

PJC 226.1 Preservation of Error (Comment)

Error in the court's charge on questions, definitions, and instructions is preserved through substantially correct jury charge requests and specific and distinct objections before submission of the charge to the jury. Tex. R. Civ. P. 272–74, 278. Traditionally, requests and objections serve different purposes and are not interchangeable. As a general rule, if the error is reached by objection, a request is not required and, if submitted alone, may not preserve the error; whereas if a request is essential, an objection is not needed and, if submitted alone, may not preserve the error. *See Lyles v. Texas Employers' Insurance Ass'n*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.).

The Supreme Court of Texas proposed a less restrictive interpretation of the rules for preserving jury charge error in *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235 (Tex. 1992). There the court said that the one test for determining whether a party preserved error in the jury charge is “*whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.*” *Payne*, 838 S.W.2d at 241 (emphasis added). However, it is not always clear from case to case whether a reviewing court will apply this more liberal standard for preservation of error or a more strict enforcement of rules 271 through 279 of the Texas Rules of Civil Procedure. *See, e.g., Texas Workers' Compensation Insurance Fund v. Mandlbauer*, 34 S.W.3d 909, 911–12 (Tex. 2000) (applying more strict interpretation of rules 277 and 278); *Universal Services Co. v. Ung*, 904 S.W.2d 638, 640 (Tex. 1995) (applying more strict interpretation of requirements for preserving jury charge error); *In re F.L.R.*, 293 S.W.3d 278, 282 (Tex. App.—Waco 2009, no pet.) (collecting cases that have applied more strict interpretation of rule 278). Therefore, one should attempt to satisfy the Texas Rules of Civil Procedure, as set out below.

Objections. The written jury charge, as signed by the court and filed with the clerk, must be submitted to the parties so that they have a reasonable opportunity to inspect the charge outside the presence of the jury in order to make their objections. Tex. R. Civ. P. 272. These objections must be made before the charge has been read to the jury, must be either in writing or dictated to the court reporter in the presence of the court and opposing counsel, and must distinctly point out what is objectionable and why it is objectionable. Tex. R. Civ. P. 272, 274. Objections to one part of the charge may not be applied to any other part of the charge by reference only, and the objections must not be obscured by too many unfounded objections, too many unnecessary requests, or small differentiations in the wording. Tex. R. Civ. P. 274. A judgment will not be reversed because the charge failed to submit different phases or shades of the same question. Tex. R. Civ. P. 278. Failure to comply with these standards may result in waiver of the objection, and failure to properly raise the objection may waive complaints about defects in the charge or in the pleadings. Tex. R. Civ. P. 272, 274.

Requests. During the period after the charge has been provided to the parties but before the charge is read to the jury, there must also be a separate opportunity apart from the objection process during which either party can tender to the court and to opposing counsel written questions, definitions, and instructions proposed to be submitted to the jury. Tex. R. Civ. P. 273. If these proposed questions, definitions, and instructions are not submitted as requested, the court must sign and endorse each written proposal as “refused” or “modified as follows: [stating the modification] and given, and exception allowed,” and such a written ruling preserves the right to appellate review of the decision by establishing that all requirements have been met. Tex. R. Civ. P. 276. If the party relying on a question has not tendered it in writing and in substantially correct wording, its exclusion from the charge will not be preserved for appeal; and if a party

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is complaining of a judgment on grounds that it was denied the submission of an instruction or definition, the party has not preserved that error for appellate review unless it has tendered the instruction or definition in writing and in substantially correct wording. Tex. R. Civ. P. 278.

Questions. A *request for submission* is the method of preserving the right to complain of the omission of, or the failure to submit, a question that is relied on by the complaining party. Tex. R. Civ. P. 273, 278. *Objection* is the proper method of preserving a complaint about (1) a question actually submitted but claimed to be defective, immaterial, unnecessary, or superfluous (Tex. R. Civ. P. 274) or (2) failure to submit a question, when the ground of recovery or defense is relied on by the opposing party (Tex. R. Civ. P. 278). *See Lyles*, 405 S.W.2d at 727.

Definitions and instructions. A *request for submission* is the required method of preserving the right to complain of an omitted definition or instruction (regardless of which party relies on the related question). Tex. R. Civ. P. 278. If the definition or instruction is given but is claimed to be defective, immaterial, unnecessary, or superfluous, *objection* is the proper means of preserving complaint. Tex. R. Civ. P. 274. A request for submission may not be used in place of an objection to point out a defect in, or preserve a complaint to, a submitted definition or instruction. A request embodying an element omitted from a definition or instruction will not be given effect as an objection under Tex. R. Civ. P. 274. *Lyles*, 405 S.W.2d at 727.

Procedure for preserving error. Procedurally, error is preserved on problem charges through the following steps.

For requests:

1. Tender the request in writing in substantially correct form. Tex. R. Civ. P. 278.
2. Have the court mark the request “Refused.” Tex. R. Civ. P. 276.
3. Have the request signed by the court and filed with the clerk. Tex. R. Civ. P. 272.

For objections:

1. Object specifically and distinctly to the charge’s omissions and defective or immaterial submissions. Tex. R. Civ. P. 274.
2. Have the court rule on the objection. Tex. R. Civ. P. 272.

A draft jury charge filed pretrial generally will not preserve error. *But see Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451–52 (Tex. 1995) (holding that under facts presented, error preserved by proposed charge submitted as trial began and objection made at charge conference).

Waiver of grounds. On appeal, all independent grounds of recovery or defense not conclusively established under the evidence and no element of which is submitted or requested are waived. Tex. R. Civ. P. 279.

Express or deemed findings. When a ground of recovery or defense consists of more than one element, if one or more of the elements necessary to sustain the ground and necessarily referable to it are submitted to and found by the jury, and one or more of the elements are omitted from the charge without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered make and file written findings on the omitted element or elements in support of the judgment. If no such written findings are made, the omitted element or elements shall be deemed found by the court in such manner as to support the judgment. Tex. R. Civ. P. 279.

Unanswered questions. Failure to object to the acceptance of a jury verdict in which some questions are unanswered constitutes a waiver of the right to have them answered. *Osterberg v. Peca*, 12 S.W.3d 31, 56 (Tex. 2000); *Continental Casualty Co. v. Street*, 379 S.W.2d 648 (Tex. 1964).