissible.**
7. **Get a ruling on your motion.**

IV. PRESERVING ERROR IN JURY SELECTION

After a long hiatus, the Texas Supreme Court decided several cases dealing with the jury selection process, thereby suggesting this may be an area subject to increasing scrutiny. *In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011) (scope of permitted questioning); *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006) (same); *Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005) (striking for cause); *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005) (same). But complaints in this area are frequently not preserved for appellate review. The steps to do so are quite specific.

A. Challenges for Cause

The Texas Supreme Court has made clear that a challenge for cause must be based on more than a veniremember's cryptic statements acknowledging an initial "leaning," or "bias," or belief that one party is "starting off a little bit behind" before the trial begins. *Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005); *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005). To establish that a veniremember has a disqualifying bias it must be shown that his preconceptions are so strong they lead "to the natural inference that he will not or did not act with impartiality." *Hafi v. Baker*, 164 S.W.3d at 385 (quoting *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963)). *See also Murff v. Pass*, 249 S.W.3d 407 (Tex. 2008) (veniremembers' confusion about standard of proof did not show bias or inability to follow court's instructions).

In short, it is not enough to establish an initial leaning. Any such leaning must be explored enough to show that it will prevent the veniremember from reaching an impartial decision after hearing the evidence. As the Court put it, "the relevant inquiry is not where jurors *start* but where they are likely to *end*." *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d at 94 (emphasis by the court). To support a challenge for cause, the objecting party must therefore pursue a more extensive inquiry into the strength and inflexibility of the veniremember's initial leaning than many lawyers and courts previously thought necessary.

To preserve error in challenging a potential juror for cause, you must do the following on the record:

1. **Challenge the panelist for cause.**
2. **State the basis for the challenge and ask that the panelist be removed.**
3. **Obtain a ruling.**
4. **If the court denies your challenge, then -- *before giving the clerk your peremptory strikes* -- complete the following steps, in this sequence, on the record:**
5. **Inform the court that, because of its refusal to strike the challenged panelist, you will be compelled to use all of your peremptory challenges before being able to strike a panelist whom you would remove but who will remain on the jury.**
6. **Identify the panelist whom you would strike.**
7. **Ask the court to reconsider its ruling on the challenged panelist <u>or</u> grant you an additional peremptory challenge.**
8. **Obtain a ruling.**
9. **<u>Then</u> give the clerk your peremptory strikes, and make sure the record reflects this sequence.**

Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 90-92 (Tex. 2005); *Hallet v. Houston Nw. Med. Ctr.*, 689 S.W.2d 888, 890 (Tex. 1985); *Urista v. Bed, Bath, & Beyond, Inc.*, 245 S.W.3d 591, 596 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *McMillin v. State*

Farm Lloyds, 180 S.W.3d 183, 190-93 (Tex. App.—Austin 2005, pet. denied).

It is not necessary to state why you find objectionable the panelist you identify as the one on whom you would use the additional strike. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005); *Silsbee Hosp., Inc. v. George*, 163 S.W.3d 284, 294 (Tex. App.—Beaumont 2005, pet. denied). But you must identify that panelist before knowing who the opposing party will strike. And if that panelist is removed—whether by the strike of another party, by the court, or by agreement of the opposing party—any error in overruling your challenge for cause will be treated as harmless. *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91-92 (Tex. 2005).

B. *Batson* Challenges

Exercising peremptory challenges solely on the basis of race is a prohibited violation of the right to equal protection under the United States Constitution. *Batson v. Kentucky.*, 476 U.S. 79 (1986); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (extending *Batson* to civil cases). This has been extended to also prohibit the use of peremptory challenges solely on the basis of gender. *J.E.B. v. Ala.*, 511 U.S. 127 (1994).

Article 35.261 of the Texas Code of Criminal Procedure establishes the procedure for *Batson* challenges in criminal cases. That procedure has been adopted for juvenile delinquency proceedings, *C – E – J – v. State*, 788 S.W.2d 849, 852-53 (Tex. App. – Dallas 1990, writ denied), and civil cases, *Pierson v. Noon*, 814 S.W.2d 506, 508 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

If you believe your opponent's peremptory strikes have been exercised on such a basis, you must object *before the jury is sworn and the rest of the venire panel is discharged*. *Pierson v. Noon*, 814 S.W.2d at 508. The following are the steps in such a challenge:

1. **Object that your opponent has exercised strikes on a racial basis.**
2. **Establish a prima facie case by showing a pattern in your opponents' use of strikes. This requires showing: (1) the racial/ethnic background of the venire persons the opponent struck, and (2) the racial/ethnic background of the other members of the venire panel.**
3. **Your opponent must then present a race-neutral explanation for the strikes**
4. **You can then submit evidence to show that this explanation is merely a sham or pretext for discrimination.**
5. **The court determines whether the race-neutral explanation is plausible.**

Goode v. Shoukfeh, 943 S.W.2d 441, 445-46 (Tex. 1997). *See also Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 511-15 (Tex. 2008); *Tex. Tech Univ. Health Sci. Ctr. v. Apodaca*, 876 S.W.2d 402, 407-09 (Tex. App.—El Paso 1994, writ denied); *Woods v. State*, 801 S.W.2d 932, 935 (Tex. App.—Austin 1990, pet. ref'd); *In Interest of A.D.E.*, 880 S.W.2d 241, 243-44 (Tex. App.—Corpus Christi 1994, no writ).

C. Equalizing Peremptory Strikes

Each "side" of a lawsuit normally gets six peremptory strikes in district court and three in county court. TEX. R. CIV. P. 233; *Perkins v. Freeman*, 518 S.W.2d 532, 533 (Tex. 1974). If alternate jurors are seated, each side gets one additional strike if there will be one or two alternates, and two additional strikes if there will be three or four alternates. TEX. GOV'T CODE § 62.020(e). These additional strikes may be used only against the alternate jurors (and the regular strikes to which they were added may not be). *Id*.

A "side" of the lawsuit is defined as "one or more litigants who have common interests on the matters with which the jury is concerned." TEX. R. CIV. P. 233; *"Y" Propane Serv., Inc., v. Garcia*, 61 S.W.3d 559, 569 (Tex. App.—San Antonio 2001, no pet.). The allocation of strikes is thus simple when all the plaintiffs and all of the defendants are in alignment and there are no third parties—each side (not each party) must receive the same number of strikes. *Garcia v. Cent. Power & Light Co.*, 704 S.W.2d 734, 736 (Tex. 1986); *Pojar v. Cifre*, 199 S.W.3d 317, 324 (Tex. App.—Corpus Christi 2006, pet denied).

Multi-party cases, however, may call for a different allocation if any of the litigants on the same side of the docket are antagonistic with each other on "any issue to be submitted to the jury." TEX. R. CIV. P. 233. Any party who claims there is such antagonism can, prior to the exercise of strikes, request a re-allocation to "equalize the number of peremptory challenges so that no litigant or side is given an unfair advantage":

> **Motion to Equalize**. In multiple party cases, upon motion of any litigant made prior to the exercise of peremptory challenges, it shall be the duty of the trial judge to equalize the number of peremptory challenges so

> that no litigant or side is given unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges to each litigant or side. In determining how the challenges should be allocated the court shall consider any matter brought to the attention of the trial judge concerning the ends of justice and the elimination of an unfair advantage.

TEX. R. CIV. P. 233.

"Equalizing" strikes is a somewhat misleading term. The goal is not to give each side of the docket the same number of strikes; it is to proportion the allocation of strikes to equalize the ability of the antagonistic groups of litigants to influence the selection of the jury. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914, 920 (Tex. 1979). The court may proportion the strikes by increasing the number of strikes on one side of the docket, by reducing the number on the other, or both. *Id.* As a result, if two co-defendants are sharply antagonistic—as where each contends the other is solely responsible, but the plaintiffs are in alignment, the defendants may receive more total strikes than do the plaintiffs. *Id.* Although there is no firmly-established limit, "in most cases a two-to-one ratio between sides would approach the maximum disparity allowable" in the allocation of strikes. *Id.*

An objection to the allocation of strikes, or a motion to equalize them, must be made after voir dire but before the parties exercise their peremptory challenges. *In re T.E.T.*, 603 S.W.2d 793, 798 (Tex. 1980), *cert. denied*, 450 U.S. 1025 (1981); *In re M.N.G.*, 147 S.W.3d 521, 531-32 (Tex. App.—Fort Worth 2004, pet. denied); *Van Allen v. Blackledge*, 35 S.W.3d 61, 64-65 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

The trial court is to then conduct a hearing to consider the presence of such antagonism. This determination is not based on the pleadings alone, but must also consider relevant evidence from pretrial discovery, statements made during voir dire examination, and any other information brought to the court's attention that would reveal or dispel the existence of antagonism. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986); *Garcia v. Cent. Power & Light Co.*, 704 S.W.2d at 737; *Patterson Dental Co. v. Dunn*, 592 S.W.2d at 919; TEX. R. CIV. P. 233. Whether this evidence establishes that the parties are antagonistic is a question of law. *Garcia*, 704 S.W.2d at 736; *Patterson Dental Co.*, 592 S.W.2d at 919; *In re M.N.G.*, 147 S.W.3d at 531.

The parties must be antagonistic on an issue of fact that will be submitted to the jury, not merely in disagreement on a matter of law or adverse on a potential future claim. *Patterson Dental Co.*, 592 S.W.2d at 918; *"Y" Propane*, 61 S.W.3d at 570. The existence of a cross-claim is not enough by itself to support a finding of antagonism. *Cent. Power*, 704 S.W.2d at 737; *Patterson Dental Co.*, 592 S.W.2d at 918. Nor is it enough that the litigants on the same side have differing conflicts with the other side. *Patterson Dental Co.*, 592 S.W.2d at 918.

If the parties on the same side of the case are found to be antagonistic, they should each be given their own set of strikes. *Frank B. Hall & Co. v. Beach Inc.*, 733 S.W.2d 251, 256-57 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.). They should not then be permitted to coordinate the use of those strikes. *Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643, 645 (Tex. 1986); *Van Allen*, 35 S.W.3d at 64-65; *In re M.N.G.*, 147 S.W.3d at 532.

To preserve error in an objection to the allocation of peremptory challenges, it is not necessary to identify the veniremembers whom you would have removed with the additional strikes. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d at 5; *Van Allen*, 35 S.W.3d at 66 n.3.

In summary, to preserve a complaint about the allocation of peremptory challenges, do the following *after voir dire but before the parties exercise their strikes*:

1. **Move to equalize the number of peremptory challenges, asking that the strikes be allocated such that "no litigant or side has an unfair advantage in the number of challenges."**
2. **Specify which parties have common interests and which have antagonistic interests.**
3. **If you are claiming the parties *are* antagonistic, identify the questions of fact that will go to the jury on which those parties have opposing interests, and explain why.**
4. **If you are claiming that the parties are *not* antagonistic, list the questions of fact the jury will be asked and explain why those parties do not have opposing interests; state that any differences those parties might have on questions of law are irrelevant.**
5. **Cite evidence to support your position for or against antagonism (e.g., allegations in the pleadings, statements during**

voir dire, evidence produced during discovery).

6. **Obtain a ruling before the parties exercise peremptory challenges.**
7. **If the parties who got additional strikes, but whom you claim are not truly antagonistic, cooperate in the execution of those strikes, object immediately and move for a mistrial.**

V. PRESERVING ERROR IN RULINGS ON EVIDENCE

To start with a distressing truth, the standard of review makes it difficult to reverse a trial court's judgment on the basis of its evidentiary rulings. Not only are such rulings reviewed for abuse of discretion, but in this context the harmless error standard is especially indulgent. More than a few cases have held that a judgment will not be reversed for the improper admission or exclusion of evidence unless that particular evidence was pivotal to the entire case:

> Whether to admit or exclude evidence is a matter committed to the trial court's sound discretion. . . . To reverse a judgment based on a claimed error in admitting or excluding evidence, a party must show that the error probably resulted in an improper judgment. . . . In determining if the excluded evidence probably resulted in the rendition of an improper judgment, we review the entire record. . . . Typically, a successful challenge to a trial court's evidentiary rulings requires the complaining party to demonstrate that *the judgment turns on the particular evidence excluded or admitted*. . . . And, ordinarily, this Court will not reverse a judgment because a trial court erroneously excluded evidence when the evidence in question is cumulative and *not controlling* on a material issue dispositive to the case.

Interstate Northborough P'ship v. State, 66 S.W.3d 213, 220 (Tex. 2001)(emphasis added)(internal citations omitted). *See also Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004); *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000).

This does not mean that preserving error on an evidentiary ruling is a futile exercise. But it does mean that, when truly critical evidence is excluded or admitted, the trial lawyer opposed to that ruling needs to be especially alert to building a record that will show the ruling was harmful. For evidence that was excluded, for example, the proponent should take pains to explain (on the record) the core fact issues on which the evidence would be probative, the opponent's contentions and proof that it would rebut, and the reasons the evidence is pivotal to the proponent's theory of the case. The proponent should then not simply abandon the issue but remain alert throughout the remainder of the trial and consider re-offering the evidence, again with appropriate explanations, at any point where later developments would warrant re-visiting the issue.

For critical evidence admitted over objection, a similar approach should be taken in reverse. The party objecting to the evidence should not only tell the trial court why it is inadmissible, but why it will be unfairly prejudicial. And again, more may be needed than merely technical preservation with an objection and, where appropriate, a requested limiting instruction. The trial lawyer should stay alert to revisit the issue in light of later developments, when justified, and to request that the jury be instructed to ignore the evidence or to move for a mistrial.

A. Motions in Limine versus Motions to Exclude

Do not confuse a motion in limine with a motion to exclude. The court's ruling on a motion in limine preserves nothing for appeal because it is not a ruling on the admissibility of the evidence. The ruling simply determines whether the proponent of the evidence will have to first approach the bench for a decision on its admissibility before referring to the evidence in front of the jury. *Pool v. Ford Motor Co*., 715 S.W.2d 629, 637 (Tex. 1986); *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Waldon v. City of Longview*, 855 S.W.2d 875, 880 (Tex. App.—Tyler 1993, no writ); *Bifano v. Young*, 665 S.W.2d 536, 541 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

If the court has granted the motion in limine, the party who wishes to present the evidence must still offer it at trial or waive any complaint about its exclusion. *Sw. Country Enter., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 493 (Tex. App.—Fort Worth 1999, pet denied); *Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied). Similarly, if the court has denied the motion in limine, the party who wants the evidence excluded must object when it is offered at trial or waive any complaint about its admission. *McCardell*, 369 S.W.2d at 335; *Boulle v. Boulle*, 254 S.W.3d 701, 709 (Tex. App.—Dallas 2008, pet. denied).

In sharp contrast, a court's ruling on a motion to exclude under Texas Rule of Evidence 103 does preserve error, whether that ruling is made before or during trial. It *is* a ruling on the admissibility of the evidence. *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Huckaby v. A.G. Perry & Sons, Inc*., 20 S.W.3d 194, 203-04 (Tex. App.—Texarkana 2000, pet. denied). If the evidence is ruled admissible, the objection has been preserved and need not be repeated in front of the jury. TEX. R. EVID. 103(a)(1). Nonetheless, when the evidence is then offered at trial, the party opposing that evidence should be careful not to say anything that could be deemed a waiver of its previous objections that were already overruled.[4] *Pojar v. Cifre*, 199 S.W.3d 317, 341 (Tex. App.—Corpus Christi 2006, pet. denied)("If a party affirmatively asserts during trial that he or she has "no objection" to the admission of the complained-of evidence, any error in the admission of the evidence is waived, even in the face of a pretrial ruling."); *Tex. Dep't of Transp. v. Pate*, 170 S.W.3d 840, 850 (Tex. App.—Texarkana 2005, pet. denied)(same).

As a result, if you wish to use a pre-trial motion to obtain a ruling on the admissibility of an opponent's evidence, and on your objections to that evidence, do it with a "Motion to Exclude." Remove all possible ambiguity on this point. Do not call it a motion in limine, and do not call it a "Motion in Limine to Exclude"—which is an oxymoron. In your motion, if not also in its title, specifically refer to Texas Rule of Evidence 103, and expressly ask the court to rule on the admissibility of the evidence. Reliance on anything less clear may be hazardous.

B. Objecting to Your Opponent's Evidence

Unless the court has expressly ruled that one party's objection will preserve error for another, in multiparty cases each party must make its own objections. *In re Estate of Womack*, 280 S.W.3d 317, 321-22 (Tex. App.—Amarillo 2008, pet. denied); *Wolfe v. East Tex. Seed Co.*, 583 S.W.2d 481, 482 (Tex. App.—Houston [1st Dist.] 1979, writ dism'd); *cf Beutel v. Dallas County Flood Control Dist.*, 916 S.W.2d 685, 694 (Tex. App.—Waco 1996, writ denied) (complaining party did not join in offer of excluded evidence). In multiparty cases, it therefore makes sense to obtain such a ruling before trial.

1. Basic requirements for objecting to evidence.

Objections to your opponent's evidence must be both timely and specific.

An objection must be timely in that it must be made as soon as the reason for it becomes apparent. TEX. R. EVID. 103(a)(1); *Seneca Res. Corp. v. Marsh & McLennan, Inc*., 911 S.W.2d 144, 152 (Tex. App.—Houston [1st Dist.] 1995, no writ). This usually means that an objection to evidence must be made the first time it is offered. *In re Amaya*, 34 S.W.3d 354, 357 n.1 (Tex. App.—Waco 2001, no pet.); *In re A.V.*, 849 S.W.2d 393, 396 (Tex. App.—Fort Worth 1993, no writ); *MBank Dallas v. Sunbelt Mfg*., 710 S.W.2d 633, 638 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

And, in the absence of a valid "running objection" (see below), the objection must be repeated each time the same or similar evidence is offered — or the objection is waived. *Bay Area Healthcare Group v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007); *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984); *Marling v. Maillard*, 826 S.W.2d 735, 739 (Tex. App.—Houston [14th Dist] 1992, no writ).

In the event that the evidence gets before the jury before an objection can be made, or where it becomes apparent only later that the conditions for the admission of that evidence have not been met, follow the steps described below for "objections to evidence the jury has already heard."

In addition to being timely, the objection must also be sufficiently specific in two respects: (1) it must identify the part of the requested testimony or offered exhibit that is objectionable, unless the evidence is inadmissible in its entirety and (2) it must identify the legal principle that makes the evidence inadmissible, if that principle is "not apparent from the context." TEX. R. EVID. 103(a)(1); *Smith Motor Sales, Inc. v. Tex. Motor Vehicle Comm'n*, 809 S.W.2d 268, 272 (Tex. App.—Austin 1991, writ denied); *United Cab Co., Inc. v. Mason*, 775 S.W.2d 783, 785 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

If the objection does not specify the inadmissible portion(s) of the evidence being offered, it is proper for the trial court to overrule the objection if *any part* of that evidence is admissible. *Speier v. Webster College*, 616 S.W.2d 617, 619 (Tex. 1981); *Sunl Group, Inc. v. Zhejiang Yongkang Top Imp. & Exp. Co., Inc.*, 394 S.W.3d 812, 816 (Tex. App. – Dallas 2013, no pet.); *In re M.P.*, 220 S.W.3d 99, 101 (Tex. App.—Waco 2007, pet. denied); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 205-06 (Tex. App.—Corpus Christi 1990, writ dism'd by agr.). Since the burden of curing deficiencies in the evidence is on the offering party, however, it is not necessary for the objecting party to list each and every part that is objectionable, but at least a few examples of specific inadmissible parts must be identified. *Hurtado v. Tex. Employers' Ins. Assoc*., 574 S.W.2d 536, 538-39 (Tex. 1978).

[4] Rather than saying simply "no objection" when the evidence is later offered at trial, one should instead say something like "no objection other than the matter we took up before trial," or "the court has already ruled on this and we have nothing further."

The objection must also be specific in stating the legal rule or principle that makes the evidence inadmissible. TEX. R. EVID. 103(a)(1); *City of Mesquite v. Moore*, 800 S.W.2d 617, 619 (Tex. App.—Dallas 1990, no writ); *Murphy v. Waldrip*, 692 S.W.2d 584, 591 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). An objection that "the predicate has not been laid," for example, is too general, and the overruling of such an objection does not preserve any complaint for appeal. *Winkel v. Hankins*, 585 S.W.2d 889, 892 (Tex. Civ. App.—Eastland 1979, writ dism'd); *State v. Stiefer*, 443 S.W.2d 275, 279 (Tex. Civ. App.—Tyler 1969, writ ref'd n. r. e.). *See also Lege v. Jones*, 919 S.W.2d 870, 874 (Tex. App.—Houston [14th Dist.] 1996, no writ)(objection that evidence is "immaterial and irrelevant" is too general).

And it is important to specify *every* legal basis for your objection. You will not be able to argue on appeal that the trial court should have sustained your objection on a ground that was not stated at the time the objection was made. *Smith v. Levine*, 911 S.W.2d 427, 436 (Tex. App.—San Antonio 1995, writ denied); *Richard Gill Co. v. Jackson's Landing Owners' Ass'n*., 758 S.W.2d 921, 927-28 (Tex. App.—Corpus Christi 1988, writ denied); *Wilkerson v. Pic Realty Corp*., 590 S.W.2d 780, 782 (Tex. App.—Houston [14th Dist.] 1979, no writ).

Finally, if the evidence is not admissible for all purposes or for all parties, but is admissible for some, it should not be admitted without an appropriate limiting instruction. Texas Rule of Evidence 105 summarizes the basic rules in such a situation:

> **(a) Limiting Instruction**. When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly; but, in the absence of such request the court's action in admitting such evidence without limitation shall not be a ground for complaint on appeal.
>
> **(b) Offering Evidence for Limited Purpose**. When evidence referred to in paragraph (a) is excluded, such exclusion shall not be a ground for complaint on appeal unless the proponent expressly offers the evidence for its limited, admissible purpose or limits its offer to the party against whom it is admissible.

TEX. R. EVID. 105.

Note that, where the court admits your opponent's evidence on the basis of the contention that it is admissible for a specific limited purpose, even where concededly not admissible for other purposes, it is still *your* obligation to request a limiting instruction on the use of that evidence. TEX. R. EVID. 105(a); *Larson v. Cactus Util. Co*., 730 S.W.2d 640, 642 (Tex. 1987). If you do not, you cannot complain on appeal that the evidence was admitted and used for all purposes. *Id. See also Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000); *Aluminum Co. of Am. v. Alm*, 785 S.W.2d 137, 139 (Tex.), *cert. denied*, 498 U.S. 847 (1990); *Birchfield v. Texarkana Mem'l Hosp*., 747 S.W.2d 361, 365 (Tex. 1987); *In re K.S*., 76 S.W.3d 36, 39-40 (Tex. App.—Amarillo 2002, no pet.).

To preserve error in the admission of your opponent's evidence, you must therefore do the following:

1. **Make a timely objection (as soon as the basis for objection becomes apparent).**
2. **If any part of the evidence is admissible, specifically identify the inadmissible portion(s) to which you object (at least a few examples must be identified).**
3. **State every legitimate legal basis for the objection.**
4. **Get a ruling on your objection. If the objection is overruled, then . . . .**
5. **Request a limiting instruction if the evidence is being admitted for only certain purposes or parties.**
6. **Get a ruling on that request.**
7. **Repeat the objection each time the same or similar evidence is offered again (or obtain a valid "running objection").**

2. Running objections.

The tedious and annoying task of repeatedly objecting to the same evidence can be avoided if the court grants your request for a valid running objection. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). The request must be made and granted on the record. *State v. Baker*, 574 S.W.2d 63, 65 (Tex. 1978); *Freedman v. Briarcroft Prop. Owners, Inc*., 776 S.W.2d 212, 217-18 (Tex. App.—Houston [14th Dist.] 1989, writ denied). If the court denies your request, it may be necessary for you to object again each time any witness testifies about the evidence that was admitted over your initial objection. *Jurek v.*

Couch-Jurek, 296 S.W.3d 864, 870 (Tex. App. – El Paso 2009, no pet.); *City of Fort Worth v. Holland*, 748 S.W.2d 112, 113-14 (Tex. App. – Fort Worth 1988, writ denied); *Kelso v. Wheeler*, 310 S.W.2d 148, 150 (Tex. Civ. App. – Houston 1958, no writ).

Even when a running objection is granted, however, it is easily waived and should be employed with caution. On appeal, if there is any conceivable doubt about the scope of the running objection, it may not be construed to apply to similar evidence that was later presented in a slightly different form or to testimony that came from a different witness. *Leaird's, Inc. v. Wrangler, Inc*., 31 S.W.3d 688, 691 (Tex. App.—Waco 2000, pet. denied); *Huckaby v. A.G. Perry & Son, Inc*., 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied). *See also Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 243 (Tex. App.—Corpus Christi 1994, writ denied) (suggesting this is a "case-by-case" inquiry). If the request is not sufficiently specific in those respects, the running objection is properly denied. *Low v. Henry*, 221 S.W.3d 609, 619 (Tex. 2007).

On the other hand, where the objection identifies the evidence to which it is directed with sufficient specificity, and expressly extends to the potential sources of that evidence beyond one witness, it will preserve error as a valid running objection. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004).

In addition to having the court grant the running objection, the core requirement is that it be specific and unambiguous in identifying the evidence to which it is directed *and* in identifying the potential sources of that evidence the objection covers. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004); *Huckaby v. A.G. Perry & Son, Inc*., 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied); *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 242-43 (Tex. App.—Corpus Christi 1994, writ denied).

To obtain a running objection after your initial objection to the evidence has been overruled, do the following:

1. **Request a running objection.**
2. **Identify the evidence to which the running objection will apply (*e.g*. hearsay statements to a television news crew made by an unidentified bystander).**
3. **Describe the forms in which that evidence may be offered (*e.g.* the videotape containing the bystander's statements, live testimony from the news crew about what the bystander said).**
4. **Identify the potential witnesses to whom the running objection will apply.**
5. **Have the court grant your request for a running objection on the record.**
6. **Thereafter renew the objection at any point where there could be any conceivable doubt about its application.**

See Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 907 (Tex. 2004).

3. Objections to evidence the jury has already heard.

There are at least two circumstances in which it is appropriate to object to evidence that is already in front of the jury. The first and most obvious is when the evidence is blurted out or displayed before an objection can be interjected. The second circumstance is where evidence is conditionally admitted. Even if an objection to that evidence was already made and overruled at the time it was offered, the objection must be renewed if the conditions on which the evidence was admitted are not met. *Young v. State*, 242 S.W.3d 192, 200 (Tex. App.—Tyler 2007, no pet.); *Owens-Corning Fiberglass Corp. v. Keeton*, 922 S.W.2d 658, 661-62 (Tex. App.—Austin 1996, writ denied). In either case, make the objection as soon as possible and get a ruling on the admissibility of the evidence.

But that is not enough, especially if the court sustains your objection. If you stop there, the court has not denied you any requested relief and you therefore have nothing about which to complain on appeal. *One Call Systems, Inc. v. Houston Lighting & Power*, 936 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *Parallax Corp. v. City of El Paso*, 910 S.W.2d 86, 90 (Tex. App.—El Paso 1995, writ denied); *Hur v. City of Mesquite*, 893 S.W.2d 227, 231 (Tex. App.—Amarillo 1995, writ denied). Furthermore, even if your objection is sustained, the evidence is still before the jury for them to consider unless they are instructed to disregard it. *Heidelberg v. State*, 36 S.W.3d 668, 674 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Prudential Ins. Co. of Am. v. Uribe*, 595 S.W.2d 554, 564 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); *City of Denton v. Mathes*, 528 S.W.2d 625, 634 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

As a result, you must pursue the matter until the court rules against you. In fact, at least one case suggests that you may have to pursue a motion to strike even if the court has already ruled against you on your objection. *Parallax Corp. v. City of El Paso*, 910 S.W.2d 86, 90 (Tex. App.—El Paso 1995, writ denied).

To preserve a complaint about the admissibility of evidence the jury has already seen, you should therefore complete the following steps, *in this order*:

> **1. Object to the evidence. Then, regardless of how the judge rules on that objection,**
> **2. Move to strike the evidence and request that the jury be instructed to disregard it. Then, if these requests are granted,**
> **3. Move for a mistrial, and**
> **4. Get a ruling.**

State Bar of Tex. v. Evans, 774 S.W.2d 656, 658 n.6 (Tex. 1989); *Hur v. City of Mesquite*, 893 S.W.2d 227, 231-32 (Tex. App.—Amarillo 1993, writ denied).

C. Offering Your Evidence

At the outset, insist that your opponent's objections are made with the required specificity. If the trial court sustains a vague, general objection and excludes your evidence, that ruling might be upheld on appeal if there was *any valid ground* for objection—at least where you did not ask that the objection be made more specific. *State Bar of Tex. v. Evans*, 774 S.W.2d 656, 658 n.5 (Tex. 1989); *Gen. Acc. Fire & Life Assur. Corp. v. Camp*, 348 S.W.2d 782, 784 (Tex. App.—Houston [1st Dist.] 1961, no writ). As a result, if there is any reasonable doubt about the basis for your opponent's objection, or about the parts of your evidence to which that objection is directed, ask that the objection be made more specific. Explain on the record that you are entitled to an objection that is sufficiently specific to allow you to cure any deficiencies in your evidence, and that the existing objection is too general to permit you to do that. *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1989).

In addition to confronting the merits of an opponent's objections to your evidence, there are at least two other points to keep in mind. First, consider whether it might be appropriate to modify your evidence in some way to avoid those objections, such as by removing objectionable portions and re-tendering the evidence in redacted form, or by suggesting that it be admitted for a limited purpose with an accompanying instruction to the jury. Second, and most important, make an adequate offer of proof for any evidence the court excludes.

Finally, remember that, in multiparty cases, an offer of proof by one party does not preserve any complaint on appeal by another party who does not join in that offer. *In re Estate of Womack*, 280 S.W.3d 317, 321-22 (Tex. App.—Amarillo 2008, pet. denied); *Beutel v. Dallas County Flood Control Dist.*, 916 S.W.2d 685, 694 (Tex. App.—Waco 1996, writ denied); *Howard v. Phillips*, 728 S.W.2d 448, 451 (Tex. App.—Fort Worth 1987, no writ).

1. Partial admissibility.

The proponent of the evidence has the obligation of curing any deficiencies necessary to make the evidence admissible. As a result, if the court sustains an objection that pertains only to certain parts of your evidence, it is your obligation to delete those parts and re-offer the evidence. Otherwise, you will not be able to argue on appeal that the admissible portions should have been permitted. *Hurtado v. Tex. Employers' Ins. Assoc.*, 574 S.W.2d 536, 538-39 (Tex. 1978); *Am. Gen. Fire & Cas. Co. v. McInnis Book Store, Inc.*, 860 S.W.2d 484, 488 (Tex. App.—Corpus Christi 1993, no writ); *Olson v. Bayland Publ'g, Inc.*, 781 S.W.2d 659, 665 (Tex. App.—Houston [1st Dist.] 1989, writ denied), *overruled on other grounds, Sage St. Assoc. v. Northdale Constr. Co.*, 863 S.W.2d 438 (Tex. 1993). If any part of the evidence is still not admissible, the court may properly sustain an objection to the evidence in its entirety. *Tex. Reciprocal Ins. Ass'n v. Stadler*, 166 S.W.2d 121, 104 (Tex. Comm. App. 1942); *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 783 (Tex. App.—Dallas 2005, pet. denied); *Perry v. Tex. Mun. Power Agency*, 667 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

2. Limited admissibility.

Similarly, if the court sustains an objection to your evidence on the contention that certain *uses* of that evidence would be improper, it is your obligation to re-offer the evidence for the limited purpose(s) for which it can be admitted. If you do not, you will have to argue on appeal that the evidence was admissible for all purposes, and cannot complain that it should have been admitted for the more limited use for which it would have been admissible. TEX. R. EVID. 105(b); *Worldwide Anesthesia Assocs., Inc. v. Bryan Anesthesia, Inc.*, 765 S.W.2d 445, 449 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Terry v. Buttercup Oil Corp.*, 487 S.W.2d 169, 175 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

3. Offers of proof.

An appellate court cannot evaluate whether the exclusion of the evidence was erroneous, or caused reversible harm, unless that evidence is in the record. *McInnes v. Yamaha Motor Corp.*, 673 S.W.2d 185, 187 (Tex. 1984), *cert. denied*, 469 U.S. 1107 (1985); *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 334-35 (Tex. App.—Dallas 2008, no pet.); *Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 494 (Tex. App.—Fort Worth 1999, pet. denied); *Hartford Ins. Co. v. Jiminez*, 814 S.W.2d 551, 552-53

(Tex. App.—Houston [1st Dist.] 1991, no writ). To be able to complain on appeal about a ruling that excludes your evidence, you must therefore get that evidence in the record by properly completing the steps for an offer of proof. Texas Rule of Evidence 103 describes the basic requirements:

> The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

TEX R. EVID. 103(b).

But the rule tells only part of the story. When an objection to the evidence is asserted, its proponent also needs to specify the purpose for which the evidence is offered and the reason it is admissible. *Ulogo v. Villanueva,* 177 S.W.3d 496, 501-02 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Richards v. Comm'n for Lawyer Discipline*, 35 S.W.3d 243, 251-52 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Estate of Veale v. Teledyne Indus., Inc.*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

In addition, since an offer of proof is in theory an opportunity for the court to change its mind and admit the evidence, the proponent must tender the evidence again, and obtain a ruling, after the offer of proof is completed. *Waldon v. City of Longview,* 855 S.W.2d 875, 880 (Tex. App.—Tyler 1993, no writ); *Winkel v. Hankins,* 585 S.W.2d 889, 892 (Tex. Civ. App.—Eastland 1979, writ dism'd). For the same reason, and as the rule states, the offer must be made before the court's charge is read to the jury. TEX. R. EVID. 103(b); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.,* 766 S.W.2d 264, 274-75 (Tex. App.—Amarillo 1988, writ denied).

The offer of proof must show the "substance" of the evidence at issue; it must be specific enough to allow the reviewing court to determine the admissibility of that evidence. TEX R. EVID. 103(a)(2); *Lone Starr Multi-Theatres. Ltd. v. Max Interests, Ltd.*, 365 S.W.3d 688, 703 (Tex. App. – Houston [1st Dist.] 2011, no pet.); *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 484 (Tex. App.—Dallas 1995, writ denied). For excluded testimony, a complete presentation is therefore not necessary; the offer can be (and perhaps should be) in the form of a concise description of what the witness would have said. *In re N.R.C.*, 94 S.W.3d at 806. Any party or the court may nonetheless require that offered testimony be presented in question and answer form. TEX R. EVID. 103(b).

Excluded exhibits need to be identified, marked, and presented to the court reporter for inclusion in the record. *Owens-Ill., Inc. v. Chatham*, 899 S.W.2d 722, 731 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd); TEX. R. CIV. P. 75a. This should be done even if the exhibit can already be found somewhere in the court's file. *McInnes v. Yamaha Motor Corp.*, 673 S.W.2d at 187; *Malone v. Foster*, 956 S.W.2d 573, 577 (Tex. App.—Dallas 1997), *aff'd*, 977 S.W.2d 562 (Tex. 1998).

Generally speaking, it is reversible error for the court to refuse a party the opportunity to make a timely offer of proof. *State v. Biggers*, 360 S.W.2d 516, 517 (Tex. 1962); *In re Goodwin*, 562 S.W.2d 532, 533 (Tex. App.—Texarkana 1978, no writ). But the error may not be reversible if the appellate court can still determine the nature of the evidence that was excluded or conclude that it was immaterial. *Pennington v. Brock*, 841 S.W.2d 127, 131 (Tex. App.—Houston [14th Dist.] 1992, no writ); *4M Linen & Unif. Sup. Co. v. W.P. Ballard & Co.*, 793 S.W.2d 320, 328 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

In short, when the court has sustained an objection and ruled to exclude your evidence, you should do the following to make an offer of proof, *on the record and before the court's charge is read to the jury*:

1. **Present the "substance" of the excluded evidence.**
2. **For testimony, state a precise summary of what it would be. (Must be in question and answer form with witness on the stand if any party or the court requests.)**
3. **For exhibits, identify them, have them marked, and present them to the court reporter for filing.**
4. **Specify the purpose(s) for which the evidence is being offered.**
5. **Explain why the evidence is admissible.**
6. **Explain how the evidence is relevant and significant to your case.**
7. **Offer the evidence again.**
8. **Get a ruling.**

VI. PRESERVING ERROR IN THE JURY CHARGE

The principal hazard should be noted at the outset: The Texas Supreme Court has repeatedly confirmed that an erroneous charge submitted to the jury without

proper objection essentially becomes the law for that case. In the absence of a proper objection, the evidence will be measured against what *the charge* said the law was—regardless of what the statutes or courts might say the law is. *St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 530 (Tex. 2002); *Wal-Mart Stores, Inc. v. Sturges,* 52 S.W.3d 711, 715 (Tex. 2001); *Osterberg v. Peca,* 12 S.W.3d 31, 55-56 (Tex. 2000). When the trial court submits an erroneous charge over a proper objection, by contrast, the evidence is measured against the charge the trial court *should* have given. *St. Joseph Hosp. v. Wolff,* 94 S.W.3d at 530.

The starting point to preserving complaints about these potentially-critical errors is therefore a thorough understanding of the substantive law on what the charge should tell the jury about the elements of the claims and defenses in the case. One should not simply assume that a rote adaptation of the Texas Pattern Jury Charge ("PJC") will always get it right. The PJC is not a source of law, and it is sometimes wrong or incomplete. *Ford Motor Co. v. Ledesma,* 242 S.W.3d 32, 44-45 (Tex. 2007); *St. Joseph Hosp. v. Wolff,* 94 S.W.3d 513, 530 n.52 (Tex. 2002); *Keetch v. Kroger,* 845 S.W.2d 262, 266-67 (Tex. 1992); *Plas-Tex, Inc. v. U.S.A. Steel Corp.,* 772 S.W.2d 442, 443-44 n.4 (Tex. 1989). Without a solid grasp of what the charge should tell the jury about the issues in your case, what follows on preserving complaints about the court's charge will be largely irrelevant.

The trial court has broad discretion in the preparation and submission of the jury charge. *See Hyundai Motor Co. v. Rodriguez,* 995 S.W.2d 661, 664 (Tex. 1999). The goal of the charge is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely. *Rodriguez,* 995 S.W.2d at 664. Rule 277 directs that, "[T]he Court shall submit such instructions and definitions as proper to enable the jury to render a verdict." TEX. R. CIV. P. 277.

Error in the charge is reversible if it probably caused the rendition of an improper verdict. TEX. R. APP. P. 44.1. Harm may, however, be presumed if the error in the charge prevents the appellant from properly presenting its complaint to the appellate courts. *See* TEX. R. APP. P. 61.1(b); *Crown Life Ins. Co. v. Casteel,* 22 S.W.3d 378, 388-89 (Tex. 2000)(when a trial court submits a single broad-form liability question commingling valid and invalid theories of liability, the error is presumed harmful if an appellate court cannot determine whether the jury based its answer on an invalid theory). *See also Harris County v. Smith,* 96 S.W.3d 230, 233 (Tex. 2002) (applying *Casteel's* analysis of an invalid liability theory to an element of damages not supported by the evidence).

Conceptually, preserving error at the charge stage follows the same basic rules described at the start of this paper. The trial court must be made aware of your complaint with sufficient specificity that it can cure the error if it chooses to do so, and a ruling must be obtained on the complaint. *See Ford Motor Co. v. Ledesma,* 242 S.W.3d 32, 43 (Tex. 2007) ("preservation of error generally depends on whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling")(quoting *State Dep't of Hwys. & Pub. Transp. v. Payne,* 838 S.W.2d 235, 241 (Tex. 1992).

Similarly, your complaints must be presented at a time when the trial court can still correct the charge. This means that, to preserve error, you must either present your requests for inclusion in the charge or object to the court's charge before it is read to the jury. TEX. R. CIV. P. 272. An agreement between the parties to make objections to the charge after the charge is read, even with the court's consent and approval, violates this rule and results in waiver of the objections. *Missouri Pac. R. Co. v. Cross,* 501 S.W.2d 868 872-73 (Tex. 1973). Likewise, objections dictated to the court reporter in the judge's absence are not properly presented and are waived. *Bronthy v. Sprague,* 636 S.W.2d 224, 225 (Tex. App.—Texarkana 1982, writ ref'd n.r.e.). After all, if the judge is not there, he can neither deny the objections nor sustain them and correct the charge.

From these basic points, preserving error concerning the jury charge is governed by a determination of whether the point of contention is an instruction, definition, or question, and whose burden it is on that issue (or more pragmatically, who is relying upon that instruction, definition, or question). An objection stated on the record may be sufficient in some situations, but not others. The same is true of written requests for the inclusion in the charge of instructions and definitions. A broad-form submission may be proper in certain situations, but not others.

A. The Components of the Court's Charge.

The court's charge consists of three ingredients: (1) instructions; (2) definitions; and (3) questions, each of which is subject to somewhat different requirements:

Instructions Instructions fall into two categories—(a) general, *see e.g.* TEX. R. CIV. P. 226a; and (b) specific to that particular case. An instruction is "proper" if it is supported by the pleadings and evidence, accurately states the law, and would assist the jury. *Columbia Rio Grande Healthcare, L.P. v. Hawley,* 284 S.W.3d 851, 856 (Tex. 2009); *Union Pac. RR Co. v. Williams,* 85 S.W.3d 162, 666 (Tex. 2002). On the other hand, if the instruction does not aid the jury in

answering a question, it should not be included in the charge, even if a correct statement of the law. *Tex. Indemn. Co. v. Welch*, 595 S.W.2d 205, 208 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

Some instructions are mandatory and must be included in the jury charge. *See* TEX. R. CIV. P. 226a. In addition, substantive law may require certain instructions be given to the jury. *See e.g.*, TEX. CIV. PRAC. & REM. CODE §§ 18.091, 41.012.

Substantially correct does not mean absolutely correct. "It means [an instruction] that in substance and in the main is correct, *and that is not affirmatively incorrect.*" *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (emphasis added).

"An instruction may cause the rendition of an improper verdict when the instruction singles out the law in a way that would sway the jury in favor of one party, and therefore constitutes a comment on the weight of the evidence or the case as a whole." *Paschall v. Peevey*, 813 S.W.2d 710, 714 (Tex. App.—Austin 1991, writ denied). Incidental comments may be acceptable. *H.E. Butt Grocery Co. v. Bilotto*, 585 S.W.2d 22, 24 (Tex. 1998).

Definitions Like instructions, definitions are intended to help the jurors in answering questions and rendering a verdict. Unless the word or term has a special legal or technical meaning apart from ordinary usage, no definition is necessary.

Questions A party is entitled to have "controlling issues" submitted to the jury for it to answer. *Rodriguez*, 995 S.W.2d at 663 n.7; *Triplex Commc'ns., Inc. v. Riley*, 900 S.W.2d 716, 718 (Tex. 1995). If there is some evidence to support the submission of a controlling question, and the court does not submit it, the court commits reversible error. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); TEX. R. CIV. P. 278. However, it is not error for the court to refuse to submit additional issues or instructions that are mere shades or variations of issues or instructions already contained in the court's charge. TEX. R. CIV. P. 278; *Mayes v. Stewart*, 11 S.W.3d 440, 455 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Only disputed issues should be submitted. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 223 (Tex. 1992). Hence, if the evidence supporting a party's affirmative defenses or claims is undisputed, such claim is conclusively established and does not require submission to the jury. *Id.*

Whenever feasible, "broad-form" questions should be used. TEX. R. CIV. P. 277; *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009); *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 648 (Tex. 1990).

B. Reviewing the Court's Proposed Charge

The trial court is supposed to allow counsel a "reasonable time" in which to examine the charge and present their objections. TEX. R. CIV. P. 272. As every trial lawyer knows, however, application of this rule is sometimes problematic. If the trial court refuses to allow you a reasonable time to examine its proposed charge, you must: (1) object on the record; (2) indicate the amount of time you have been given to review the court's charge (that information will not otherwise appear in the record); (3) indicate how much time you need; (4) explain why the charge is too complex or lengthy for you to examine in the time provided; and (5) explain how the lack of adequate time to examine the charge will prevent you from making a proper record for appeal. *See Dillard v. Dillard*, 341 S.W.2d 668, 675 (Tex. App.—Austin 1960, writ ref'd n.r.e.).

C. The Basic Rules on Preserving Error in the Court's Charge

The governing rules for error preservation in the charge are TEX. R. CIV. P. 271, 273, 276, 277, 278 and 279. The key case for making a correct objection is *State Dep't of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235 (Tex. 1992). Whether one must preserve error by objecting or by tendering a request depends on which party is relying upon the particular instruction, definition, or question. Obviously, however, the safest course is to do both whenever possible; that is: (1) object to what is included in or omitted from the court's proposed charge, and (2) submit in writing the

charge as you believe it should go to the jury (and have the court mark it as "refused").

In an attempt to reduce the complexity of the case law surrounding charge error preservation, the *Payne* court held that "[t]here 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*." 838 S.W.2d at 241 (emphasis added). Generally speaking, one meets this test by following the traditional rules on error preservation.

Beyond the adage "when in doubt do both" (object and request), one should add that clarity is essential. Make your objection or request as clear as possible so the trial court will understand how to cure the alleged error if it wishes to do so, and obtain a ruling.

The "basic" rules for "safe" preservation of complaints about the charge are generally stated as follows—

(1) If it is a question on which the opposing party has the burden of proof—you object. TEX. R. CIV. P. 278

(2) If it is a question on which you bear the burden of proof, tender a proposed question in writing in substantially correct wording. TEX. R. CIV. P. 278

(3) Irrespective of who has the burden of proof, if you want a particular instruction or definition included in the court's charge, tender that instruction or definition in writing, in substantially correct wording. TEX. R. CIV. P. 278

(4) If an instruction or definition in the court's charge is defective, you should object. TEX. R. CIV. P. 274; *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994). It is the application of this rule that worries many attorneys and results in the "object and request" procedure to avoid any accusation of waiver.

(5) If your opponent's cause of action or defense consists of more than one element, and it is not entirely clear that the proposed charge is going to require the jury to find all of those specific elements, object to the omission. Otherwise, the missing element may be deemed found by the jury or can be found by the trial court. TEX. R. CIV. P 279; *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 44 (Tex. 2007); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 836 (Tex. 2000).

(6) Always object on the record to any error, and obtain a ruling.

(7) Make sure your objection identifies the defect and how the trial court could cure it.

1. Preservation of error by requests.

For a definition, instruction, or question on which you have the burden of proof (*i.e.* a definition, instruction, or question on which you hope to base a judgment in your favor), do the following:

1. Submit a *written* request to the court in "substantially correct" wording.
2. Make the request *separate and apart* from your objections to the charge.
3. Tender the requested definition, instruction, or question to the court before the charge is read to the jury.
4. Do not obscure or conceal the submissions you really want by burying them in a collection of unnecessary requests or minute differentiations.
5. Explain on the record why the request is raised by the pleadings, supported by the evidence, and how it will assist the jury in answering the court's charge.
6. For any request the court does not grant, make sure the judge signs it as "Refused" (or, if appropriate, as "Modified").
7. File with the clerk the requests that have been refused (and keep your own file-stamped copies in the event the clerk decides not to put the requests in the official file since they were not "given" – which some clerks have been known to do.)

2. Preservation of error by objection.

If you are objecting to something that is included in – or has been omitted from – the court's proposed charge, do the following:

1. Present your objection either in writing or on the record – before the charge is read to the jury and with the trial court and opposing counsel present.
2. Make your objection separate from your written requests.
3. Distinctly identify what portion of the question, instruction, or definition is objectionable so the court could cure the error.

4. **Explain why that portion of the question, instruction, or definition is defective or erroneous.**
5. **Do not get lazy and incorporate by reference objections you have made to another portion of the charge.**
6. **Do not obscure objections that are important by burying them in a collection of trivial or unfounded objections.**
7. **Get the trial court to rule on your objections.**

3. Broad-form vs. granulated submissions.

In certain situations, it is no longer feasible for the court to submit a single broad-form liability question. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). 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.

The problem of a litigant's inability to show harm on appeal because of a Rule 277 mandated "broad-form" submission lies at the heart of *Casteel.* The principle of that case has been extended both to broad-form damage questions (when at least one listed element of damage is not supported by legally insufficient evidence), single broad-form apportionment questions (when conditioned upon the jury's answers to more than one liability question, including one improperly submitted); and the omission of key instructions. *See Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002); *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005); and *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 865 (Tex. 2009).

If you intend to preserve an argument based upon *Casteel*, the objection is critical. The safer practice is not to rely upon a mere "no evidence" objection. More should be added:

1. **Before the charge is read to the jury, object to the broad-form submission on grounds it is not "feasible;"**
2. **Identify the legally invalid theory, unsupported claim of liability, or unproven element of damage that has been improperly commingled with others;**
3. **Explain that, because of the broad-form submission, you will not be able to demonstrate harm on appeal in the event you are correct about the improperly submitted theory, claim, or element of damage.**
4. **Get a ruling on your objection.**

VII. PRESERVING ERROR IN CLOSING ARGUMENT

To preserve error, you must make a timely objection to any improper argument and ask the court to instruct the jury to disregard it. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-41 (Tex. 1979). If the trial court sustains your objection and gives such an instruction, however, you will then have no adverse ruling about which to complain unless you also move for a mistrial. TEX. R. APP. P. 33.1.

Without these steps, you will have no complaint on appeal except when the argument was so outrageously improper it will be regarded as "incurable." In that rare event, no instruction to the jury could have remedied the prejudice, so whether an instruction was requested or given will be deemed irrelevant. A complaint of *incurable* jury argument can be preserved by raising it for the first time in a motion for new trial. TEX. R. CIV. P. 324(b)(5).

Truly incurable jury arguments are uncommon, however. Examples are generally limited to such things as appeals to racial, ethnic, or religious bigotry. *See, e.g. General Motors Corp. v. Iracheta*, 161 S.W.3d 462, (Tex. 2005) (plaintiff stood and thanked the all-Hispanic jury in Spanish); *Tex. Employers' Ins. Ass'n. v. Haywood*, 266 S.W.2d 856, 858 (Tex. 1954) (argument that defendant's witnesses were "yellow nigs" rather than "white fellows . . . that you could believe"); *Showbiz Multimedia, LLC v. Mountain States Mortgage Centers, Inc*., 303 S.W.3d 769, 771-72 (Tex. App. – Houston [1st Dist.] 2009, no pet.) (accusing plaintiff from India of "judicial terrorism"); *Tex. Employers' Ins. v. Guerrero*, 800 S.W.2d 859, 862-66 (Tex. App. – San Antonio 1990, writ denied) (veiled appeal to ethnic solidarity); *Tex. Employers' Ins. Assoc. v. Jones*, 361 S.W.2d 725, 727 (Tex. App. – Waco 1962, writ ref'd n.r.e.) (appeal to religious prejudice).

An incurable jury argument is one that undermines the fairness of the judicial system itself:

> [J]ury argument that strikes at the appearance of and actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also

> because of its capacity to damage the judicial system. Such argument is not subject to the general harmless error analysis.

Living Ctrs. of Tex., Inc. v. Peñalver, 256 S.W.3d 678, 681 (Tex. 2008).

Because it is seldom apparent that an improper argument will be treated as incurable, the following steps should be taken to preserve the complaint if you believe your opponent has crossed the line during closing argument:

1. **Promptly object to the improper argument. If possible, explain not only why the argument is improper, but why it strikes at the basic impartiality, equality, and fairness of the court system.**
2. **If the court sustains the objection, request the court to strike the argument and instruct the jury to disregard the argument.**
3. **If the court does instruct the jury to disregard, move for a mistrial.**

VIII. PRESERVING ERROR IN THE VERDICT

If the jury returns a verdict that leaves questions in the charge unanswered or gives answers that are inconsistent or in conflict, this must be brought to the court's attention before the jury is released.[5] The jury can then be instructed accordingly and retired for further deliberations to fix the problem:

> If the purported verdict is defective, the court may direct it to be reformed. If it is incomplete, or not responsive to the questions contained in the court's charge, or the answers to the questions are in conflict, the 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.

Any objection to incomplete or conflicting answers must be made before the jury is discharged; otherwise, the complaint is waived. *Fleet v. Fleet*, 711 S.W.2d 1, 2-3 (Tex. 1986) (incomplete answers); *Cont'l Cas. Co. v. Street*, 379 S.W.2d 648, 650-51 (Tex. 1964) (incomplete answers); *Beard v. Commission for Lawyer Discipline*, 279 S.W.3d 895, 904 (Tex. App. – Dallas 2009, pet. denied) (conflicting answers); *Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 861 (Tex. App.—Fort Worth 2003, pet. denied) (conflicting answers); *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied) (conflicting answers); *Roling v. Alamo Group, Inc.*, 840 S.W.2d 107, 109-10 (Tex. App.—Eastland 1992, writ denied).

Once the jury has been discharged, it cannot be recalled for further deliberations. *Archer Daniels Midland Co. v. Bohall*, 114 S.W.3d 42, 47 (Tex. App.—Eastland 2003, no pet.); *Branham v. Brown*, 925 S.W.2d 365, 368 (Tex. App.—Houston [1st Dist.] 1996, no writ).

If the jury is retired for further deliberations over the objection of either party, the record must contain both the original and subsequent verdicts in order for the appellate court to assess whether it was appropriate for the trial court to do so. *Archer Daniels Midland Co. v. Bohall*, 114 S.W.3d 42, 47 (Tex. App.—Eastland 2003, no pet.); *Waltrip v. Bilbon Corp.*, 38 S.W.3d 873, 876 (Tex. App.—Beaumont 2001, pet denied).

You should do the following as soon as the jury returns its verdict and *before it is released*:

1. **Review the verdict to ensure that the jury has answered all of the questions it needed to answer.**
2. **Ensure that none of the answers conflict with each other.**
3. **Object on the record if the answers are incomplete or in conflict.**
4. **Request that the jury be instructed to cure the deficiency and retired for further deliberations to do so.**
5. **If you *oppose* having the jury retired for further deliberations: (a) state your opposition on the**

[5] Note the distinction between this situation, where the jury leaves a question in the charge unanswered, and the situation where the charge *omitted* part of a question that the jury does answer. If the charge failed to include one or more elements of a claim or defense that was submitted to -- and found by -- the jury, it may be possible for the trial court to provide the finding(s) on the omitted element(s) if neither party brought that omission to the court's attention before the jury was retired. *See* TEX. R. CIV. P. 279. This is a narrowly-tailored remedial measure and should not be relied upon to preserve error.

> **record, and (b) make sure that both the original verdict and any subsequent verdict are included in the record.**

IX. CONCLUSION

The preceding discussion, while admittedly cursory and incomplete, should nonetheless cover most trial situations during which it might be necessary for you to preserve error. Following these checklists, and keeping in mind the basic principles at the start of this paper, should ensure that you preserve the right to complain on appeal about any trial court rulings you contend were improper.