Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge

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REVISION AND RECODIFICATION OF THE
TEXAS RULES OF CIVIL PROCEDURE
CONCERNING THE JURY CHARGE

WILLIAM V. DORSANEÔ, III*

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I. INTRODUCTION

The primary purpose of this article is to discuss and explain why the Texas Rules of Civil Procedure concerning the trial court's charge to the jury should be replaced by a new set of procedural rules initially developed by a Jury Charge Task Force appointed by the Texas Supreme Court in 1991. As seminared, amended, and recommended for adoption to the Texas Supreme Court by the Supreme Court Advisory Committee in 1996, these proposed rules, or comparable ones, should be promulgated by the Texas Supreme Court. Revision of the jury charge rules is desirable because the procedures for preserving complaints about the court's proposed charge are unsatisfactory and inconsistent with current standards for submitting cases to juries. More significantly, the main focus of the existing rules concerning the methods for making charge complaints is on the technical sufficiency of a complaint to preserve a party's complaint for appellate review, rather than providing trial judges with reasonable guidance in fashioning the jury charge. The method in which charge complaints are presented, in whatever form, should be sufficiently specific to apprise the trial court of the charge problem and to enable trial judges to prepare proper jury charges, not merely to lay the basis for an appeal. Reinterpretation of the existing rules during the last decade has eliminated some problems, but the current rules, even as reinterpreted in a common-sense manner, are unworkable as well as philosophically wrongheaded.

II. THE PROCESS OF REVISION AND RECODIFICATION

On June 19, 1991, the Texas Supreme Court appointed four Task Forces to consider changes in the rules of procedure in Texas courts: (1) the Task Force on the Jury Charge, (2) the Task Force on Discovery, (3) the Task Force on Sanctions, and (4) the Task Force on the
Revision of the Texas Rules of Civil Procedure.\(^1\) Three of the Task Forces were appointed to study specific problem areas. The Task Force on the Jury Charge was charged by the court to study, consult with such other interested persons as may seem appropriate, and report to the Supreme Court Advisory Committee ("Advisory Committee") what changes, if any, should be made to the *Texas Rules of Civil Procedure* governing the jury charge.\(^2\) The Task Force on Discovery was assigned to study, consult with such other interested persons as may seem appropriate, and report to the Advisory Committee what changes, if any, should be made to the procedural rules governing the scope and conduct of discovery.\(^3\) The Task Force on Sanctions was appointed to perform the same function, and report to the Advisory Committee "as soon as practicable" concerning the procedural rules governing the imposition of sanctions.\(^4\)

The Texas Supreme Court also appointed a separate Task Force on the Revision of the Texas Rules of Civil Procedure to study, consult with such other interested persons as may seem appropriate, and report directly to the court as soon as practicable whether those rules should be recodified into a more coherent and easily usable body, either with or without substantive changes.\(^5\)

Each of the special purpose Task Forces completed their assigned work and reported their conclusions to the Advisory Committee within a few years of their respective appointments. The Jury Charge Task Force was the first to complete its written report, which was submitted in April, 1993.\(^6\) The Task Force on the Revision of the Texas Rules of Civil Procedure completed and submitted a detailed

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4. Id. *The following persons were appointed to the Task Force on Sanctions: Charles F. Herring, Jr., Chairman, Lisa Blue, Herbert Boyland, The Honorable Scott A. Brister, Carlyle H. Chapman, Jr., Elizabeth A. Crabb, Russell H. McMains, Elizabeth G. Thornburg, and Robert A. Valadez."
6. See App. A.
written report to the Texas Supreme Court on November 8, 1993. The chairpersons of each task force presented the recommendations contained in the written reports at the November 1993 meeting of the Supreme Court Advisory Committee. Thereafter, the Advisory Committee met every other month until it substantially completed an entirely new draft of the Texas Rules of Civil Procedure—the "Recodification Draft"—in late 1997.

On June 5, 1995, the Advisory Committee submitted its own "final" jury charge report to the Texas Supreme Court. On May 6, 1996, Lee Parsley, Rules Staff Attorney for the Court, returned the jury charge rules as revised by the court to the Advisory Committee. As reflected in correspondence dated May 27, 1996, directed to the court by Luther H. Soules, III, Chairman of the Advisory Committee, the committee reviewed and discussed the court’s revisions and recommended two changes to the court's draft rules. The committee's draft jury charge rules were incorporated into the Recodification Draft, where they remain and await further action.

7. See William V. Dorsaneo, III, Southern Methodist University School of Law (visited Apr. 12, 2000) <http://www.smu.edu/~wdorsane>. The Task Force on the Revision of the Texas Rules of Civil Procedure reported that wholesale recodification of the Texas Rules of Civil Procedure was feasible and desirable, and recommended the ultimate adoption of an entirely new rulebook. See id.
8. See Texas Supreme Court Advisory Committee transcript, November 20, 1993, at 10–626.
9. The Recodification Draft incorporates the work product of the special purpose Task Forces as reviewed, revised, rejected, or replaced by the Advisory Committee's own reports from the date of their submission through the end of 1997, when the Advisory Committee disbanded. See App. E. The "Recodification Draft," as reported to the court in late 1997, is also located on Professor Dorsaneo's website. See William V. Dorsaneo, III, Southern Methodist University School of Law (visited Apr. 12, 2000) <http://www.smu.edu/~wdorsane>. After a two-year hiatus, during which the court functioned without a formally constituted Supreme Court Advisory Committee, a new committee was appointed in late 1999. Unfortunately, the court's own efforts to revise the procedural rulebook met with substantial political opposition by legislators who were annoyed by the court's adoption of a revised set of Discovery Rules in late 1998 while the Legislature was not in session. This opposition has made the court more circumspect and has placed the Recodification Draft in political limbo.
10. See App. B.
11. See App. C.
12. See App. D. The Supreme Court Advisory Committee suggested eliminating the comment to Rule 278 and changed the last sentence of Rule 278(a) to read: "Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection which gives the court reasonable guidance is made pursuant to paragraph (b)." (changes emphasized).
13. See App. E.
III. THE NEED FOR SUBSTANTIVE REVISION OF THE JURY CHARGE RULES

Broad-form jury questions became appropriate in all cases on September 1, 1973.14 For a number of years before then, Texas courts were required by law to use an excessively complex method for submitting civil cases to juries.15 The former practice required the use of specific questions to submit the elements of claims and defenses raised by the pleadings and the evidence, accompanied by instructions and definitions of legal terms contained in the questions.16 In the older system, questions, definitions, and instructions performed distinctly different functions.17 Broad-form submission reduces the number of jury questions, expands the breadth of the questions submitted, and increases the role of accompanying instructions and definitions by enabling the jury to understand the questions submitted and thereby render a verdict without undue confusion.18

Despite its many benefits, the adoption of broad-form jury submission practice created problems for courts and practitioners, concerning the division of labor among jury questions, definitions and instructions, and the proper method of preserving complaints concerning the jury charge for appellate review.19 On January 1, 1988, submission of broad-form questions in jury cases was made mandatory rather than discretionary.20 The Texas Rules of Civil Procedure addressing preservation of charge complaints, however, were not also revised to correspond to the new method of broad-form submission. Due to this shortcoming, courts and practitioners were left with the extremely difficult task of using complex complaint preservation rules originally designed to apply to a fundamentally different method of submitting civil cases to juries in an entirely new context.21

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15. See Dorsaneo, supra note 14, at 600–09.
16. See id. at 605–07. Each individual issue was required to be submitted “distinctly and separately.”
17. See id. at 604 (discussing early Texas practice).
18. See id. at 609.
19. See Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass’n, 710 S.W.2d 551, 555 (Tex. 1986) (holding that although submission of “broad form” issues should be combined with submission of “appropriate accompanying instructions,” failure to do is not reversible error per se).
20. See TEX. R. CIV. P. 277 (first sentence) (“In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.”).
21. Although this problem was recognized by the members of the Supreme Court Advisory Committee shortly after the new broad-form rules were promulgated, an earlier
IV. THE FLAWED ORGANIZATION OF THE JURY CHARGE RULES

The procedural rules concerning the preparation and submission of the trial court’s charge to the jury are currently found in Rules 271 through 279.22 From the time of their original promulgation in 194023 through today, these nine rules have been disorganized and deal with complaints concerning the jury charge in a confusing manner.24 The four principal rules developed by the Jury Charge Task Force are designed to remedy this organizational problem by using separate rules containing titled sub-headings and sub-paragraphs to cover the principal subjects of (a) how and when the jury should be charged,25 (b) the standards for the charge,26 (c) the preservation of appellate complaints,27 and (d) the treatment of omissions from the charge.28

As explained below,29 this straight-forward reorganization of the principal jury charge rules was embraced by the Advisory Committee and appears to have been tentatively approved by the Texas Supreme Court when the court’s revised draft rules were resubmitted to the Advisory Committee on May 6, 1996.30

As incorporated in the Recodification Draft, the proposed rules are a vast improvement over the current rules, because they are better effort to revise the rules concerning the preservation of complaints was met with substantial political opposition and was ultimately defeated. The proposed rules embraced an “object-only” system that was perceived to unfairly burden the trial judge with the responsibility for preparing the charge. As argued in this article, the important question is not whether preservation requires a request or objection, but whether charge complaints, in whatever form, are adequate to provide the trial court with reasonable guidance in fashioning the charge.

23. Act of May 9, 1939, 46th Leg., 1st C.S., ch. 25, 1939 Tex. Gen. Laws 201 (amended 1973) (current version at TEX. R. CIV. P. 271-279). Although the jury charge rules were subjected to more revision than virtually any other part of the original rulebook, the general organization of the charge rules followed the statutory organization of articles 2184-2190 of the Revised Civil Statutes of 1925, from which the original Texas Rules of Civil Procedure were taken.
24. For example, no one rule provides for the manner of preserving complaints about the charge. Although Rule 278 contains most of the information, Rules 273-276 also cover this subject. See TEX. R. CIV. P. 273-276, 278. Because the coverage overlaps, it is sometimes difficult to determine whether preservation of charge complaints requires an objection, a written charge request, or both.
29. See discussion infra Part XII.
30. See App. C.
organized, and contain procedures that facilitate both the preparation of a proper jury charge and the preservation of charge complaints in a manner that is in tune with modern jury submission practice.

V. A SUMMARY OF THE TRADITIONAL PRESERVATION RULES

The most significant and controversial of the proposed rules prescribes the procedures for preserving complaints concerning the jury charge.31 For more than fifty years, the Texas procedural rules have divided the practice of preserving complaints at the charge stage by requiring either objections or written charge requests.32 Objections are required if the alleged defect in the charge involves submitted questions, definitions, or instructions. If, however, the complaint involves an omission from the charge, rather than a defect in a submitted question, definition, or instruction already included within a proposed charge, a written charge request has been required, unless the omitted matter constituted part of a ground of recovery or defense relied upon by another party.34 Under this approach, the complexity of the specific methods for preserving complaints has been a hallmark of Texas practice.

Because objections and requests serve different purposes,35 it has been essential that the practitioner develop an understanding about when each method is required to preserve complaints about charge error. Otherwise, under the traditional Texas philosophy concerning the respective roles of the court and counsel, the complaint was waived if the wrong procedural mechanism was used, because the trial judge had no obligation to respond to a complaint that was not made in the proper form, even if the judge understood the complaint and could have remedied the problem.36

In *Lyles v. Texas Employers' Insurance Ass'n*, the basic rules were summarized by Justice/Professor Wilson37 as follows:

Although it is now well established, we repeat that under Rules 273, 274, 276, and the first paragraph of Rule 279 [now Rule

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32. See *Lyles v. Texas Employers' Ins. Ass'n*, 405 S.W.2d 725 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (explaining respective roles of objections and charge requests).
33. See *id.* at 727.
34. See *id*.
35. See *id*.
36. See discussion infra Part VI(A)–(B).
37. Justice Frank Wilson served as a justice on the Waco Court of Appeals for a number of years and also taught procedure courses at Baylor University School of Law. It is widely believed that the *Lyles* opinion was actually written for his students.
278], a request for submission is the method of preserving the right to complain of omission of, or failure to submit an issue [question] which is relied on by the complaining party. Objection, however, is the proper method of preserving complaint as to (1) an issue [question] actually submitted, but claimed to be defective; or (2) failure to submit, where the ground of recovery or defense is relied on by the opposing party.

In the case of explanatory instructions and definitions: if they are omitted, under Rule 279 a request is prerequisite to complaint of the omission by any party, irrespective of reliance on an issue. If the definition is given, but is claimed to be defective, under Rule 274 objection is the means of preserving the complaint.

A request for submission is not an available alternative to an objection as a means of pointing out a defect in, or preserving a complaint to a submitted definition or instruction. The request embodying an element omitted will not be given effect as an objection under Rule 274.38

Thus, each party has the burden to request the submission of the elements of claims or defenses and cannot preserve any complaint as to the omission of elements or claims relied upon by the complaining party without making a proper request in the appropriate manner.39 As noted in the quotation, however, an objection to the non-submission of an element of a ground of recovery or defense relied upon by an opposing party preserves the right to submission of the omitted matter.40 Otherwise, under TEXAS RULE OF CIVIL PROCEDURE 279, if elements, which constitute only a part of a complete and independent ground, are omitted, but other elements necessarily referable to that ground are submitted and answered, the omitted elements are deemed found in support of the judgment, if no objection or request is made and the questions are supported by factually sufficient evidence.41 Finally, the failure to request any of the necessary elements of a party’s claim or defense results in a complete waiver of that claim or defense under Rule 279.42

38. Lyles, 405 S.W.2d at 727.
39. See id. Under the provision of TEXAS RULE OF CIVIL PROCEDURE 279, an independent ground of recovery or defense not conclusively established by the evidence is waived if no issue thereon is given or requested.
40. See id.
41. See TEX. R. CIV. P. 279; See also Ramos v. Frito-Lay, Inc., 784 S.W.2d 667, 668 (Tex. 1990).
42. See Strauss v. LaMark, 366 S.W.2d 555, 557 (Tex. 1963).
VI. THE SPECIFIC REQUIREMENTS OF THE CURRENT PROCEDURAL RULES

A. Separation of Objections and Requests

TEXAS RULE OF CIVIL PROCEDURE 273 expressly requires that requests for questions, definitions, and instructions must be submitted "separate and apart" from objections to the court’s charge.43 Under this approach, mixing requests with objections destroys the efficacy of the requests as a method for preserving complaints about the jury charge. For example, in Templeton v. Unigard Security Insurance Co.,44 the Texas Supreme Court held that the plaintiff’s submission of an objection to the court’s charge with a request for the submission of a question in one document, entitled "Plaintiffs Objections and Exceptions to the Court’s Charge," resulted in the waiver of the request.45 Similarly, in Woods v. Crane Carrier Co.,46 the plaintiff dictated his requested definition of "unreasonably dangerous" to the court reporter at the charge conference during the process of making objections to the proposed jury charge.47 The Texas Supreme Court held that the objection containing a requested instruction was properly overruled by the trial court because it was not in writing, as required by TEXAS RULE OF CIVIL PROCEDURE 279, and was not made separate and apart from the plaintiff’s objections, as required by TEXAS RULE OF CIVIL PROCEDURE 273.48 This "form over substance" approach to the preservation process was justified on the theory that the trial judge does not have a fair opportunity to consider the merits of charge requests that are incorporated into objections made orally during the charge conference.49 In other words, the Texas Supreme Court demanded strict adherence to formal requirements to provide the trial judge a fair opportunity to comprehend the party’s complaint. Not surprisingly, the formal requirement that objections and requests must be kept separate from each other was applied strictly by many courts for a number of years.50 More recently, the Texas Supreme Court has embraced a common sense interpretation of

43. TEX. R. CIV. P. 273.
44. 550 S.W.2d 267 (Tex. 1976).
45. Id. at 269.
46. 693 S.W.2d 377 (Tex. 1985).
47. Id. at 379.
48. See id.
49. See id.
50. See supra notes 40–46 and accompanying text.
TEXAS RULE OF CIVIL PROCEDURE 273, which demands more from Texas trial judges.¹

B. Making the Right Form of Complaint

Under traditional practice, as previously demonstrated in the Lyles quotation, requests for submission and objections performed distinct functions in the complaint preservation process.² That is, a request for a correct substitute question, definition, or instruction would not preserve a complaint if an objection should have been made to the trial court's proposed charge.³ Similarly, an objection to the omission of a definition or instruction from the charge would not preserve the complaint, because TEXAS RULE OF CIVIL PROCEDURE 278 usually requires a request for submission of omitted matter to be made in writing and in substantially correct form.⁴ Although the procedural rules were probably never intended to require both an objection and a request,⁵ some appellate courts have reached the conclusion that both an objection and a request are necessary to preserve a complaint concerning omitted material; in other words, they held that Rule 278's requirement as to omitted material is in addition to Rule 274's requirement for proper objections.⁶ This interpretation of the

¹. See Dallas Mkt. Ctr. Dev. v. Liedeker, 958 S.W.2d 382, 383 (Tex. 1997) (rejecting the approach that a "trial court's endorsement is a prerequisite to preservation of error, or that the trial court's failure to comply with [Rule 276] waives the requesting party's complaint"); Alaniz v. Jones & Neuse, Inc., 907 S.W.2d 450, 451–52 (Tex. 1995) ("While Payne does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them."); see also discussion infra Part IX.

². See supra note 35 and accompanying text.

³. See id.; see also, e.g., Hernandez v. Montgomery Ward & Co., 652 S.W.2d 923, 925 (Tex. 1983) (holding that because objections and requests are not alternatively permissible methods of complaining, the tender of a correct question does not preserve the complaint when a defectively framed question is contained in the court's charge); Johnson v. State Farm Mut. Auto. Ins., 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied) (holding that tender of requested question is not a substitute for an objection and does not preserve error as to defective submission; failure to object to the defective submission of a question is considered a waiver of the defective submission) (citing Allen v. American Nat'l Ins. Co., 380 S.W.2d 604, 609 (Tex. 1964)).

⁴. See TEX. R. CIV. P. 278; see also Woods v. Crane Carrier Co., 693 S.W.2d 377, 379 (Tex. 1985).

⁵. See TEX. R. CIV. P. 273 (requiring that requests and objections be made separately).

⁶. See TEX. R. CIV. P. 274; see also, e.g., Gilgon v. Hart, 893 S.W.2d 562, 566 (Tex. App.—Corpus Christi 1994, writ denied) (explaining that the rules should be interpreted to require the complaining party to tender remedial language); National Fire Ins. v. Valero Energy Corp., 777 S.W.2d 501, 508 (Tex. App.—Corpus Christi 1989, writ denied) (holding
current procedural rules has some support in the ambiguous wording of TEXAS RULE OF CIVIL PROCEDURE 274, which states that "[a]ny complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections." However, aside from an apparent inconsistency of an interpretation requiring both an objection and a request with TEXAS RULE OF CIVIL PROCEDURE 273's requirement that objections and requests to the charge must "be separate and apart," such an interpretation of the procedural rules can be used to justify a trial court's refusal to submit a proper written charge on technical grounds, as if no objection had been made, even if the trial court record shows that the trial judge considered and refused the request.

As the excerpt from the Lyles case also shows, it was once the standard interpretation of the current procedural rules that if a trial court failed to submit an element relied upon by the other side, a request would not preserve the complaint, such that the failure to object to non-submission would waive the right to jury trial. For example, in Morris v. Holt, the defendant requested omitted questions relied on by the plaintiff. The trial court refused to submit the requested questions, and, on appeal, the court of appeals held that the defendant's written request for submission was not sufficient to preserve the complaint. That is, the defendant was required to object to the charge that "it is the complaining party's burden both to object to the charge and tender ... instruction in substantially correct form"); Texas Cookie Co. v. Hendricks & Peralta, 747 S.W.2d 873, 878 (Tex. App.—Corpus Christi 1988, writ denied) (stating if a court fails to include a limiting instruction, the complaining party must both object to and correct the written instructions); see also Riddick v. Quail Harbor Condominium Ass'n, 7 S.W.3d 663, 674–75 (Tex. App.—Houston [14th Dist.] 1999, no writ) (discussing the three step process of tendering an instruction in writing prior to submission, specifically objecting to any omission, and obtaining a ruling from the court to preserve errors in the omission of an instruction relied upon by a requesting party); Jim Howe Homes v. Rogers, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) ("If the court fails to include in the charge a limiting instruction on damages, the complaining party must object to the charge and tender a written instruction in substantially correct wording on the proper measure of damages.").

57. TEX. R. CIV. P. 274; see also Yellow Cab & Baggage Co. v. Green, 277 S.W.2d 92, 93 (Tex. 1955) ("When the court's charge contains no instruction, the complaining party must accompany his clear and specific objections to such omission with a substantially correct definition or explanatory instruction.").
58. TEX. R. CIV. P. 273.
59. See supra note 35 and accompanying text.
60. See Jon-T Farms, Inc. v. Goodpasture, Inc., 554 S.W.2d 743, 751 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).
61. 714 S.W.2d 311 (Tex. 1986).
62. See id. at 312.
63. See id.
for failure to submit a question relied upon by the plaintiff. The Texas Supreme Court disagreed, and held that the defendant’s request for submission was sufficient to preserve the complaint under Rule 279. The Texas Supreme Court followed the San Antonio Court of Appeals’ reasoning in Clarostat Manufacturing, Inc. v. Alcor Aviation, Inc. as follows:

[T]here is nothing in the Rule to support the conclusion that an objection is the only way of calling such omission to the attention of the trial court. Rule 279 [now Rule 278] requires tender of an issue in substantially correct form, but then goes on to provide that where the omitted issue is one relied upon by the opposing party, an objection shall be sufficient. A statement to the effect that an objection is “sufficient” cannot be construed reasonably as a statement to the effect that an objection is “the sole method by which the error can be preserved.” All the Rule says is that when the omitted issue is an issue relied on by the opponent, it shall be necessary to tender an issue in substantially correct form. It does not say that in case of such an omission the tender of an issue in substantially correct form is insufficient. The purpose of the Rule is to place a more onerous burden on the party relying on the omitted issue than on the opponent. There is nothing in the language to indicate that a party who notes the omission of an issue relied on by his opponent cannot call the omission to the court’s attention by tendering the omitted issue for submission.

Thus, a party may preserve complaints regarding an opponent’s omitted question through either an objection or by a request.

Another longstanding exception to the traditional rule that objections and requests are not alternative mechanisms for preserving charge complaints concerns the placement of the burden of persuasion to be used by the jury to answer the trial court’s jury questions. Because the failure to fix the burden of proof can be cured either by changing a question or by adding an instruction, either type of complaint has been recognized as sufficient for some time. Thus, if the trial court fails to place the burden of proof in the charge, the defect is considered an omission that can be preserved by an objection. For example, in City of Austin v. Powell, the Texas Supreme Court held

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64. See id.
65. See id. at 312–13.
66. 544 S.W.2d 788 (Tex. Civ. App.—San Antonio 1976, writ ref’d n.r.e.).
67. Morris, 714 S.W.2d at 312–13 (quoting Clarostat, 544 S.W.2d at 794).
68. See City of Austin v. Powell, 156 Tex. 610, 613, 299 S.W.2d 273, 275 (1957).
69. See id.
70. Id.
that the submission of a special issue that failed to fix the burden of proof on either party was an error that could properly be complained of either by an objection or by a written request for an instruction that properly placed the burden of proof. The court reached this conclusion because the placement of the burden of proof on the appropriate party could be accomplished in a jury question or in accompanying instructions.

Prior to the adoption of broad-form submission, complaints about jury questions, instructions, and definitions normally could not be resolved except by changing or omitting the flawed question, instruction or definition. Thus, despite these exceptions, the complaint preservation rules prescribed specific procedural mechanisms for preserving charge complaints about the separate components of the court’s proposed charge. Under this reasoning, until the Texas Supreme Court’s decision in *Spencer v. Eagle Star Insurance Co. of America,* it was widely believed that a submitted question could not be challenged by an objection that the charge failed to include an instruction or definition necessary to make the question meaningful and accurate under the substantive law, because such a complaint really concerned the omission or defective submission of the definition or instruction, rather than a flaw in the question.

C. Specificity of Objections

**TEXAS RULE OF CIVIL PROCEDURE 274** provides that objections must “point out distinctly the objectionable matter and the grounds of the objection.” However, there is considerable controversy about how informative a party’s objection must be to preserve the party’s complaint. There is a general agreement that a party waives a complaint to a defective question unless the objection specifically points out the matter objected to and the basis for the objection, and that an objection must be specific enough to designate the defect to the court.

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71. See id. at 275.
72. See id.; Texas Employers’ Ins. Ass’n v. Olivarez, 694 S.W.2d 92, 94 (Tex. App.—San Antonio 1985, no writ) (holding that although request for instruction fixing burden of proof would have preserved error, objection to issue because of failure to fix burden of proof also was sufficient).
73. See former TEX. R. CIV. P. 279 (first paragraph), now TEX. R. CIV. P. 278.
74. 876 S.W.2d 154 (Tex. 1994); see discussion infra Part X.
75. See supra note 35 and accompanying text.
76. TEX. R. CIV. P. 274.
78. See Castleberry v. Branscum, 721 S.W.2d 270, 276 (Tex. 1986) (“The purpose of
Under better reasoned decisions, the defect and grounds of objection must be “stated specifically enough to support the conclusion that the trial court was fully cognizant of the ground of the complaint and deliberately chose to overrule it.” There is, however, considerable disagreement about whether objections must be sufficient to provide trial judges with reasonable guidance in fashioning the charge, particularly when the objecting party does not have the burden to prove the matter that is the subject of the flawed question, definition, or instruction. The problem is highlighted in comment on the weight of the evidence cases.

In Ahlschlager v. Remington Arms Co., a party objected to the inclusion of two instructions on sole cause asserting that the instructions constituted a comment on the weight of the evidence. The court of appeals determined that the objection was sufficient to preserve the objector’s complaint as to the submission of the instructions and their combined effect. The court of appeals rejected any requirement that the complainant “go spontaneously into the details of precisely how and why” the instructions commented on the evidence. The court stated that to require “litigants to make full appellate arguments during preparation of the charge [would] run afoul of Rule 274’s policy of minimizing verbose, prolix objections.” Similarly, in Wilson v. Kaufman & Broad Home Systems, a products liability case, the court held that a party’s objection to an instruction as a comment

Rule 274 is to afford trial courts an opportunity to correct errors in the charge, by requiring objections both to clearly designate the error and to explain the grounds for complaint. An objection that does not meet both requirements is properly overruled and does not preserve error on appeal.” (citations omitted); Brown v. American Transfer & Storage Co., 601 S.W.2d 931, 938 (Tex. 1980) (stating that a complaint about variance must be distinct and specific); see also, e.g., Citizens State Bank of Dickinson v. Bowles, 663 S.W.2d 845, 850 (Tex. App.—Houston [14th Dist.] 1983, writ dism’d) (holding that objection to the term “market value” was not sufficient because it did not “present the legal requirement to determine a measure of damages”); Brazos Elec. Power Coop., Inc. v. Taylor, 576 S.W.2d 117, 119–20 (Tex. Civ. App.—Waco 1978, writ ref’d n.r.e.) (holding that an objection in a condemnation case based on the fact that the question did not submit the proper measure of damages was too general); Hayes v. Nichols, 203 S.W.2d 274 (Tex. Civ. App.—Eastland 1947, no writ) (holding that an objection that a definition is not a correct definition of a term does not preserve error).

79. Anderson v. Higdon, 695 S.W.2d 320, 325 (Tex. App.—Waco 1985, writ ref’d n.r.e.); see Bowles, 663 S.W.2d at 850.

80. See infra notes 76–86 and accompanying text.
81. 750 S.W.2d 832 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
82. See id at 833.
83. See id.
84. Id.
85. Id.
86. 728 S.W.2d 874 (Tex. App.—Beaumont 1987, writ ref’d n.r.e.).
on the weight of the evidence was not too general and preserved the objecting party's complaint as to any deviation from the Pattern Jury Charge.\textsuperscript{87} Under this questionable view, an objection is sufficient if it makes an accurate description of the nature of the problem even though the objection does not identify the cure.\textsuperscript{88} For example, under this approach a question is a comment on the case as a whole when it identifies the particular word, phrase, sentence, or question even if the court is not told more about how to solve the problem.\textsuperscript{89} Other courts have held that an objection to a question as a comment on the weight of the evidence is not sufficient.\textsuperscript{90}

The court of appeals decisions that require both an objection and a written charge request reflect judicial dissatisfaction with objection practice precisely because these courts do not believe that technically sufficient objections necessarily provide sufficient guidance to trial judges.\textsuperscript{91} Unfortunately, these opinions emphasize the need for a written charge request rather than more informative objections.\textsuperscript{92}

\section*{D. Charge Requests Must Be in Substantially Correct Form}

Rule 278 requires that a "substantially correct" request for a definition or instruction must be tendered in writing.\textsuperscript{93} The words "substantially correct" were construed by the Texas Supreme Court in \textit{Placencio v. Allied Industrial International, Inc.}\textsuperscript{94} as follows:

[S]ubstantially correct... does not mean that it must be abso-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{87} See \textit{id.} at 875. Because the requirements with regard to specificity and detail are not altogether clear, the practitioner is faced with the dilemma of risking making too many objections and later being vulnerable to the attack that the objections gave too much information, of not objecting thus resulting in waiver, or making brief objections that do not provide enough information. Both the Task Force report and the rules in the Recodification Draft require objections to "identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection." Proposed Jury Charge Task Force Rule 278(b); App. E, RECODIFICATION DRAFT RULE 83(b). Although the matter is still controversial (see infra text accompanying notes 234-41), an informed ruling sustaining an objection to an error in the charge should require at least reasonable guidance concerning curative action.
\item \textsuperscript{88} See \textit{Ahlschlager}, 728 S.W.2d at 875.
\item \textsuperscript{89} See \textit{id.}
\item \textsuperscript{90} See Aetna Cas. & Surety Co. v. Depoister, 393 S.W.2d 822, 826-28 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); Baker Material Handling Corp. v. Cummings, 692 S.W.2d 142, 145 (Tex. App.—Dallas 1985, writ dism'd).
\item \textsuperscript{91} See \textit{supra} note 53 and accompanying text.
\item \textsuperscript{92} See \textit{id.} As explained in Part XIII of this article, during the rule revision process, the penultimate issue has become the sufficiency of a complaining party's objections to the charge.
\item \textsuperscript{93} Tex. R. CIV. P. 278.
\item \textsuperscript{94} 724 S.W.2d 20 (Tex. 1987).
\end{itemize}
\end{footnotesize}
lutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, and that is not affirmatively incorrect.\textsuperscript{95}

Although this standard does not require a charge request to be completely correct, the appellate courts and the Texas Supreme Court have interpreted the standard very strictly in cases in which the request was denied by the trial judge.\textsuperscript{96} The concept of "substantially correct" has also offered ample opportunity for appellate courts to apply a "double standard" to requests. If the trial court submits the requested instruction or definition, it may be flawed in some manner and still be substantially correct, at least if a similar instruction is found in the Texas Pattern Jury Charges.\textsuperscript{97} If, however, the trial court refuses to submit the requested matter, "substantially correct" may take on a different meaning.\textsuperscript{98} For example, the trial court's refusal of the request in its entirety has been justified on appeal if any part of the request is defective.\textsuperscript{99} Despite the traditionally strict interpretation of the "substantially correct" standard by the courts of appeals and the Texas Supreme Court, more recent Texas Supreme Court decisions are considerably less rigorous in the interpretation of the traditional standard.\textsuperscript{100}

\textsuperscript{95} Id. at 21 (quoting Modica v. Howard, 161 S.W.2d 1093, 1094 (Tex. Civ. App.—Beaumont 1942, no writ)).

\textsuperscript{96} See, e.g., Select Ins. Co. v. Boucher, 561 S.W.2d 474, 479 (Tex. 1978) (affirming appellate court's ruling that Select's failure to provide a substantially correct charge precluded submission of the issue); Placencio, 724 S.W.2d at 22 (holding it was the defendant's duty to present the trial judge with an affirmatively correct issue and the trial court's refusal to submit an affirmatively incorrect issue was not reversible); Adams v. Rhodes, 543 S.W.2d 18, 19 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (explaining that where the complaining party did not meet its burden to produce a substantially correct instruction, the trial court properly refused to submit the charge); Yellow Cab Co. v. Smith, 381 S.W.2d 197, 198 (Tex. Civ. App.—Waco 1964, writ ref'd n.r.e.) (affirming the trial court's refusal to submit an issue that could not be presented as submitted); Thomas v. Billingsley, 173 S.W.2d 199, 200 (Tex. Civ. App.—Dallas 1943, writ ref'd) (stating that the failure of the court to submit a charge that was substantially covered by the court's main charge was not grounds for reversal).

\textsuperscript{97} See Vela v. Alice Specialty Co., 607 S.W.2d 289, 291 (Tex. Civ. App.—Tyler 1980, no writ) (holding that the issue submitted was stated "broadly enough to include the duty created by statute").

\textsuperscript{98} See, e.g., Adams, 543 S.W.2d at 19 ("A specially requested special issue, definition or explanation cannot be substantially correct if its insertion in the charge in the exact words requested would, upon proper objection, constitute affirmative error upon appeal by the opponent.").

\textsuperscript{99} See id.

\textsuperscript{100} See discussion infra Part VIII.
E. Voluminous Unfounded Objections or Numerous Unnecessary Requests Waive Complaints

Rule 274 provides that "[w]hen the complaining party's objection, or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such objection or request shall be untenable." Although this rule fairly penalizes a party who makes so-called stock objections without attempting to identify the party's specific complaint, if a proposed charge contains a number of objectionable characteristics it is difficult not to make numerous objections. However, if too many objections are determined to be unfounded, waiver may result.

Rule 274 has also been used to penalize a party who makes charge requests containing too much information. Accordingly, the often sensible strategy of presenting charge requests to a trial judge in the form of a complete charge, ready for submission to the jury, potentially subjects the requesting party to a similar problem. Based on the idea that trial judges should not be required to sift through a combined set of requests, which could be made separately, the use of combined requests for submission has resulted in waiver of the entire request. For example, in Crisp v. Southwest Bancshares Leasing Co., the Amarillo Court held that the trial judge was justified in refusing to give any of the questions tendered en masse if any of them should not

101. TEX. R. CIV. P. 274; see also McDonald v. New York Cent. Mut. Fire Ins. Co., 380 S.W.2d 545, 549-50 (Tex. 1964) ("But whether or not the objection as presented is too general to merit consideration, we nevertheless say that it is obscured by many formal and unfounded and trivial objections."); Hinote v. Local 4-23, 777 S.W.2d 134, 143-44 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (holding that objections to every special issue, every instruction except one, and the charge as a whole, many of which were invalid, were a flagrant and extreme violation of Rule 274 and demonstrated the purpose of the rule, which is to "protect the appellate court from having to waste judicial time by wading through countless spurious and unwarranted objections"). This part of current Rule 274 is carried forward in revised form in both the Task Force recommendations and in the Recodification Draft. See App. A, Proposed Task Force Rule 274(3); App. E, RECODIFICATION DRAFT RULE 83(c).

102. See Monsanto Co. v. Milam, 494 S.W.2d 534, 537 (Tex. 1973) (holding that defendant's 150 stock objections of "no pleadings" and "insufficient pleadings" were properly overruled); see also Hinote, 777 S.W.2d at 144 (stating that appellees' "shot gun" objections were waived because they were a flagrant and extreme violation of Rule 274 and were a waste of judicial time).

103. See TEX. R. CIV. P. 274.

104. See Crisp v. Southwest Bancshares Leasing Co., 586 S.W.2d 610, 616 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (explaining that the trial court did not err in refusing to submit seven special issues that represented "five separate and distinct subjects").

105. Id.
be given.\textsuperscript{106} Hence, the trial judge was not required to sift through requested issues and instructions, submitting proper requests and refusing improper ones.\textsuperscript{107}

Although it has been held that trial courts do not commit error in refusing a charge request that is incomplete because all of the elements of a ground of recovery or defense are not requested,\textsuperscript{108} appellate courts have approved trial courts' refusal of the request in its entirety if any part of the combination request is objectionable for any reason.\textsuperscript{109} These courts also have reasoned that trial judges are not required to sift through voluminous requested questions and instructions culling the good from the bad, submitting those that are proper, and refusing those that are improper.\textsuperscript{110} Some cases suggest that trial courts may properly reject an \textit{en masse} request in its entirety even in the absence of an error in any part of the request.\textsuperscript{111} More recently, however, the Texas Supreme Court has rejected this philosophy and taken a common sense approach to the use of combination charge requests.\textsuperscript{112}

VII. THE EFFECT OF BROAD-FORM SUBMISSION: THE LOSS OF "PHILOSOPHICAL MOORINGS"

Before September 1, 1973, the objection/request practice had a type of disciplined logic to it because under prior law the role of questions and instructions in Texas charge practice was fairly rigidly defined.\textsuperscript{113} There were only a few matters that could be incorporated into the charge in question form or as definitions and instructions accompanying the questions.\textsuperscript{114} This is no longer the case under current

\textsuperscript{106} See \textit{id}.

\textsuperscript{107} See \textit{id}.

\textsuperscript{108} See Attebery v. Henwood, 177 S.W.2d 95, 97–98 (Tex. Civ. App.—Texarkana 1943, writ ref'd w.o.m.).

\textsuperscript{109} See, \textit{e.g.}, Edwards v. Gifford, 137 Tex. 559, 564, 155 S.W.2d 786, 788 (1941).

\textsuperscript{110} See discussion supra Part VI(c).

\textsuperscript{111} See Armellini Exp. Lines of Fla. v. Ansley, 605 S.W.2d 297, 307 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ("It is not error for the trial judge to refuse such requested submission when they are intermingled in such a way as to be confusing."); Hoover v. Barker, 507 S.W.2d 299, 305 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.) (holding that appellant waived his issues submitted \textit{en masse} because he did not point out how any issue was relevant to his defense); Dewey v. Am. Nat. Bank, 382 S.W.2d 524, 528 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.) (explaining that a trial court can justifiably refuse to submit every issue submitted \textit{en masse} were some are merely duplications of others).

\textsuperscript{112} See Lester v. Logan, 907 S.W.2d 452, 453 (Tex. 1995); see also discussion infra Part IX.

\textsuperscript{113} See Dorsaneo, supra note 14, at 644.

\textsuperscript{114} See \textit{id} at 644–45 (stating that in order to avoid complex jury charges, courts rigorously applied the principle of necessity which "permitted 'such explanations and defini-
TEXAS RULE OF CIVIL PROCEDURE 277, which requires the submission of broad-form questions whenever feasible. 115 Broad-form submission, however, frequently results in the inclusion of material in the definitions and instructions that was formerly submitted in a series of separate questions. 116 In broad-form practice, instructions, rather than separate questions, properly place the specific grounds of recovery or defense before the jury. 117 With the adoption of broad-form submission, it is very common for a definition or an instruction to perform the function of submitting the component elements of claims and defenses inquired about more generally in broad-form jury questions.118 Accordingly, under broad-form submission practice, it makes sense for a party to object to a question because the charge does not include an appropriate accompanying instruction. In recognition of this problem, several courts have held that an objection to a broad-form question that is included in the trial court's proposed charge should not be sufficient without the written tender of an instruction or definition containing the necessary remedial language. 119 These decisions make some sense under broad-form practice if a problem in a broad-form question may be cured by an instruction or by changing the question itself, although the courts' real concern is that brief and sometimes opaque objections to questions may not provide sufficient guidance to the trial judge. 120 Of course, these cases show that the

116. See Texas Dept. of Human Servs. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990) (explaining that the controlling question was properly submitted in broad-form and the statutory requirements were covered by an instruction).
118. See Island Recreational Dev. v. Republic of Tex. Sav'n, 710 S.W.2d 551, 555 (Tex. 1986) ("Rule 277, as amended, permits the submission of issues broadly even though they include a combination of elements or issues.").
119. See Gilgon v. Hart, 893 S.W.2d 562, 567 (Tex. App.—Corpus Christi 1994, writ denied) ("[O]bjections that imply the necessary inclusion of limiting instructions or definitions oblige the objecting party to provide those instructions or definitions to preserve any error."); Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) ("[T]he complaining party must object to the charge and tender a written instruction . . . ."); Wright Way Constr. v. Harlingen Mall Co., 799 S.W.2d 415, 418–19 (Tex. App.—Corpus Christi 1990, writ denied) (holding that objection and request are required). These courts reason that the burden of researching the law should not be shifted from the parties to the trial court. See Gilgon, 893 S.W.2d at 567; Jim Howe Homes, Inc., 818 S.W.2d at 903.
120. See Gilgon, 893 S.W.2d at 567 ("Rule 278 cannot operate to shift the burden of researching the law from the defendant to the court."); Jim Howe Homes, 818 S.W.2d at 903 (holding that an objection to the court's charge on damages must be accompanied by
objection/request methodology and its accoutrements are no longer sensible because the required behavior is dictated as a matter of form rather than by a principled concern for the respective roles of questions, accompanying definitions and instructions. As the Texas Supreme Court explained in *State Department of Highways and Public Transportation v. Payne*,121 as a result of the adoption of broad-form submission practice, "[t]he procedure for preparing and objecting to the jury charge has lost its philosophical moorings."122

VIII. THE NEW PHILOSOPHY: THE "ONE TEST" OF *STATE DEPARTMENT OF HIGHWAYS AND PUBLIC TRANSPORTATION V. PAYNE*

Recognizing that mandatory broad-form submission increases the difficulty of determining the proper method to preserve charge complaints, in 1992 the Texas Supreme Court took a new approach to preservation issues.123 In *Payne*, the plaintiff was injured when he fell into a culvert that ran perpendicular to and beneath a highway.124 The plaintiff filed suit against the State alleging that the culvert was both a special defect and a premises defect, and that the State had knowledge of the alleged defect and he did not.125 The State answered that the culvert was not a defect of any kind.126 Alternatively, the State asserted that the culvert was not a special defect and that under the provisions of the *Texas Tort Claims Act*,127 even if a premises defect existed, the State owed Payne the limited duty that a private landowner owes a licensee.128 That is, the State had the duty to "use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not."129

The trial court considered the culvert a special defect under the *Texas Tort Claims Act* and, therefore, submitted the case by using standard jury questions.130 "The first question asked whether Payne's or the State's negligence was a proximate cause of the occurrence.

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121. 838 S.W.2d 235 (Tex. 1992).
122. *Id.* at 241.
123. *See id.*
124. *See id.* at 236.
125. *See id.* at 236–37.
126. *See id.* at 237.
128. *See Payne*, 838 S.W.2d. at 237.
129. *See id.*
130. *See id.* at 238.
The second question asked what percentage of such negligence was attributable to each [party].\textsuperscript{131}

The questions submitted were accompanied by extensive definitions including a legal description of the duty owed by the State where a special defect exists.\textsuperscript{132} The jury found that Payne's injuries were caused 60% by the negligence of the State and 40% by his own negligence, and trial court rendered judgment in Payne's favor for $148,800 plus interest.\textsuperscript{133}

On appeal, the State argued that the trial court erred in refusing to inquire of the jury concerning Payne's knowledge of the culvert.\textsuperscript{134} The State's sole objection to the charge was that the definition of the duty owed by the State where a special defect exists "constitutes a comment upon the weight of the evidence and amounts to an instruction to the jury that there is, in fact, a special defect, removes that issue from the province of the jury and keeps it from being a fact issue as it should be."\textsuperscript{135} The State had also requested the trial court to include the following question in the charge:

Do you find from a preponderance of the evidence that Kenneth Herschel Payne had actual knowledge that the culvert was at the location in question on F.M. 1301?\textsuperscript{136}

As argued by three prominent law professors, as \textit{amici curiae}, the State's objection and its request were flawed under traditional preservation standards.\textsuperscript{137} The objection was insufficient because it erroneously asserted that the existence of a special defect is a jury question, when in fact it is a question of law.\textsuperscript{138} Payne also argued that the "State ha[d] not preserved its complaint that the trial court erred in refusing to inquire of the jury concerning his knowledge of the culvert."\textsuperscript{139} In rejecting Payne's argument, the Texas Supreme Court stated that "the issue is whether the State's request [for a question inquiring into Payne's knowledge of the culvert] called the trial court's attention to the State's complaint that no premise liability theory was submitted to the jury sufficiently to preserve that complaint for appeal."\textsuperscript{140} The State's request arguably was not substantially correct.

\begin{footnotes}
\item[131] \textit{Id.} at 238.
\item[132] See \textit{id.}
\item[133] See \textit{id.} at 236.
\item[134] See \textit{id.} at 238.
\item[135] \textit{Id.} at 239.
\item[136] \textit{Id.}
\item[137] See \textit{id.} at 243 (Mauzy, J., dissenting).
\item[138] See \textit{id.} at 238.
\item[139] \textit{Id.} at 239.
\item[140] \textit{Id.} at 239-40.
\end{footnotes}
and, more importantly, the State’s real complaint was that the definitions and instructions that accompanied the broad-form question were flawed because they submitted a special defect theory, rather than a premises defect theory.\textsuperscript{141} The court reasoned that despite noncompliance with the strict requirements of the procedural rules, the State’s requested question “clearly called the trial court’s attention to the State’s complaint . . . ."\textsuperscript{142} The court concluded that although it did not intend to change the procedural rules by a judicial opinion:

There should be but \textit{one test} for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.\textsuperscript{143}

Thereby, the \textit{Payne} “one test” philosophy was established. Accordingly, \textit{Payne} signaled that a technical interpretation of the existing procedural rules is unwarranted, the manner in which a party’s complaint is made is no longer the test for preservation purposes, and a reviewing court’s focus should be on the guidance provided to the trial judge by the complaining party.\textsuperscript{144} Reasonable guidance, regardless of its form, coupled with a record showing of apparent comprehension by the trial court, became the preservation standard.\textsuperscript{145}

\section*{IX. Reinterpretation of the Procedural Rules Under Payne’s Philosophy}

Several subsequent Texas Supreme Court opinions have extended the \textit{Payne} philosophy to charge requests that were flawed as a matter of form or substance.\textsuperscript{146} In \textit{Lester v. Logan}, the court expressly disapproved of the court of appeals’ affirmance of a trial court’s refusal to consider a charge request that incorporated a series of requests.\textsuperscript{147} The Texas Supreme Court reasoned that the combination request, which consisted of only one page, was substantially correct and complied with \textit{Texas Rules of Civil Procedure} 274 and 278, even though it included arguably improper requests with proper

\textsuperscript{141} See id. at 238.
\textsuperscript{142} Id. at 240.
\textsuperscript{143} Id. at 241 (emphasis added).
\textsuperscript{144} See id.
\textsuperscript{145} See discussion infra Part IX.
\textsuperscript{146} See, e.g., \textit{Lester v. Logan}, 907 S.W.2d 452 (Tex. 1995); \textit{Alaniz v. Jones & Neuse}, 907 S.W.2d 450 (Tex. 1995).
\textsuperscript{147} See \textit{Lester}, 907 S.W.2d at 453.
In Alaniz v. Jones & Neuse, Inc., the court took a similar "common sense" approach to preservation issues in interpreting current TEXAS RULE OF CIVIL PROCEDURE 273, which requires objections and requests to be "separate and apart." Alaniz submitted a complete requested charge for various elements of damages, including future lost profits. The trial court included one page of Alaniz's request, but redacted references to lost profits. Alaniz objected to the omission. The court of appeals faulted Alaniz for not making his requests separate from his objections, and for making his request before trial as a complete charge request. The Texas Supreme Court reversed the lower court in the following terms:

In each respect the court of appeals erred. First, Alaniz' request was "written" as Rule 273 requires. The rule does not prohibit including the request in a complete charge as long as it is not obscured. Second, to say that a party does not present a request after the charge is given to the parties simply because he first submitted it earlier, when the trial court was clearly aware of the request, is too strained a reading of Rule 273. Alaniz raised the issue after the charge was prepared and should not be penalized for also raising it earlier. Third, Alaniz' written request was plainly separate from his oral objection, and the appeals court's view that the two were "improperly entwined" was incorrect.

The court of appeals also erred in concluding that Payne conflicts with Rule 273. In Payne we held that a party has preserved error in the jury charge when he has made the trial court reasonably aware of the complaint, timely and plainly, and obtained a ruling. While Payne does not revise the requirements

148. See id.; The court of appeals held that Lester improperly submitted his requested jury questions and instructions. See Lester v. Logan, 893 S.W.2d 570, 575 (Tex. App.—Corpus Christi 1994), writ denied, 907 S.W.2d 452 (Tex. 1995) (per curiam). On a single page, Lester submitted a question on the implied warranty of fitness for a particular purpose, definitions for the terms "implied warranty of fitness for a particular purpose," "producing cause" and instructions on "course of dealing" and "usage of trade." Id. The trial court refused the group of requests. See id. The court of appeals observed that the trial court was not required to go through the submitted group of requests and submit the proper requests to the jury while refusing the improper requests. See id. The court of appeals also emphasized that Lester did not request and tender a substantially correct instruction to the trial court in writing and indicated that Lester therefore had waived any complaint regarding the instruction on appeal. See id.

149. 907 S.W.2d 450 (Tex. 1995).

150. TEX. R. CIV. P. 273.

151. See Alaniz, 907 S.W.2d at 451.

152. See id.

153. See id.

154. See id.
of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them. Under the reading of Rule 273 Payne requires, Alaniz preserved his jury charge complaint.\footnote{155}

A particularly significant reinterpretation of the "substantially correct" standard appears post-Payne in the court's opinion in Texas Department of Human Services v. Hinds.\footnote{156} In Hinds, the court made it clear that a substantively erroneous charge request could satisfy the requirement that a charge request must be made in "substantially correct" form.\footnote{157} Despite the fact that the causation instruction requested for submission incorporated the wrong standard, the court explained that the request preserved the complaint for two reasons.\footnote{158} First, the instruction was taken from a concurring opinion endorsed by three members of the Texas Supreme Court and no other Texas decisions provide proper guidance.\footnote{159} Second, the request called the trial court's attention to the omission of a definition or instruction concerning the causation element.\footnote{160} Under these circumstances, the trial judge was not at liberty to disregard the request and to refuse to define the causation standard in some manner.\footnote{161}

Other Texas Supreme Court decisions also reflect that the court's primary concern is whether the trial court was made aware of the complaint in an understandable manner.\footnote{162} In Dallas Market Center Development Co. v. Liedeker, the court ruled that the trial court's endorsement of the notation "Refused" on a party-written charge request is not the exclusive method of preserving a requesting party's complaint,\footnote{163} because the trial judge stated on the record that he had considered the requested question and refused it.\footnote{164} Hence, the defendant's complaint was preserved even though the trial judge neglected

\begin{footnotes}
\footnotetext{155}{Id. at 451–52 (citations omitted).}
\footnotetext{156}{904 S.W.2d 629 (Tex. 1995).}
\footnotetext{157}{Id. at 637–38; see also TEX. R. CIV. P. 278.}
\footnotetext{158}{See Hinds, 904 S.W.2d at 638.}
\footnotetext{159}{See id.; see also Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 725 (Tex. 1990).}
\footnotetext{160}{See Hinds, 904 S.W.2d at 638.}
\footnotetext{161}{See id.}
\footnotetext{162}{See, e.g., Dallas Mkt. Ctr. Dev. Co. v. Liedeker, 958 S.W.2d 382 (Tex. 1997).}
\footnotetext{163}{Id. at 387 ("Rule 276 allows for preservation of error by other means. Consistent with the rule, the clear weight of authority, and sound policy, we hold that an endorsement by the trial court is not the exclusive means of preserving error for refusing a charge request.") (emphasis added).}
\footnotetext{164}{See id.}
\end{footnotes}
to endorse the request as promised.165

For the most part, these decisions discussed above demonstrate that the Texas Supreme Court is inclined to interpret the specific requirements of the current procedural rules, which exist to ensure the trial judge is aware of the complaint about the proposed charge by evaluating whether the trial record shows that the trial judge understood or should have understood the charge complaint sufficiently to take some corrective action rather than as a way to insulate the trial judge’s rulings from review.166 Under this approach, the trial judge has the responsibility to evaluate complaints about the proposed charge and to take appropriate action, including requesting counsel to provide reasonable guidance concerning how the court should fashion the charge to address the complaint and obviate the problem.167

X. THE PROBLEM WITH PAYNE’S “ONE TEST”

The Texas Supreme Court’s adoption of a new approach presents its own difficulties because, as shown in Spencer v. Eagle Star Insurance Co. of America,168 the “one test” can be used to validate charge complaints that do not really give reasonable guidance to trial judges.169 In that case, the Spencers insured their furniture store through Eagle Star Insurance Company.170 After the store was destroyed by fire, Eagle Star delayed insurance payments and refused to pay the full policy limits.171 The Spencers sued Eagle Star for breach of contract, breach of the common law duty of good faith and fair dealing, and violations of the Texas Deceptive Trade Practices-Consumer Protection Act.172 The trial court submitted two questions to the jury regarding Eagle Star’s liability.173 Question 1A asked whether Eagle Star’s treatment of the Spencers’ claim for loss of earnings was an “unfair practice in the business of insurance,”174 which was defined in an accompanying instruction as “any act or series of acts which is arbitrary, without justification, or takes advantage of a person to the extent that an unjust or inequitable result is obtained.”

165. See id.
166. See Proposed Task Force Rule 274, App. A.
167. See discussion infra Part XIII.
168. 876 S.W.2d 154 (Tex. 1994).
169. See id. at 157.
170. See id. at 155.
171. See id.
172. See id. at 156 n.1.
173. See id. at 156.
174. Id.
Question 1B asked whether Eagle Star had "engaged in unconscionable conduct as defined in section 17.45(5)(A) of the DTPA." Eagle Star objected, however, to the questions and instructions, because neither question [was] "based upon a cause of action recognized under Texas law," and "more specifically ... that [Question 1A] permits the jury to determine what duty, if any, is owed to the Spencers, which is a question of law for the Court, and not one of fact for the jury." The jury answered Question 1A affirmatively, but "no" to Question 1B. The trial court granted Eagle Star judgment notwithstanding the verdict on the ground that Question 1A was insufficient to support the Spencers' recovery, and the appellate court affirmed. The issue before the Texas Supreme Court was "whether error in the instruction accompanying a jury question on liability for an 'unfair practice in the business of insurance' made the question immaterial or merely defective." The court held that Question 1A was defective.

The language of Question 1A "unfair practice in the business of insurance" was taken from the Texas Insurance Code, but, as the court noted, that statute "does not refer to every such practice imaginable but only to those specified by certain other statutes and regulations." The court held that "[w]ithout an instruction specifying the actions for which Eagle Star could be liable, Question 1A was improper." Further, the instruction given to the jury did not meet this requirement, because it allowed the jury to find an unfair insurance practice based upon any action by Eagle Star that improperly took advantage of the Spencers. The court also determined that Eagle Star's objections had preserved error concerning the defective instruction. Citing Moulton v. Alamo Ambulance Service, Inc. and Rule 274, the court held that an objection is sufficient to preserve error in a defective definition or instruction.

175. Id.
176. Id.
177. See id. at 157.
178. See id.
179. Id. at 155.
180. See id. at 157.
181. See TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 2000).
182. Spencer, 876 S.W.2d at 157.
183. Id.
184. See id.
185. See id.
186. 414 S.W.2d 444, 449-50 (Tex. 1967).
187. TEX. R. CIV. P. 274.
188. See Spencer, 876 S.W.2d at 157.
The Texas Supreme Court's holding that Eagle Star's objections
to Question 1A and to the accompanying instruction (because neither
one specified the actions for which Eagle Star could properly be held
liable under the Insurance Code)\(^\text{189}\) is a sensible extension of Payne's
holding that it does not matter in what manner a defect in the trial
court's charge is brought to the court's attention.\(^\text{190}\) But the high
court's conclusion that Eagle Star's objections provided proper guid-
ance to the trial court\(^\text{191}\) is another matter. In fact, it is very likely that
if Eagle Star's counsel had made more informative objections, by
making the same points that were presumably made in connection
with Eagle Star's motion for judgment n.o.v., the objections would
have been sustained. On balance, because it suggests that a formulary
objection is sufficient, the opinion sends the wrong message.

In a dissenting opinion, Justice Doggett argued that Eagle Star
had waived error concerning the jury charge.\(^\text{192}\) But his concerns are
covered in terms of Eagle Star's violation of the technical require-
ments of the procedural rules rather than with the more significant is-
sue of how informative a complaining party's complaint must be un-
der Payne's philosophy.\(^\text{193}\) Justice Doggett noted that the majority's
opinion was based on its disapproval of the accompanying instructions
to which Eagle Star never properly objected:

Eagle Star never properly objected to the definition submitted.
Rather, following its objections to the question, the insurer con-
tended only that "we object to the instructions submitted for
these [same] reasons." Rule 274 does not permit the use of such
cross-references in objections.\(^\text{194}\)

Justice Doggett criticized the majority for "blurring the line be-
tween questions and definitions," arguing that the majority's opinion
"perpetuates the refusal to adhere to the rules governing objections to
the charge so recently announced in" Payne.\(^\text{195}\) Accordingly, Justice
Doggett argued that the majority's opinions in Payne and Eagle Star
made Rule 278 meaningless and concluded that "[i]f the rules are to
change, it should not be by opinion, but by ordered consideration and
public comment."\(^\text{196}\) In other words, rather than recognizing that the

\(^\text{189}\) See id. at 156–57.
\(^\text{190}\) See State Dep't of Highways and Public Transp. v. Payne, 838 S.W.2d 235, 241
\(^\text{191}\) See Spencer, 876 S.W.2d at 157.
\(^\text{192}\) See id. at 159 (Doggett, J. dissenting).
\(^\text{193}\) See id. at 157–60.
\(^\text{194}\) Id.
\(^\text{195}\) Id. at 160.
\(^\text{196}\) Id. (citing Alvarado v. Farah Mfg. Co., 830 S.W.2d 911, 915 (Tex. 1992)).
current procedural rules are inadequate and that the majority misapplied the teachings of the \textit{Payne} decision, the dissent trumpets a retreat to the rulebook and arguably to technical preservation rules and strict attitudes about procedural waiver.\(^{197}\)

\textbf{XI. INTERPRETING THE COURT'S MIXED MESSAGES}

Lower courts have had mixed results in deciding preservation issues under the \textit{Payne} test, and in accordance with the current procedural rules.\(^{198}\) Several intermediate appellate courts have recognized that it no longer matters whether a request or an objection is used to present the complaint to the trial judge, as long as the record reflects the trial court understood the complaint or should have understood the complaint.\(^{199}\) Similarly, a number of opinions hold that it is no longer permissible for a trial judge to disregard the complaining party's objection or request, because it contained some mistake.\(^{200}\)

At the other end of the spectrum, the Corpus Christi Court of Appeals initially treated \textit{Payne} as "advice" that added little or nothing to the preservation requirements contained in the charge rules;\(^{201}\) however, after a series of adverse decisions from the Texas Supreme Court,\(^{202}\) the court of appeals rearticulated its own views concerning the preservation of charge complaints—particularly its view that objections to broad-form questions should be accompanied by suggested

\(^{197}\) See id.

\(^{198}\) See infra notes 196–201 and accompanying text.

\(^{199}\) See Green Tree Fin. Corp. v. Garcia, 988 S.W.2d 776, 781 (Tex. App.—San Antonio 1999, no pet.) (holding that an objection satisfied the tender requirement of Rule 278); D.S.A., Inc. v. HISD, 975 S.W.2d 1, 19 (Tex. App.—Waco 1997), rev'd, 973 S.W.2d 662 (Tex. 1998) (per curiam) (explaining that a charge complaint may be preserved by a "sufficiently specific" request or objection); Collins v. Beste, 840 S.W.2d 788, 790 (Tex. App.—Fort Worth 1992, writ denied); see also In re Stevenson, No. 04-98-00893-CV, 2000 WL 253954, at *5 (Tex. App.—San Antonio Mar. 8, 2000, no pet. h.) (not designated for publication) ("[w]e should concern ourself with common sense and not promote form over substance.").

\(^{200}\) See State Farm Lloyds, Inc. v. Williams 960 S.W.2d 781, 790 (Tex. App.—Dallas 1997, writ dism'd by agr.) (holding that a requested question was sufficient under \textit{Payne}, although "not exactly a model of clarity"); see also Libhart v. Copeland, 949 S.W.2d 783, 799 n.12 (Tex. App.—Waco 1997, no writ). But see Cal-Tex Lumber Co. v. Owens Handle, Co., 989 S.W.2d 802, 816 (Tex. App.—Tyler 1999, no pet. h.) (holding that neither Rule 274, nor \textit{Payne} was satisfied).

\(^{201}\) Borden v. Rios, 850 S.W.2d 821, 827 n.3 (Tex. App.—Corpus Christi 1993, writ granted), vacated, 859 S.W.2d 70 (Tex. 1993).

instructions and definitions when the objection would not provide sufficient information.\textsuperscript{203} In this sensible view, the Corpus Christi Court of Appeals is joined by other appellate courts.\textsuperscript{204}

The so-called "one test" expressed in \textit{Payne} appears to have spawned a regional jurisprudence under which some appellate courts operate differently from their counterparts.\textsuperscript{205} These courts appear to be doing the best they can under the current rules and the new approach to their interpretation and enforcement while awaiting the promulgation of new rules that can be applied and interpreted in a principled manner.

\textbf{XII. THE JURY CHARGE TASK FORCE}

The Texas Supreme Court announced its decision in \textit{Payne} shortly before the completion of the Jury Charge Task Force's report.\textsuperscript{206} By the time the report was delivered to the Advisory Committee and the Texas Supreme Court, the report was described as a mechanism for incorporating the \textit{Payne} standard—"whether the party made the trial court aware of the complaint, timely and plainly"—into the "reasonable guidance" standard made applicable to charge requests.\textsuperscript{207}

The Jury Charge Task Force simplified, clarified, and reorganized the jury charge rules into four rules containing titled subparts—namely proposed TEXAS RULES OF CIVIL PROCEDURE 271, 272, 274 and 279.\textsuperscript{208} The Jury Charge Task Force recommended that the standards for the jury charge should not be changed.\textsuperscript{209} Moreover, mandatory broad-form submission of jury questions,\textsuperscript{210} the prohibition on submission of inferential rebuttal questions,\textsuperscript{211} and allowance of


\textsuperscript{204} See, e.g., Riddick v. Quail Harbor Condominium Ass'n, 7 S.W.3d 663, 674–75 (Tex. App.—Houston [14th Dist.] 1999, n.w.h.) ("If the error is the omission of an instruction relied on by the requesting party, three steps are required by the rules to preserve error: a proper instruction must be tendered in writing and requested prior to submission; a specific objection must be made to the omission of the instruction; and the court must make a ruling.").

\textsuperscript{205} See supra notes 195–201 and accompanying text.


\textsuperscript{207} See Minutes of Rules Advisory Committee for November, 1993.

\textsuperscript{208} See App. A.

\textsuperscript{209} See id.

\textsuperscript{210} See TEX. R. CIV. P. 277 (first sentence); \textit{cf.} proposed Task Force Rule 272(2)(b).
sion of inferential rebuttal questions, and allowance of disjunctive submission in proper cases are all retained. Similarly, the requirement that the trial court submit such instructions and definitions as shall be proper to enable the jury to render a verdict, the prohibition on direct comments on the weight of the evidence, and the allowance of an otherwise proper question, instruction, or definition that incidentally comments on the weight of the evidence or advises the jury of the effect of their answers on the trial court's judgment are incorporated into the Task Force's recommended rule concerning the standards for submission of the charge to the jury. The treatment of omissions from the charge is also retained in revised language.

The Jury Charge Task Force recommended four significant changes in the procedures for preserving complaints concerning the court's charge to the jury. First, because the current procedural rules contain an outdated preservation scheme that governs whether an objection or a request is the proper way to preserve a particular charge error, the Task Force's proposal eliminates the conundrum about the need for an objection to the trial court's refusal to submit a requested question, instruction or definition by requiring an objection to preserve a party's complaint about the jury charge in all cases.

Second, under the Jury Charge Task Force's proposal, a party is required to submit a written charge request on claims or defenses "which that party was required to plead." Although practitioners on the Jury Charge Task Force favored an "object only" system, the request requirement was included to address concerns expressed by trial judges. Third, because the "substantially correct" test was widely regarded before the Texas Supreme Court's decision in Payne as a waiver-prone standard that could be used to require the submission of

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211. See TEX. R. CIV. P. 277 (third sentence); cf. proposed Task Force Rule 272(2)(e).
212. See TEX. R. CIV. P. 277 (eighth sentence); cf. proposed Task Force Rule 272(d).
213. See App. A.
215. See Tex. R. Civ. P. 277 (last paragraph); cf. proposed Task Force Rule 272(1)(b).
218. P. Michael Jung, The Jury Charge: What's About to Happen, Advanced Civil Trial Short Course, SMU School of Law, April 7, 1995, at N6. Mr. Jung was a member of the Jury Charge Task Force, and acted as liaison between it and the Task Force on Revision of the Texas Rules of Civil Procedure; See App. A. Proposed Task Force Rule 274. Thus, the Task Force embraced the view of the courts of appeals that require both a request and an objection. See supra text accompanying note 53.
a flawless request, a standard of "reasonable guidance" was substituted. Fourth, the Jury Charge Task Force recommended the abolition of the requirement that objections and requests must be kept "separate and apart," because the requirement no longer made any sense under the Task Force's revised preservation scheme and because it had been strictly interpreted against counsel who simultaneously objected and tendered a written charge request to the trial judge.

With respect to the important question concerning the sufficiency of charge objections, the Jury Charge Task Force Report provides that "[n]o party may assign as error the giving or the failure to give a question; definition or instruction unless that party objects thereto before the charge is read to the jury stating distinctly the matter objected to and the grounds of objection." Accordingly, it appears that the Jury Charge Task Force embraced the line of cases approving objections that do not necessarily provide trial judges with reasonable guidance in fashioning the charge. Of course, if the objecting party had the burden to plead the claim or defense, the additional requirement that the party tender a written charge request would provide the trial judge with reasonable guidance in fashioning the charge. When Judge Ann Tyrrell Cochran, Chairperson of the Jury Charge Task Force, presented the Task Force Report to the Supreme Court of Texas on April 12, 1993, and when she orally presented the Task Force Report to the Advisory Committee in November, 1993 she explained that the Task Force believed that once the trial court took corrective or responsive action in revising the draft charge, the objection process would provide sufficient guidance and that the party with the burden to plead the claim or defense should be the one to provide the trial court with reasonable guidance. As shown in the next section of this article, the Advisory Committee debated the issue on several occasions, but ultimately, by the narrowest of margins, concluded

221. See supra Part VI.
222. Proposed Task Force Rule 274, App. A ("Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction.").
224. Proposed Task Force Rule 274. See App. A.
225. See discussion supra Part X.
226. Proposed Task Force Rule 274. See App. A.
227. See letter dated April 12, 1993 from Ann Tyrrell Cochran, Judge 270th District Court, Houston, Texas to Honorable Nathan L. Hecht, Supreme Court of Texas, transmitting recommended rule changes from the Jury Charge Task Force to the Texas Supreme Court, which is included in App. A.
that an objecting party not having the burden to plead would not be required to provide the trial judge with specific advice concerning how to cure or correct the charge problem.\(^{228}\)

**XIII. THE RECODIFICATION DRAFT**

The Jury Charge Task Force’s report was favorably received by the Advisory Committee. The Chairman of the Rules Advisory Committee, Luther H. Soules, III, submitted the Task Force’s Report to the Advisory Committee’s Subcommittee on Rules 216–295.\(^{229}\) In May of 1994, the Chairperson of the Subcommittee, Paula Sweeney, reported to the Advisory Committee and made specific recommendations for revision and clarification of the proposed rules, and, at the request of Chairman Soules, raised the question of whether the Task Force’s recommended language concerning the sufficiency of an objection to preserve a complaint should be changed to require an objecting party to provide specific guidance on how to cure the problem, even if the party did not have to plead the matter.\(^{230}\) After considerable debate, the Advisory Committee voted to require that “[a]n objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection.”\(^{231}\)

Although a number of important changes were made, the Jury Charge Task Force’s recommendations were largely approved, and the Advisory Committee submitted its “final” report to the court on June 5, 1995.\(^{232}\) On May 6, 1996, the court submitted the jury charge rules, as revised by the court, to the Advisory Committee.\(^{233}\) After further extensive debate concerning the objection process and preservation issues, on May 27, 1996, the Advisory Committee resubmitted the jury charge rules to the Texas Supreme Court.\(^{234}\) These drafts were then incorporated into the Recodification Draft.\(^{235}\) The following paragraphs describe the most important features of the jury charge

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228. See Texas Supreme Court Advisory Committee transcript, Morning Session, May 10, 1996, at 4636–37. The proposal was defeated by a vote of eight to seven.

229. See Texas Supreme Court Advisory Committee transcript, November 20, 1993, at 570.


231. Texas Supreme Court Advisory Committee transcript, Morning Session, May 20, 1994, at 2001–05.

232. See App. B.

233. See App. C.

234. See App. D.

235. See App. E.
rules as they appear in the Recodification Draft.

A. Preservation of Charge Complaints

The first sentence of subdivision (a) of Recodification Draft Rule 83, the basic preservation rule, states that:

After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party must submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead.236

Consistent with the recommendations of the Jury Charge Task Force, this sentence makes two major changes in the current procedural rules. First, objections and requests can be combined.237 Second, the rule changes existing law with respect to the burden to request submission of a definition or instruction.238 Under existing law, regardless of who had the burden to plead or prove the matter that the definition or instruction would cover, a party must request its submission, rather than merely object to the non-submission of the definition or instruction.239 The first change is clearly a good one because an objection that is combined with a request is a sensible way to provide trial judges with reasonable guidance in the charge preparation process. The second change is more problematic. It imposes the burden to provide the trial judge with written charge requests on the party having the burden to plead and prove the claim or defense at trial.240 Thus, by implication the second change suggests that an objection to a broad form question on the ground that it is not accompanied by an appropriate definition would preserve a party's complaint, if the objector did not have the burden to plead, even if the objection did not provide the judge with sufficient guidance about the content of the missing definition. However, the problem disappears if the objecting party's objection must itself provide the trial judge with reasonable guidance in fashioning the charge, regardless of which party has the burden to plead the matter. Unfortunately, each time the matter was presented to the Advisory Committee, the majority of the members who were present and who voted on the objection standard stopped short of including specific language requiring the objecting party to

236. See App. E, Recodification Draft Rule 83(a).
237. See id. ("before or at the time of objecting . . ."); cf. Tex. R. Civ. P. 274.
238. See Tex. R. Civ. P. 278.
239. See id.
advise the trial judge how to remedy the problem.\textsuperscript{241}

The next sentence in Rule 83 also contains a noteworthy change. Charge requests “must be sufficient to provide the court reasonable guidance in fashioning the charge.”\textsuperscript{242} The current standard, which itself has undergone some interpretive change as a result of \textit{Payne} and its progeny, requires that the written requests be in substantially correct form.\textsuperscript{243} The current standard, however, has been replaced in the new rules by a concept of “reasonable guidance.”\textsuperscript{244} An instruction can provide reasonable guidance, even though it is affirmatively incorrect.\textsuperscript{245} This appears to be the Texas Supreme Court’s view under the \textit{Payne} line of cases, at least in certain contexts, as previously explained.\textsuperscript{246} Under this approach, reviewing courts should concentrate on whether the trial judge understood the requests, rather than on some more technical standard that minimizes the trial judge’s responsibility to take an active role in the charge’s preparation.\textsuperscript{247}

The last sentence in subdivision (a) of \textsc{Recodification Draft Rule} 83 is much more controversial. A significant modification was made by the Texas Supreme Court in the draft rule recommended for adoption by the Jury Charge Task Force and the Advisory Committee.\textsuperscript{248} Subdivision (a) of the basic preservation rule was rewritten by the court as follows:

\begin{quote}
(a) Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b).\textsuperscript{249}
\end{quote}

\begin{flushleft}
\textsuperscript{241} Texas Supreme Court Advisory Committee transcript, Morning Session, May 20, 1994, at 1974–2005.
\textsuperscript{242} See App. E, \textsc{Recodification Draft Rule} 83(a).
\textsuperscript{243} See \textsc{Tex. R. Civ. P.} 278.
\textsuperscript{244} See App. E, \textsc{Recodification Draft Rule} 83(a).
\textsuperscript{245} See \textit{supra} Part VIII–XI.
\textsuperscript{246} See id.
\textsuperscript{247} See id.
\textsuperscript{248} The court also added a subdivision to proposed \textsc{Texas Rule of Civil Procedure} 236, Oath to Jury, that allowed an affirmation in lieu of the oath, changed the term “judge” to “court” throughout the draft, renumbered Task Force proposed Rules 272 and 274 as proposed Rules 277 and 278, and simplified the language of the proposed rules.
\textsuperscript{249} See id.
\end{flushleft}
The court's proposed rule is also followed by a textual comment concerning the new sentence.

Comment to 1996 change: Paragraph (a) provides that "failure to comply with this rule shall not preclude a party from assigning error in the charge if an objection is made to paragraph (b)," but the court may sanction a party who fails to comply with the rule.\textsuperscript{250}

When the Texas Supreme Court submitted this change to the Advisory Committee in May 1996, the Advisory Committee's reaction was, at best, mixed. Paula Sweeney, Chair of the Advisory Committee's Subcommittee on Rules 216-295, criticized the court's proposal in strong terms.\textsuperscript{251} Another member regarded the change as an acceptable approach provided that the objection itself provided the trial court with "reasonable guidance in fashioning the charge."\textsuperscript{252} Ulti-

\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{See} Texas Supreme Court Advisory Committee transcript, Morning Session, May 10, 1996, at 4594. Paula Sweeney: [T]he decision of . . . this Committee was that object—only permitted parties to lay behind the log, not submit a correct charge on their own issues, and then at the last minute object; thereby, quote, unquote, preserving appellate error; thereby sandbagging the trial court; thereby sandbagging opposing counsel; thereby ensuring appeals; thereby not giving the trial court guidance as to what a proper submission of the issues on which that party has a burden ought to be. And the very considered decision and in fact the whole thrust of what the task force and the subcommittee and the [Advisory] Committee decided was to the contrary.
But what this rule does is provides that a party has a duty to submit questions on their issues, but if they don't, then all they have to do is object. The only recourse that the court has is, quote, unquote, a sanction, and the sanction provision is not part of the rule, it's just a comment to the rule, so I don't know procedurally the effect of that other than as a suggestion.
\textit{Id.} at 4594-95.
\textsuperscript{252} \textit{Id.} at 4597. Professor Dorsaneo: The first paragraph [of RECODIFICATION DRAFT RULE 83] still makes it mandatory that the party with the burden to plead make a request, and it still provides that requests and objections may be made contemporaneously in its first line. Granted, the objection preserves the complaint if counsel doesn't do what's mandated by paragraph (a), but if you think about this operationally, the type of objection that would be required to take the place of the request would be essentially equivalent to what the written request would provide . . .
1 . . . suggest that the second sentence [of subdivision (b) of the proposed rule] say an objection must, [(1)] identify the portion of the charge to which [a] complaint is made; [(2)] be specific enough to enable the trial court to make an informed ruling on the objection; and . . . [(3)], borrowing from paragraph (a), . . . 'provide the court reasonable guidance in fashioning the charge.'
Then all we're talking about for sure, and I think if you thought about it, you would have to conclude that that's implicit in the second sentence any-
mately, the Advisory Committee recommended that the last sentence of subdivision (a), which deals with the requirements for written charge requests, be amended to provide that “[f]ailure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection which gives the court reasonable guidance is made pursuant to paragraph (b)” but refused a more general recommendation for an amendment of the language of the objection standard to state that all objections provide the court reasonable guidance in curing the error. Thus, the objection standard contained in Subdivision (b) of RECODIFICATION DRAFT RULE 83 still provides:

(b) Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. *An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection.* Objections must be in writing or must be made orally in the presence of the court, the court reporter, and opposing counsel. It must be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

The Advisory Committee also recommended that the court eliminate the proposed comment to RECODIFICATION DRAFT RULE 83.

The main proponents of the recommendation to require all objecting parties to provide “reasonable guidance” expressed the view that all objections should at least attempt to inform the trial judge how to cure the problem with the objectionable charge. Other
members regarded this suggestion as imposing an undue burden on the party not having the burden to plead—that is a burden to advise the trial judge how to submit the other party’s case.\textsuperscript{258}

Otherwise, although wording changes have been made in these provisions, the Recodification Draft preserves: (1) the obscured or concealed objections provision,\textsuperscript{259} (2) the case law concerning the need for express or implicit rulings,\textsuperscript{260} and (3) the provisions concerning the making of evidentiary sufficiency complaints.\textsuperscript{261} The Recodification Draft also incorporates the requirements of \textsc{Texas Rule of Civil Procedure} 279 regarding waived grounds and deemed elements.\textsuperscript{262}

On May 27, 1996, Luther H. Soules, III, Chairman of the Advisory Committee, reported to the court: (1) the suggested change to the last sentence of subdivision (a) of proposed \textsc{Texas Rule of Civil Procedure} 278, (2) the Committee’s recommendation for deleting the comment to the proposed rule, and (3) the part of the meeting transcript pertaining to the discussions about the jury charge rules.\textsuperscript{263}
B. Standards for the Jury Charge

1. Adoption of the Burden to Plead Standard

Rule 278 currently allows a party to either request or object to the omission of a jury question "if the question is one relied upon by the opposing party." Because a broad form jury question may combine a ground of recovery and a ground of defense, as explained above, the Jury Charge Task Force recommended adoption of a "burden to plead" concept as a replacement for the reliance concept.

Under the "burden to plead" concept recommended by the Jury Charge Task Force and embraced by the Advisory Committee, if a party has the burden of pleading a claim or a defense under the other rules of procedure, the party is not entitled to the submission of the claim or defense in the form of a question, instruction, or definition, unless the matter is affirmatively raised by the party's pleadings.

Texas Rules of Civil Procedure 45 and 47 require that a plaintiff plead a cause of action and that a defendant plead grounds of defense by giving fair notice of the claim involved and the defenses. The grounds of defense fall into three categories: (1) specific denial defenses; (2) general denials, which are permitted unless a specific rule or statute requires more specificity; and (3) affirmative defenses, which must be stated affirmatively. Accordingly, these basic pleading rules have been incorporated into the proposed jury charge rules. Despite this improvement, one old problem remains. For some time, Texas lawyers have had difficulty with the procedural requirements for pleading and proving inferential rebuttal defenses.

Because no specific pleading rule addresses inferential rebuttal defenses and because, as a matter of logic, a general denial supports...
the introduction of evidence concerning alibi defenses and converse theories, it has not been necessary for defendants to plead affirmatively and specifically the rebuttal defenses of unavoidable accident, sole proximate cause, sudden emergency, and Act of God to present evidence of these defensive matters during trial. From the standpoint of the pleading rules, inferential rebuttal defenses can be raised by general denials.

The 1940 revisions to the jury charge rules, however, imposed the burden on a defendant who wanted the court to submit an inferential rebuttal defense in question form, to plead the rebuttal defense affirmatively to obtain submission of the rebuttal defense in question form. Accordingly, until the submission of inferential rebuttal defenses in question form was prohibited in 1973, to obtain submission of an inferential rebuttal question, a defendant was clearly required to plead rebuttal defenses specifically. Unfortunately, when the Texas Supreme Court revised the basic charge rules in 1973, prohibiting submission of inferential rebuttal questions, the pleading requirement was not changed. As a result, it has been unclear whether a defendant must affirmatively plead inferential rebuttal defenses in specific form to obtain submission of an instruction, although all defense lawyers know that is what they should do. The Recodification Draft has not expressly corrected this oversight, although it can be reasonably argued that the inclusion of the word “affirmatively” in the first sentence of subdivision (a) of Rule 82 means “specifically” and clearly imposes the burden to plead rebuttal defenses on defendants.

2. Retention of Mandatory Broad-Form Submission of Jury Questions

The Recodification Draft also incorporates the broad-form submission sentence that is the first sentence of Rule 277. Although the Texas Supreme Court has recognized that broad form submission is not always feasible, in most cases it is capable of being accomplished.

275. See former TEX. R. CIV. P. 279 (first paragraph).
276. 5 TEX. B.J. 236 (1942).
278. App. E, RECODIFICATION DRAFT RULE 82(a).
279. See App. E, RECODIFICATION DRAFT RULE 82(b) (second sentence); cf. TEX. R. CIV. P. 277 (first paragraph).
280. See Texas Dept. of Human Servs. v. E. B., 802 S.W.2d 647, 648-49 (Tex. 1990); see also William V. Dorsaneo, III, 8 TEXAS LITIGATION GUIDE § 122.02[3][b] (2000).
3. Conditional Submission of Damage Questions

Conditional submission of jury questions is proper and has been appropriate for some time. For the first time in 1988, a sentence was added to TEXAS RULE OF CIVIL PROCEDURE 277 (the last sentence of the third paragraph) stating that it is proper to condition or predicate the submission of a damage question on affirmative findings of liability. That sentence, which has been extremely controversial, has not been specifically included in the Recodification Draft, unless it is incorporated by inference in subdivision (b) of RECODIFICATION DRAFT RULE 82 which speaks more generally of the proceedings of the Advisory Committee. The omission of the controversial sentence makes it possible to argue that both the sentence, and the authorization to predicate damage questions on affirmative findings, have not been carried forward into the Recodification Draft. Nonetheless, although it can be argued that the general language in RECODIFICATION DRAFT RULE 82(b) is not specific enough to authorize the trial court to predicate the submission of damage questions on affirmative findings of liability, the Jury Charge Task Force’s Report indicates briefly that the sentence was incorporated in the Task Force’s Report, rather than superseded by it.

4. Problems of Disjunctive Submission

Disjunctive submission has also been preserved in the Recodification Draft. The disjunctive submission provision contained in Rule 277 was added to the jury charge rules in 1940 as an exception to separate and distinct submission. Accordingly, disjunctive submission is simply one type of broad-form submission. The failure of some appellate courts to recognize this reality has created unnecessary difficulties. For example, there is one particularly troubling case that disapproves of the use of a perfectly acceptable broad-form jury question, because the question did not involve strict alternatives. In

281. See TEX. R. CIV. P. 277.
282. See H.E. Butt Grocery Co. v. Bilotto, 985 S.W.2d 22, 23–25 (Tex. 1998) (holding that the trial court did not err in allowing a conditional damage jury instruction).
283. See id.
286. 8 TEX. B.J. 281 (1945).
287. See infra notes 270–75 and accompanying text.
Rathmell, a bill of review case involving an attack on a property settlement agreement that was incorporated into a divorce decree, the court of appeals disapproved of the following question: "Do you find . . . that Mary Ann Rathmell, unmixed with any negligence on her part, was induced to agree to the divorce settlement agreement by false representations made by John A. Rathmell or by coercion on his part, or by his failure to disclose material facts?" The court found the question problematic because the question had more than two alternatives and under Rule 277 disjunctive questions may be used only to present "true opposites, [defined as] alternative grounds of recovery which are factually inconsistent." Clearly, such a conclusion is nonsense under the current regime of broad-form submission. Thus, the disjunctive submission provision should be construed to mean only that an "either/or" submission is not appropriate, unless the evidence shows that only one of the matters inquired about necessarily exists.

Of course, if that is all that the rule's provision about disjunctive submission means, the provision is unnecessary. However, the Recodification Draft contains another companion sentence, added by the Advisory Committee, which provides that a proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential rebuttal submission. Arguably, the new sentence allows the submission of inferential rebuttal defenses in question form, thereby reversing a Texas Supreme Court's decision on the point.

5. Retention of Current Standards Regulating Comments on the Evidence

The Recodification Draft incorporates the current standards concerning direct and incidental comments on the weight of the evidence. Direct comments are prohibited. Moreover, the jury charge cannot include an incidental comment on the weight of the evidence or advise the jury of the effect of an answer, unless it is

289. See id.
290. Id. at 11.
291. Id. at 12 (citing Parker v. Keyser, 540 S.W.2d 827 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.)).
292. See App. E, RECODIFICATION DRAFT RULE 82(b).
293. See Lemos v. Montez, 680 S.W.2d 798, 800 (Tex. 1984) (holding that the trial court erred in submitting an issue that compelled plaintiff to negate unavoidable accident).
294. Compare App. E, RECODIFICATION DRAFT RULE 82(a), with TEX. R. CIV. P. 277 (last paragraph).
295. See App. E, RECODIFICATION DRAFT RULE 82(a).
proper for the charge to do so to enable the jury to render a verdict. Although this circular formulation is not altogether clear, it incorporates the body of law that has developed since 1973 concerning the submission of broad-form questions and appropriate accompanying definitions and instructions.  

**XIV. CONCLUSION**

The current procedural rules have remained too long after the loss of their philosophical moorings. The court should officially publish the proposed rules for public commentary as required by law as soon as possible, and promulgate new rules as soon as it is politically feasible to do so. The court's own efforts to remedy deficiencies in the current rules by judicial decisions are not an adequate substitute for their wholesale revision. It is now unclear whether: (1) an objection is technically necessary when a charge request is made, (2) a charge request is required when an objection does not tell the trial judge how to solve the problem the complaint identifies, and most importantly (3) how informative an objection must otherwise be to pass procedural muster. Adoption of the revised jury charge rules as they appear in the Recodification Draft preferably with a slight modification to the basic preservation rule to make it crystal clear that all objections must provide reasonable guidance, is long overdue. Adoption of these rules will help the bench and bar to reconceptualize the whole process as a joint effort on the part of the court and counsel to prepare a proper charge rather than as an appellate preservation game. Part of the problem with the current rules is that they no longer provide reliable guidance, predictable results, or a coherent jurisprudence. A much more serious problem is that the current rules misperceive the proper objective of the charge phase of the litigation process, which is to get a correct charge, not to lay the basis for an appeal.

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296. See id.
297. See supra Part VII.
298. See TEX. GOV'T CODE ANN. § 22.004(b) (Vernon Supp. 2000).
April 12, 1993

Hon. Nathan Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Dear Justice Hecht:

Enclosed for consideration by the Supreme Court are recommended rule changes from your Task Force on Rules Relating to the Jury Charge. These proposals have the unanimous recommendation of the members of that task force and, as explained in greater detail below, are the result of our consulting with a great many other lawyers, judges and law professors.

The greatest challenge to the task force came in considering proposals to simplify the means to preserve appellate complaint. As you well know, an earlier proposal to move to an "object only" system raised a good deal of opposition from the trial bench. In order to understand the concerns of the trial judges, we asked Justice Linda Thomas, then chair of the Judicial Section, to appoint several trial judges from across the state to meet with us and share their concerns. Our two meetings with these judges were very productive. All agreed that the current system needed to be revised to simplify preservation of error, but given the complicated nature of so much civil litigation, and the lack of clerical support, time, and research facilities so many trial judges face, there was a serious concern that total abolition of the tender requirement would give rise to greater problems in preparing a correct charge at the trial court level. Thought was given to earlier proposals to allow judges to order tender without making tender a prerequisite to appellate complaint, but we concluded that the lack of appellate consequences made such orders unenforceable and thus unhelpful.

In addition to the trial judges, task members have sought and received advice and comment from the consultant group, many lawyers
who have expressed interest in our work, and scholars. We feel that our conclusions have the support of a wide cross-section of the trial and appellate bar as well as the trial judiciary.

The conclusion of the task force was that objection should always be required, but that an additional requirement of written tender should be necessary only in the following limited circumstances: (1) the question, definition, or instruction is totally omitted from the proposed charge; and (2) it is something that party has the burden to plead. This approach gives the trial judge the "bare bones" of the charge, but alleviates the current problem of requiring a party to write a correct charge for the opposing side.

We also addressed the problems currently posed by the appellate construction of the requirement that any tender be in "substantially correct" form, and have proposed instead the following language:

"Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction."

The task force believes that this approach satisfies the legitimate concerns of the trial bench and offers as well as workable system of preservation of error.

The task force retained the substance of Rule 279 regarding the effect of omissions from the charge. Two substantive clarifications were made: (1) that express or deemed findings by the court on omitted elements may be made against any party who has failed to preserve appellate complaint regarding the omission, but not against a party who has preserved appellate complaint; and (2) that evidentiary sufficiency challenges to express findings under Rule 279 are governed by the same rules for preservation of appellate complaint as in the case of findings in bench trials. See Tex. R. App. P. 52(d).

The jury instructions (Rule 226a) have been rewritten, primarily to simplify the language used and to reorganize at what point in the trial certain instructions are given. A few are new. Instructions about conduct in the jury room and the role of the presiding juror were added at the suggestion of trial judges who have found over the years that jurors need more information about the stage of the trial. An instruction about the effect of sustaining evidentiary objections has been added, as has one telling the jury that they are bound to follow the law whether they think it is right or wrong. (The latter was added as emphasis in light of the fact that the types of jury misconduct that may be grounds for motions for new trial have changed since the Rule 226a instructions were originally written.)
We did attempt to consolidate and reorganize the rules with which we were dealing, and understand that Professor Dorsaneo’s task force will be looking at these aspects as well. Michael Jung, of our task force, is serving as our unofficial liaison with that group.

The enclosed report is submitted in two forms: (1) a plain copy of the proposal; and (2) an annotated version, with underlining and strike-outs to show the changes.

Thank you for allowing me to work on this project for you. The members of the task force are excellent lawyers and fine people. It has been a pleasure to serve with them.

Very truly yours,

Ann Tyrrell Cochran
SUPREME COURT JURY CHARGE TASK FORCE
PROPOSED REVISIONS TO TEX. R. CIV. P. 271-79
REVISED DRAFT 10/19/92

RULE 271. CHARGE TO THE JURY

Amended Text

Unless expressly waived by the parties; the trial court shall prepare and deliver a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

Sources and Dispositions

Disposition: Omitted as unnecessary
Source: Second sentence of Current Rule 272 and second sentence of Current Rule 273
Source: Current Rule 275
Source: First sentence of Current Rule 272

RULE 272. REQUISITES STANDARDS FOR THE JURY CHARGE

Amended Text

The charge shall be in writing, signed by the court, and filed with

Sources and Dispositions

Disposition: Omitted as
the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.

Disposition: First sentence of New Rule 271
Disposition: Fifth sentence of New Rule 271
Disposition: Omitted as unnecessary
Disposition: Second sentence of New Rule 271
Disposition: Second sentence of
New Rule 274(2)
Disposition: First sentence of New Rule 274(2)
Disposition: First sentence of New Rule 274(4)

General Standards.
Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.
Source: Generalization of second sentence of Current Rule 278

Source: Generalization of ninth sentence of Current Rule 277

Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers.

Questions.
In General. The court shall submit questions on the disputed material factual issues which are raised by the pleadings and the evidence.

Broad Form Submission. The court shall, whenever feasible, submit the case upon broad form questions.

Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

Disjunctive Submission. The court may submit a question disjunctively when the evidence shows as a matter of law that one or the other of the
conditions or facts inquired about necessarily exists.

Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

Instructions and Definitions.
In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Burden of Proof. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

Source: Adapted from first sentence of Current Rule 278
Source: First sentence of Current Rule 277
Source: Generalization of seventh sentence of Current

RULE 273. JURY SUBMISSIONS [Repealed]

Amended Text Sources and Dispositions

Either party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or
instructions shall be made separate and apart from such party’s objections to the court’s charge.

Disposition: Omitted as unnecessary
Disposition: Second sentence of New Rule 271
Disposition: Omitted as unnecessary
Disposition: Requirement repealed

RULE 274. OBJECTIONS AND REQUESTS
PRESERVATION OF APPELLATE COMPLAINTS

Amended Text

Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a correct question, definition, or instruction. If a request has been filed and bears the judge’s signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

Objections. No party may assign as error the giving or the failure to give a question.
definition, or instruction unless that party objects thereto before the charge is read to the jury. A party objecting to a charge must point out stating distinctly the objectionable matter objected to and the grounds of the objection. An objection is required even if the objecting party is required to tender a request under paragraph 1 of this rule. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

Source: Second sentence of Current Rule 274
Source: New
Source: Second sentence of Current Rule 272
Source: Sixth sentence of Current Rule 272
Disposition: First sentence of new Rule 274(2)

Obscured or Concealed Objections or Requests. When the complaining party's an objection; or requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections or requests, minute differentiations, or numerous unnecessary objections or requests, such objection or request shall be untenable not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed

Source: Adapted from fourth sentence of Current Rule 278
Source: Fourth sentence of Current Rule 272
Source: Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984)
Source: Adapted from fourth sentence of Current Rule 279
because of the failure of the court to submit different shades of the same question, instruction, or definition.

Rulings. The court shall announce its rulings on objections in open court before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

Evidentiary Sufficiency Complaints. A claim that there was no evidence to support the submission of a question, or that the answer to the question was established as a matter of law, may be made for the first time after the verdict. A claim that there was factually insufficient evidence to support the jury's answer to a question, or that the answer to the question was against the great weight and preponderance of the evidence, must be made after the verdict. Any of such claims may be made regardless of whether the submission of the question was requested by the complainant.

RULE 275. CHARGE READ BEFORE ARGUMENT [Repealed]

Amended Text

Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions which the court may give.

Disposition: Third sentence of New Rule 271
RULE 276. REFUSAL OR MODIFICATION [Repealed]

Amended Text

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

RULE 277. SUBMISSION TO THE JURY [Repealed]

Amended Text

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. The

Sources and Dispositions

Disposition: Requirement repealed
Disposition: Requirement repealed
Disposition: Third sentence of New Rule 274(1), in modified form
The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Inferential rebuttal questions shall not be submitted in the charge. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

In any cause in which the jury is required to apportion the loss among the parties the court shall submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the

Disposition: New Rule

272(2)(d)

Disposition: New Rule

272(3)(c)
ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS, AND INSTRUCTIONS [Repealed]
instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Disposition: New Rules 272(2)(a) and 272(3)(a)
Disposition: Omitted as unnecessary
Disposition: New Rule 272(1)
Disposition: Omitted as unnecessary
Disposition: Third sentence of New Rule 274(3)
Disposition: First sentence of New Rule 274(1), in modified form
Disposition: First sentence of New Rule 274(1), in modified form

RULE 279. OMISSIONS FROM THE CHARGE

Amended Text Sources and Dispositions

Omission of Entire Ground. Upon appeal all Any independent grounds of recovery or of defense which is not conclusively established under the evidence and no element of which is submitted or requested all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon are is waived.

Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, if and one or more of such the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are is submitted to and found by the jury, and one or more
of such 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 such omitted element or elements in support of the judgment, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, such the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

Disposition: Later in same sentence
Disposition: Second sentence in New Rule 279(2)
Disposition: Omitted as unnecessary
Source: Language conformed to Current Rule 299
Source: Second sentence of Current Rule 279
Source: New; to conform to Tex. R.
App. P. 52(d)
Disposition: New Rule 274(5), in modified form
APPENDIX B

SUPREME COURT JURY CHARGE TASK
FORCE PROPOSED REVISIONS TO TEX. R. CIV. P. 271-79
[Final Task Force Report (Oct. 19, 1992), as amended by the
Supreme Court Advisory Committee (June 5, 1995)]

RULE 271. CHARGE TO THE JURY

Amended Text

Unless expressly waived by the parties, the trial court shall prepare and in open court deliver a written charge to the jury. The court shall provide counsel with written copies of the proposed charge, and shall provide a reasonable opportunity for the parties to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After the requests and objections are made and ruled upon and any modifications to the charge are made, the court shall read the charge to the jury in open court in the precise words in which it is written. The court shall deliver one or more copies of the written charge to the jury. The charge shall be signed by the court and filed with the clerk.

Sources and Dispositions

Disposition: Omitted as unnecessary
Disposition: Fourth sentence of New Rule 271

Source: Second sentence of Current Rule 272 and second sentence of Current Rule 273

Source: Current Rule 275
RULE 272. \textbf{REQUISITES STANDARDS FOR THE JURY CHARGE}

\textbf{Amended Text}

The charge shall be in writing, signed by the court, and filed with the clerk, and shall be a part of the record of the cause. It shall be submitted to the respective parties or their attorneys for their inspection, and a reasonable time given them in which to examine and present objections thereto outside the presence of the jury, which objections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel before the charge is read to the jury. All objections not so presented shall be considered as waived. The court shall announce its rulings thereon before reading the charge to the jury and shall endorse the rulings on the objections if written or dictate same to the court reporter in the presence of counsel. Objections to the charge and the court's rulings thereon may be included as a part of any transcript or statement of facts on appeal and, when so included in either, shall constitute a sufficient bill of exception to the rulings of the court thereon. It shall be presumed, unless otherwise noted in the record, that the party making such objections presented the same at the proper time and excepted to the ruling thereon.

\textbf{Sources and Dispositions}
General Standards.

Pleading Required. A party who has the burden of pleading a matter shall not be entitled to the submission of a question, instruction, or definition regarding that matter unless the matter is affirmatively raised by the party's pleading.

Comment on the Evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of their answers, but an otherwise proper question, instruction, or definition shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers.
Questions.

In General. The court shall submit questions about the disputed material factual issues raised by the pleadings and the evidence.

Source: Generalization of ninth sentence of Current Rule 277

Broad Form Submission. The court shall, whenever feasible, submit the case by broad form questions.

Source: Adapted from first sentence of Current Rule 278

Conditional Submission. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends.

Source: First sentence of Current Rule 277

Disjunctive Submission. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question is not an impermissible inferential rebuttal submission.

Source: Generalization of seventh sentence of Current Rule 277

Inferential Rebuttal. Inferential rebuttal questions shall not be submitted.

Source: Adapted from eighth sentence of Current Rule 277

Instructions and Definitions. In General. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Source: Third sentence of Current Rule 277
RULE 273. JURY SUBMISSIONS [Repealed]

Amended Text
Either party may present to the court and request written questions, definitions, and instructions to be given to the jury; and the court may give them or a part thereof, or may refuse to give them, as may be proper. Such requests shall be prepared and presented to the court and submitted to opposing counsel for examination and objection within a reasonable time after the charge is given to the parties or their attorneys for examination. A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party's objections to the court's charge.

RULE 274. OBJECTIONS AND REQUESTS PRESERVATION OF APPELLATE COMPLAINTS

Amended Text Requests. A party may not assign as error the failure to give a question, definition, or instruction on a contention which that party was required to plead unless the record reflects that, after the conclusion of the evidence and before or at the time of objecting, the party tendered such question, definition, or instruction to the judge in writing. Defects in a requested question, definition, or instruction shall not constitute a waiver of error if the request provides the trial court reasonable guidance in fashioning a
correct question, definition, or instruction. If a request has been filed and bears the judge's signature, it shall be presumed, unless otherwise noted in the record, that the request was tendered at the proper time.

Objections. A party may not assign as error the giving or the failure to give a question, definition, or instruction unless that party objects thereto before the charge is read to the jury. A party objecting to a charge must point out stating distinctly the objectionable matter objected to and the grounds of the objection. An objection must identify the portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections.

Source: Second sentence of Current Rule 274

Obscured or Concealed Objections or Requests. When the complaining party's an objection; or requested question, definition, or instruction is, in the opinion of
Source: Second sentence of Current Rule 272

Disposition: First sentence of new Rule 274(2)

Source: Adapted from fourth sentence of Current Rule 278

Evidentiary Sufficiency Complaints. A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to the question is against the great weight of the evidence, must be made at the time of the verdict and in any case before the court has rendered judgment. Any objection not cured by the charge shall be unavailing and not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

Rulings. The court shall announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.
and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

Source: Adapted from fourth sentence of Current Rule 279

**RULE 275. CHARGE READ BEFORE ARGUMENT [Repealed]**

Amended Text

Before the argument is begun, the trial court shall read the charge to the jury in the precise words in which it was written, including all questions, definitions, and instructions which the court may give.

Sources and Dispositions

Disposition: Third sentence of New Rule 271

**RULE 276. REFUSAL OR MODIFICATION [Repealed]**

Amended Text

When an instruction, question, or definition is requested and the provisions of the law have been complied with and the trial judge refuses the same, the judge shall endorse thereon "Refused," and sign the same officially. If the trial judge modifies the same the judge shall endorse thereon "Modified as follows: (stating in what particular the judge has modified the same) and given, and exception allowed" and sign the same officially. Such refused or modified instruction, question, or definition, when so endorsed shall constitute a bill of exceptions, and it shall be conclusively presumed that the party
asking the same presented it at the proper time, excepted to its refusal or modification, and that all the requirements of law have been observed, and such procedure shall entitle the party requesting the same to have the action of the trial judge thereon reviewed without preparing a formal bill of exceptions.

Disposition: Requirement repealed

Disposition: Third sentence of New Rule 274(1), in modified form

RULE 277. SUBMISSION TO THE JURY [Repealed]

Amended Text

In all jury cases the court shall, whenever feasible, submit the cause upon broad form questions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict.

Disposition: New Rule 272(2)(e)

Disposition: New Rule 272(3)(b)

Disposition: Omitted as too case-specific for inclusion in the

Disposition: Omitted as substantive

Sources and Dispositions

Disposition: New Rule 272(2)(b)

Disposition: New Rule 272(3)(a)
The occurrence or injury in question is attributable to each of the persons found to have been culpable. The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured. The court may predicate the damage question or questions upon affirmative findings of liability.

Disposition: New Rule 272(2)(c), in modified form

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.

Disposition: New Rule 272(2)(d)

**RULE 278. SUBMISSION OF QUESTIONS, DEFINITIONS, AND INSTRUCTIONS**

[Repealed]

Amended Text

The court shall submit the questions,

Sources and Dispositions
instructions and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence. Except in trespass to try title, statutory partition proceedings, and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to any submission of any question raised only by a general denial and not raised by affirmative written pleading by that party. Nothing herein shall change the burden of proof from what it would have been under a general denial. A judgment shall not be reversed because of the failure to submit other and various phases or different shades of the same question. Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party. Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

Disposition: New Rules 272(2)(a) and 272(3)(a)

Disposition: Omitted as unnecessary
Disposition: New Rule 272(1)

Disposition: Omitted as unnecessary

Disposition: Third sentence of New Rule 274(3)

Disposition: First sentence of New Rule 274(1), in modified form

RULE 279. OMISSIONS FROM THE CHARGE

Amended Text

Omission of Entire Ground. Upon appeal all Any independent grounds of recovery or of defense which is not conclusively established under the evidence and no element of which is submitted or requested all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon are is waived.

Omission of One or More Elements. When an independent ground of recovery or defense consists of more than one element, if and one or more of such the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are is submitted to and found by the jury, and one or more of such elements are is 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 such omitted element or elements in support of the judgment, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, such the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal or factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases. A claim that the evidence was legally or factually insufficient to warrant the submission of any question may be made for the first time after verdict, regardless of whether the submission of such question was requested by the complainant.

Disposition [in support]: Omitted as unnecessary

Source: Second sentence of Current Rule 279
Source: New; to conform to TEX. R. APP. P. 52(d).
Disposition: New Rule 274(5), in modified form
APPENDIX C

SUPREME COURT ADVISORY COMMITTEE
PROPOSED CHANGES TO TEX. R. CIV. P. 271-79,
AS REVISED BY THE TEXAS SUPREME COURT

May 6, 1996

RULE 271. CHARGE TO THE JURY

The court shall prepare a written charge to the jury. The court shall provide the parties written copies of the proposed charge and a reasonable opportunity to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After requests and objections are made and ruled upon and any modifications to the charge are made, and before argument, the judge shall read the charge to the jury in open court precisely as written. The court shall deliver a copy of the written charge to each member of the jury. The charge shall be signed by the judge and filed with the clerk.

RULE 277. STANDARDS FOR THE JURY CHARGE

a. **General Standards.** A party is not entitled to the submission of a question, instruction or definition regarding a matter that is not affirmatively raised by the written pleadings and raised by the evidence. The court shall not directly comment on the weight of the evidence or advise the jury of the effect of its answers, but an otherwise proper question, instruction or definition shall not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of its answers.

b. **Questions.** The court shall submit questions about the disputed material factual issues raised by the pleadings and the evidence. The court shall, whenever feasible, submit the case by broad form questions. The court may predicate the jury's consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question that submits a defensive theory as an alternative to a claimant's theory is not an impermissible inferential re-
buttal submission. However, inferential rebuttal questions shall not be submitted.

c. Instructions and Definitions. The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.

RULE 278. PRESERVATION OF APPELLATE COMPLAINTS

a. Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph

b. Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

c. Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.

d. Rulings. The court shall announce its rulings on objections on
the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

e. **Evidentiary Sufficiency Complaints.** A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

**Notes and Comments**

Comment to 1996 change: Paragraph (a) provides that "failure to comply with this rule shall not preclude the party from assigning error in the charge if an objection is made pursuant to paragraph (b)," but the court may sanction a party who fails to comply with the rule.

**RULE 279. OMISSIONS FROM THE CHARGE**

a. **Omission of Entire Ground.** Any independent ground of recovery or defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

b. **Omission of One or More Elements.** When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the 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 such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements shall be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence.
The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.
APPENDIX D

SUPREME COURT ADVISORY COMMITTEE'S SUGGESTED CHANGE TO TEX. R. CIV. P. 278, SUBMITTED TO THE TEXAS SUPREME COURT

May 27, 1996

RULE 278. PRESERVATION OF APPELLATE COMPLAINTS

(a) Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party shall submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph shall not preclude the party from assigning error in the charge if an objection which gives the court reasonable guidance is made pursuant to paragraph (b).

(b) Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objection to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections shall be in writing or shall be made orally in the presence of the court, the court reporter, and opposing counsel. It shall be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

(c) Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request shall not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment shall not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.
(d) Rulings. The court shall announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

(e) Evidentiary Sufficiency Complaints. A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.

[version reported back to the Court by SCAC]
APPENDIX E

RECODIFICATION DRAFT SECTION 7 (C) THE JURY CHARGE, PROPOSED RULES 81-84

December 1997

RULE 81. CHARGE TO THE JURY

The court must prepare a written charge to the jury. The court must provide the parties written copies of the proposed charge and a reasonable opportunity to prepare their requests and objections and to present them on the record outside the presence of the jury after the conclusion of the evidence and before the charge is read to the jury. After requests and objections are made and ruled upon and any modifications to the charge are made, and before argument, the judge must read the charge to the jury in open court precisely as written. The court must deliver a copy of the written charge to each member of the jury. The charge must be signed by the judge and filed with the clerk. [Current Rule: 271, 272 and 275].

RULE 82. STANDARDS FOR THE JURY CHARGE

(a) General Standards. A party is not entitled to the submission of a question, instruction or definition regarding a matter that is not affirmatively raised by the written pleadings and raised by the evidence. The court must not directly comment on the weight of the evidence or advise the jury of the effect of its answers, but an otherwise proper question, instruction or definition will not be objectionable on the ground that it incidentally comments on the weight of the evidence or advises the jury of the effect of its answers.

(b) Questions. The court must submit questions about the disputed material factual issues raised by the pleadings and the evidence. The court must, whenever feasible, submit the case by broad form questions. The court may predicate the jury’s consideration of one or more questions upon specified answers to another question or questions on which the materiality of the predicated question or questions depends. The court may submit a question disjunctively when the evidence shows that only one of the matters inquired about necessarily exists. A proper disjunctive question that submits a defensive theory as an alternative to a claimant’s theory is not an impermissible in-
ferential rebuttal submission. However, inferential rebuttal questions must not be submitted.

(c) Instructions and Definitions. The court must submit such instructions and definitions as are proper to enable the jury to render a verdict. The placing of the burden of proof may be accomplished by instructions or by inclusion in the questions.  

[Current Rule: 273 and 277].

RULE 83. PRESERVATION OF CHARGE COMPLAINTS

(a) Requests. After the close of the evidence and before or at the time of objecting, or at such earlier time as the court may require, a party must submit to the court in writing the questions, definitions and instructions requested to be included in the charge on any contention that party was required to plead. The requests must be sufficient to provide the court reasonable guidance in fashioning the charge. Failure to comply with this paragraph will not preclude the party from assigning error in the charge if an objection which gives the court reasonable guidance is made pursuant to paragraph (b).

(b) Objections. A party may not complain of any error in the charge unless that party objects thereto before the charge is read to the jury, stating distinctly the matter objected to and the grounds of the objection. An objection must identify that portion of the charge to which complaint is made and be specific enough to enable the trial court to make an informed ruling on the objection. Objections must be in writing or must be made orally in the presence of the court, the court reporter, and opposing counsel. It must be presumed, unless otherwise noted in the record, that a party making objections did so at the proper time.

(c) Obscured or Concealed Objections or Requests. When an objection or request is obscured or concealed by voluminous unfounded objections or requests, minute differentiations or numerous unnecessary objections or requests, such objection or request will not preserve appellate complaint. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. A judgment must not be reversed because of the failure of the court to submit different shades of the same question, definition, or instruction.
(d) **Rulings.** The court must announce its rulings on objections on the record before reading the charge to the jury. In the absence of an express ruling, any objection not cured by the charge is deemed overruled.

(e) **Evidentiary Sufficiency Complaints.** A claim that there is no evidence to support the submission of a question, or that the answer to the question is established as a matter of law, may be made for the first time after the verdict. A claim that there is factually insufficient evidence to support the jury's answer to a question, or that the answer to a question is against the great weight and preponderance of the evidence, may be made only after the verdict. Such claims may be made regardless of whether the submission of the question was requested by the complainant.  
[Current Rule: 274, 276, 278].

**RULE 84. OMISSIONS FROM THE CHARGE**

(a) **Omission of Entire Ground.** Any independent ground of recovery or defense which is not conclusively established under the evidence and all elements of which are omitted from the charge without preservation of appellate complaint by the party relying thereon is waived.

(b) **Omission of One or More Elements.** When an independent ground of recovery or defense consists of more than one element, and one or more of the elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, is submitted to and found by the jury, and one or more of such elements is omitted from the charge, the 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 such omitted element or elements, if the party aggrieved by the findings has failed to preserve appellate complaint with respect to the omitted elements. If no such written findings are made, the omitted elements must be deemed found by the court in such manner as to support the judgment if such deemed findings are supported by legally and factually sufficient evidence. The legal and factual sufficiency of the evidence to support express findings made under this rule may be challenged in the same manner as challenges to express findings in nonjury cases.
[Current Rule: 279].