PRESERVING YOUR RECORD

CHRIS NICKELSON, *Fort Worth*
Law Office of Gary L. Nickelson

State Bar of Texas
47TH ANNUAL
ADVANCED FAMILY LAW COURSE
August 2-5, 2021
San Antonio

CHAPTER 20

CHRIS NICKELSON

LAW OFFICE OF GARY L. NICKELSON
5201 West Freeway, Suite 100
Fort Worth, Texas 76107
817-735-4000
FAX: 817-735-1480

EDUCATION
J.D., Texas Tech University School of Law, 1999
B.A., University of Texas at Austin, 1996

EMPLOYMENT
Law Office of Gary L. Nickelson, 2008-present
Partner with Shannon, Gracey, Ratliff & Miller, L.L.P., 2005-2007
Associate with Shannon, Gracey, Ratliff & Miller, L.L.P., 2001-2004
Staff Attorney to Justice David Chew of the El Paso Court of Appeals, 2000
Law Clerk to Justice Ann McClure of the El Paso Court of Appeals, 1999-2000

OFFICES HELD
Immediate Past Chair, Family Law Section, State Bar of Texas, 2020-2021
Chair, Family Law Section, State Bar of Texas, 2019-2020
Chair-Elect, Family Law Section, State Bar of Texas, 2018-2019
Vice Chair, Family Law Section, State Bar of Texas, 2017-2018
Treasurer, Family Law Section, State Bar of Texas, 2016-2017
Secretary, Family Law Section, State Bar of Texas, 2015-2016
Member, Family Law Council, State Bar of Texas, 2010-2015
Chair, Committee on Pattern Jury Charges, Family & Probate Volume, 2020 to present
Member, Committee on Pattern Jury Charges, Family & Probate Volume, 2017-2020
Chair, District Seven Grievance Committee, 2017-2019
Member, District Seven Grievance Committee, 2013-2019
Member, Texas Commission to Expand Civil Legal Services, 2015-2016
Secretary, Eldon B. Mahon Inn of Court, 2012-2013
Director, Tarrant County Bar Association Board of Directors, 2008-2009
Chair of the Tarrant County Bar Association Appellate Section, 2008-2009

HONORS RECEIVED
Board Certified in Civil Appellate Law, 2006-present
SBOT Family Law Section's Dan R. Price Award in 2013
"Joseph W. McKnight Best Family Law CLE Article Award" in 2011 and 2015
Super Lawyer, Texas Monthly Magazine 2014-present
Rising Star, Texas Monthly Magazine 2004-2013
Top Attorney, Fort Worth Magazine, 2007-present

CLE ACTIVITIES
- Co-Presenter of *Education and Other Related Rights*, Marriage Dissolution Course, April 2021.
- Author and Presenter of *Protecting Your Record at Trial*, Advanced Trial Skills for Family Lawyers Course, December 2020.
- Author and Presenter of *I Fought the Law: Mandamus for the Trial Lawyer*, Advanced Family Law Course, August 2020.
- Co-Presenter, Texas Academy of Family Law Specialists, Trial Institute, February 2020, Annapolis.
- Co-Author and Co-Presenter of, *Entities and Marital Property Law--Interrelated Claims and Issues*, New Frontiers in Marital Property Law, October 2019, Savannah.
- Author and Presenter of *Declaratory Actions, MSJ's, and Other Weird and Effective Family Law Tools*, Advanced Family Law Course, August 2019, San Antonio.
- Co-Author and Co-Presenter of *Stay in Your Lane: The Proper Role of Financial Experts*, Marriage Dissolution Course, April 2019, Galveston.
- Author and Presenter of *Don't Lose your Appeal at Trial*, Advanced Trial Skills for Family Lawyers Course, December 2018, New Orleans.
- Co-Author and Co-Presenter of Marital Agreements, New Frontiers in Marital Property Law, October 2018, San Diego.
- Author and Presenter of *Character of Debts*, Advanced Family Law Course, August 2018, San Antonio.
- Author and Presenter of *Temporary Orders During Appeal*, Marriage Dissolution, April 2018, Dallas.
- Co-Course Director, Texas Academy of Family Law Specialists, Trial Institute, February 2018, Las Vegas.
- Co-Author and Presenter of *Wildlings and Other Things Beyond the Wall—The Impact of Character Beyond Dividing the Community Estate*, New Frontiers in Marital Property Law, October 2017, Las Vegas.
- Author and Presenter of *Appellate Issues Affecting Your Family Law Practice*, Advanced Family Law Course, August 2017, San Antonio.

TABLE OF CONTENTS

PRESERVING YOUR RECORD

I. INTRODUCTION

This paper covers preservation of error during and after trial. The unique requirements for preserving error in a jury trial are not covered. The discussion begins with preservation of error during trial and then moves to the various post-trial motions that are available for attacking an adverse ruling with tips for how to draft an effective post-trial motion or response. The discussion begins with general principles regarding post-trial motions and then moves to a discussion of the following post-trial motions and what needs to be done to effectively prosecute such a motion:

1. Motion to Disregard/Motion for JNOV;
2. Motion For Reconsideration;
3. Motion for Entry of Judgment;
4. Motion for New Trial; and
5. Motion to Modify, Correct, or Reform.

II. PRESERVING ERROR AT TRIAL

A. Requirement of Objection

In order to preserve a complaint that evidence was improperly admitted during trial, an objection must be made when the evidence is offered. Rule 33.1 of the Texas Rules of Appellate Procedure lays down the general rule regarding preservation of appellate complaints, it provides:

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

Tex. R. App. P. 33.1

As Rule 33.1 makes clear, anyone who desires to complain on appeal about the improper admission of evidence during trial must present to the trial court a timely request, objection or motion stating the specific grounds for the ruling it desired the court to make if the specific grounds were not apparent from the context. The rule further states that it is necessary for the complaining party to obtain a ruling from the court or, if the court refuses to rule, then object to the court's refusal to rule.

While Rule 33.1 lays down the general rule with regard to the preservation of complaints for appellate review, it is not the only rule that governs preservation of error with regard to the admission or exclusion of evidence. Rule 103(a) of the Texas Rules of Evidence also governs the preservation of appellate complaints regarding the admission or exclusion of evidence during trial. It provides:

> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
>
> **(b) Not Needing to Renew an Objection.** When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal.
>
> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court must allow a party to make an offer of proof outside the jury's presence as soon as practicable—and before the court reads its charge to the jury. The court may make any statement about the character or form of the evidence, the

objection made, and the ruling. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Tex. R Evid. 103(a)-(d).

As Rule 103 makes clear, when evidence is erroneously admitted at trial, the complaining party must show the appellate court that the ruling affects the party's substantial rights and that the party made a timely and specific objection to the evidence or moved to strike the evidence. Similarly, if the evidence is erroneously excluded at trial, then complaining party must show the appellate court that the ruling affects the party's substantial rights and the party informs the court of its substance by an offer of proof. A few examples might help highlight the need to make timely, specific objections when evidence is admitted and offers of proof when evidence is excluded.

In *Hollon v. Rethaber*, 643 S.W.2d 783, 784 (Tex.App.—San Antonio 1982, no writ), the managing conservator complained on appeal that evidence was admitted during a modification proceeding which related to events occurring prior to the entry of the divorce decree. The court of appeals held that she could not for the first time on appeal urge alleged errors not raised at trial. Because no objection had been lodged against the testimony, error was not preserved.

In *Bobbora v. Unitrin Ins. Servs.*, 255 S.W.3d 331, 335 (Tex.App.—Dallas 2008, no pet.), the appellant complained on appeal that the appellant's expert had been improperly excluded. The court of appeals held that the appellant had waived his complaint because no reporter's record from the pre-trial hearing where the expert was excluded was brought forth on appeal and no offer of proof was made at trial with regard to the expert's testimony.

B. Requisites of a Proper Objection

1. Objection must be timely

The window of opportunity for objections to evidence at trial slams shut not long after the jury is exposed to it. A timely objection, therefore, is one made either when the evidence is offered, *St. Paul Medical Center v. Cecil*, 842 S.W.2d 808, 816 (Tex.App.–Dallas 1992, no writ), or when the need to make the objection becomes apparent. *Perez v. Bagous*, 833 S.W.2d 671, 674 (Tex.App.–Corpus Christi 1992, no writ). Testimonial evidence should be challenged when the question calling for objectionable testimony is asked, or if the question is not defective, when the witness begins giving objectionable testimony. A few moments after the jury is exposed, the opportunity is lost, and a motion for mistrial cannot resurrect the point. *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.*, 703 S.W.2d 806, 811 (Tex.App.–El Paso 1986, writ ref'd n.r.e.).

The importance of timely objections is demonstrated by *Cactus Utility Co. v. Larson*, 709 S.W.2d 709 (Tex.App.–Corpus Christi 1986), *rev'd on other grounds*, 730 S.W.2d 640 (Tex. 1987). In *Cactus*, one party attempted to introduce into evidence a stock purchase agreement. The same agreement had been attached as an exhibit to the plaintiff's original petition. Special exceptions had been filed, along with other requests that the court not consider the agreement. The court had ruled it would carry the exceptions along with the trial. During the trial, the agreement was offered into evidence and defendant's counsel made no objection, obviously believing that his objections to the document had been made and that the court was still considering those objections. The agreement was admitted. At the beginning of trial the next day, counsel introduced an objection into the record to clarify his position as to the document to ensure that error was preserved. The court of appeals ruled that the objection was untimely, inasmuch as an objection must be made when the evidence is offered, not after it has been received. Upon rehearing, the appellate court acknowledged that the defendant had made a lengthy formal objection at the beginning of trial the next day and that he had excepted to the document from the beginning. However, the court noted that the trial court never ruled upon his objection. The court concluded that an objection must actually be overruled before error is preserved. Fortunately for counsel and his malpractice carrier, the case was reversed on other grounds. *See also*, *Harry Brown, Inc. v. McBryde*, 622 S.W.2d 596 (Tex.Civ.App.–Tyler 1981, no writ).

2. Objection must be specific

Objections must be sufficiently specific so that the trial court can understand the objection and make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *Campbell v. Paschall*, 132 Tex. 226, 121 S.W.2d 593 (1938); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 205 (Tex.App. –Corpus Christi 1990, no writ). Objections which are not sufficiently specific include:

> "I object", *Murphy v. Waldrip*, 692 S.W.2d 584, 590 (Tex.App.–Fort Worth 1985, writ ref'd n.r.e.);
>
> "I object to the form of the question", *Scott v. Scruggs*, 836 S.W.2d 278, 280 (Tex.App.–Texarkana 1992, writ denied);

> "Objection, the evidence is irrelevant and immaterial", *Wilkins* v. *Royal Indemnity Co.*, 592 S.W.2d 64, 67 (Tex.Civ.App.–Tyler 1979, no writ);
>
> "Objection, no predicate has been laid", *Waldon v. City of Longview,* 855 S.W.2d 875, 878 (Tex.App.–Tyler 1993, no writ);
>
> "Objection, there are no underlying data for the report", *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n.,* 809 S.W.2d 268, 272 (Tex.App.–Austin 1991, writ denied); and
>
> "Objection, the testimony is incompetent and hearsay", *Top Value Enterprises, Inc. v. Carlson Marketing Group, Inc.,* 703 S.W.2d 806, 811 (Tex.App.–El Paso 1986, writ ref'd n.r.e.).

A valid objection identifies a specific rule of evidence violated by the offered evidence. *Smith Motor Sales, Inc.,* 809 S.W.2d at 273; *United Cab Co. v. Mason,* 775 S.W.2d 783, 785 (Tex.App.–Houston [1st Dist.] 1989, writ denied); *Burleson v. Finley,* 581 S.W.2d 304 (Tex.Civ.App.–Austin 1979, writ ref'd n.r.e.). General objections amount to no objection at all. *Murphy v. Waldrip,* 692 S.W.2d 584 (Tex.App.–Fort Worth 1985, writ ref'd n.r.e.). *See also, In Interest of McElheney,* 705 S.W.2d 161 (Tex.App.–Texarkana 1985, no writ), a termination suit, in which the mother failed to preserve any error concerning the admission of evidence of her homosexual preferences. The court of appeals determined that the objections which were raised at trial were in general terms and failed to state any grounds. Error was waived. And in *University of Texas System v. Haywood,* 546 S.W.2d 147 (Tex.Civ. App.–Austin 1977, no writ), an objection was made at a pre-trial conference, but no objection was raised at trial. Because the objection did not specify a particular rule of evidence, it was considered too general and error was waived.

An objection that the proffered testimony is "irrelevant and immaterial' is too general to preserve complaint on appeal. *Wilkins v. Royal Indemnity, Company,* 592 S.W.2d 64 (Tex.Civ.App.–Tyler 1979, no writ). An objection as to irrelevancy does not enable the trial court to make an intelligible ruling or permit the offering party to remedy the defect. As such, it is insufficient to require consideration by an appellate court. *Mayfield v. Employer's Reinsurance Corp.,* 539 S.W.2d 398 (Tex.Civ.App.–Tyler 1976, writ ref'd n.r.e.). Relevance objections should incorporate the test contained in Rule 401 of the Rules of Evidence and identify the material fact issue to which the evidence is purportedly directed but irrelevant.

Where a party seeks introduction of evidence without laying the proper predicate, it is insufficient to merely object that the predicate has not been laid. The complaining party must identify the portion of the predicate which is lacking. *See Seymour v. Gillespie,* 608 S.W.2d 897 (Tex. 1980); *In the Matter of Bates,* 555 S.W.2d 420 (Tex. 1977). Both cases involved the introduction of tape recordings over a general objection as to the predicate.

3. Objection must be ruled upon

Appellate review of an objection requires that the trial court rule on the objection. TEX.R.APP.P 33.1 (a)(2)(A). A trial court cannot commit error if it does not act. If no ruling is obtained on an objection, it is waived. *City of Los Fresnos v. Gonzalez,* 848 S.W.2d 910, 914 (Tex.App.–Corpus Christi 1993, no writ). If a trial court refuses to rule, an objection to that refusal preserves the error. TEX.R.APP.P. 33.1(a)(2)(B); *Greater Houston Transp. Co. v. Zrubeck,* 850 S.W.2d 579, 585 (Tex.App.–Corpus Christi 1993, writ denied).

C. Waiver of Error

1. Similar evidence admitted without objection

Objections to evidence are unavailable when similar evidence to the same effect is offered and received without objection. The Supreme Court has considered this issue in *Bushell and Sydex Corporation v. Dean,* 803 S.W.2d 711 (Tex. 1991). Dean had sued her employer and former manager for sexual harassment. During the course of the trial, she offered the testimony of an expert witness who indicated that he would be able to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Counsel for Sydex objected to the testimony of the witness as a whole to the extent that it went to the "profile" of a harasser. The trial court determined that the witness had not yet crossed the line but that at some point the evidence might cross into character evidence prohibitions. The judge also advised counsel that he would need to re-urge his objection at that point. Later, the expert testified as to the "profile" of a sexual harasser, but no objection was lodged. The Supreme Court concluded that error had been waived.

See also, Fabian v. Fabian, 765 S.W.2d 516 (Tex. App.–Austin 1989, no writ), in which the wife complained that the husband should not be able to use evidence derived as a result of a wiretap placed on her telephone to learn of her extracurricular sexual activities. The court never reached the question of the Texas Wire Tap Statute, however, holding that the complaint was waived because similar testimony was received without objection. *Accord, City of Houston v. Riggins,* 568 S.W.2d 188 (Tex.Civ.App.–Tyler 1978, writ ref'd n.r.e.); *Hundere v. Tracy & Cook,* 494 S.W.2d 257 (Tex.Civ.App.–San Antonio 1973, writ ref'd n.r.e.); *New Hampshire Fire Insurance Company v. Plainsman*

Elevators, Inc., 371 S.W.2d 68 (Tex.Civ. App.–Amarillo 1963, writ ref'd n.r.e.). In this instance, any error in admitting the proffered testimony is deemed harmless. *Lopez v. Southern Pacific Transportation Company*, 847 S.W.2d 330 (Tex.App.–El Paso 1993, no writ); C *&* *H Nationwide, Inc. v. Thompson*, 810 S.W.2d 259 (Tex.App.–Houston [1st Dist.] 1991), *aff'd in part, rev'd in part*, 903 S.W.2d 315 (Tex. 1994); *Top Value Enterprises v. Carlson Marketing*, 703 S.W.2d 806 (Tex.App.–El Paso 1986, writ ref'd n.r.e.); *Badger v. Symon*, 661 S.W.2d 163 (Tex.App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.).

2. Grounds of objection as limitation

On appeal, a party will be confined to the grounds of objection as stated in the trial court. *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997); *Texas Department of Transportation v. Olson*, 980 S.W.2d 890, 898 (Tex.App.–Fort Worth 1998, no pet.). A party cannot enlarge his complaint on appeal. *See Perez v. Baker Packers*, 694 S.W.2d 138 (Tex.App.–Houston [14th Dist.] 1985, writ ref'd n.r.e.); *Cusack v. Cusack*, 491 S.W.2d 714 (Tex.Civ.App.–Corpus Christi 1973, error dism'd). Thus, the grounds which are urged in an objection to the trial court limit appellate review. This rule operates in two directions. When an objection is predicated on one ground during trial, but no point of error is predicated on that ground on appeal, error is waived. By the same token, if a ground of objection is not raised during the trial, but is raised by point of error on appeal, no error has been preserved. Two cases demonstrate the difficulty.

In re Estate of Plohberger, 761 S.W.2d 448 (Tex.App. –Corpus Christi 1988, writ denied) involved a dispute as to which of two wills of the deceased was entitled to probate. Her surviving husband sought to probate a will in which her entire estate passed to him. The proponent of the other will offered into evidence medical records which contained statements by the deceased that her husband was a Nazi who had exterminated Jews and who had treated her as a slave. The records were offered as a whole. The husband's objection as to hearsay was overruled. When enlarged copies of the damaging sections of the records were marked as evidence, the husband objected again as to hearsay. This objection was overruled as well. The sections of the records were then read to the jury -- this time the objection was that the statements were inflammatory. The trial court overruled the objection. The court of appeals determined that any error in the admission of the statements was harmless. Its logic places definitive restrictions on the estoppel theory discussed above:

Since the statements appellant objected to being read to the jury **had previously been admitted without objection** (that the statements were prejudicial and should be excluded under Rule 403), we conclude that if any error existed, it was not reversible error.

The highlighted portion of the quotation is important. Obviously, the husband **had** previously objected. He had merely objected on a different and insufficient ground. Thus, it is imperative that you make the correct objection the first time the evidence is offered. If the first objection is predicated on the wrong basis or is a general objection, error will be waived inasmuch as the same or similar evidence will have been previously admitted without **proper** objection.

In *Lade v. Keller*, 615 S.W.2d 916 (Tex.Civ.App.–Tyler 1981, no writ), the proponent of a holographic will was represented by two attorneys. One of the attorneys called the other as a witness concerning the testator's testamentary capacity and state of mind. On cross examination, the attorney was asked whether he presently represented Lade in a criminal matter. The first objection lodged was that the answer was a matter of attorney-client privilege. The question was also objected to on the basis that it was immaterial. The privilege issue was not raised on appeal and was deemed waived. The immateriality issue was found to be too general to preserve any error. In the appeal, Lade urged that the testimony should have been excluded because it was highly prejudicial. This ground was waived because it had not been raised in the trial court. THE MORAL OF THIS STORY IS GET IT RIGHT THE FIRST TIME.

3. Cannot rely upon aligned party's objections

It is not unusual, particularly in family law matters, to have two distinct parties aligned by a common purpose. Paternal grandparents and the father may seek substantially similar relief against the mother. It is important to note that a party complaining of the improper admission of evidence must have objected to that evidence at trial. Thus, if the grandparents had objected to evidence at trial but the father did not, and only the father appealed, he would be precluded from reliance upon the grandparents' objection.

A party must either make its own objection to the evidence or state an exception to the ruling of the court regarding the objection if it wishes to preserve any error for appeal. *Wolfe v. East Texas Seed Co.*, 583 S.W.2d 481 (Tex.Civ.App.–Houston [1st Dist.] 1979, error dism'd).

4. Withdrawal of objection

It is also important to note that when an objection to the admissibility of testimony is withdrawn, even following an adverse ruling by the court, the objection is not preserved for review. The same is true if the exhibit is withdrawn by the party offering it. *Paramount Petroleum v. Taylor Rental Center*, 712 S.W. 2d 534 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Counsel should never withdraw an exhibit or an objection if an appeal is even remotely likely.

D. Running Objection

Less delineated are running objections, where a trial court allows one objection to apply to an area of testimony generally. Since Rule 611(a) of the Rules of Evidence permits the court to exercise reasonable control over the mode and order of interrogation of witnesses and presenting evidence so as to avoid the needless consumption of time, the granting of running objections is within the trial court's discretion.

The appellate courts are inconsistent in their view of running objections, so they should be exercised with caution. Generally, any variance between the testimony given to which a formal objection is made and testimony which may be slightly different or dissimilar may render the running objection a waiver. Further, the later admission of testimony successfully excluded earlier in a trial is considered a waiver of error. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 201 (Tex.App.–Corpus Christi 1990, no writ). In *City of Houston v. Riggins,* 568 S.W.2d 188 (Tex.Civ.App.—Tyler 1978, writ ref'd n.r.e.), the appellate court concluded that the trial court had not erred in admitting testimony where the party offering the testimony thereafter introduced the same type of testimony from other witnesses without objection and full cross examination was conducted. *See also, Kelso v. Wheeler,* 310 S.W.2d 148 (Tex.Civ.App.–Houston 1958, no writ); *F. W. Woolworth Co. v. Ellison, 232* S.W.2d 859 (Tex.Civ.App.–Eastland 1950, no writ). Some courts hold, however, that a party who makes a proper objection to testimony that is overruled is entitled to assume the judge will make the same ruling as to other offers of similar evidence, and is not required to make further objections. *See Atkinson Gas Co. v. Albrecht,* 878 S.W.2d 236, 242-43 (Tex.App.–Corpus Christi 1994, writ denied); *Bunnett/Smallwood & Co. v. Helton Oil Company,* 577 S.W. 2d 291 (Tex.Civ.App.–Amarillo 1978, no writ); *Crispi v. Emmott,* 337 S.W.2d 314 (Tex.Civ.App.–Houston 1960, no writ). This is akin to the idea of the running objection. Still others limit running objections to testimony elicited from the **same witness**. *City of Fort Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.–-Fort Worth 1988, writ denied). The Dallas Court of Appeals has loosened that rule in bench trials and allows running objections to all evidence sought to be excluded, even when elicited from other witnesses. *Commerce, Crowdus & Canton, Ltd. v. DKS Construction, Inc.,* 776 S.W.2d 615, 620 (Tex.App.–Dallas 1989, no writ).

Since running objections appear fraught with peril, they should be avoided if you believe continuing objections will not turn judge and jury against you. If a running objection is the only choice, then certain steps should be followed:

- request a running objection on specific grounds, otherwise the courts may waive error on subsequent admission of testimony. *See City of Houston v. Riggins,* 568 S.W.2d 188, 190 (Tex.App.–Tyler 1978, writ ref'd n.r.e.)(holding error was waived when counsel did not object to testimony from other witnesses);
- obtain a ruling on the request for a running objection. *See City of Forth Worth v. Holland,* 748 S.W.2d 112, 113 (Tex.App.–Fort Worth 1988, writ denied) (referring negatively to counsel's failure to gain a ruling on his request for a running objection);
- make a new request for a running objection if similar testimony is sought from another witness; and
- remember to make proper objections to other objectionable testimony elicited while you have a running objection, otherwise face the specter of waiver on untimely or non-specific objection grounds.

E. Partially Admissible Evidence

Specific objections are critical when evidence is admissible in part. A general objection to evidence admissible in part, which does not point out *specifically* the objectionable portions, is properly overruled. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 205 (Tex.App.–Corpus Christi 1990, no writ) *citing Brown & Root, Inc. v. Haddad,* 142 Tex. 624, 180 S.W.2d 339, 341 (1941). This rule is most often applicable to documentary evidence. *Dyer v. Shafer, Gilliland, Davis, McCollum & Ashley, Inc.,* 779 S.W.2d 474, 477 (Tex.App.–El Paso 1989, writ denied).

1. Complaint as to admission

A general objection to a unit of evidence as a whole which fails to specify the portion objected to is properly overruled if any portion of the evidence is admissible. *Speier v. Webster College,* 616 S.W.2d 617 (Tex. 1981); *Brown & Root, Inc. v. Haddad,* 142 Tex. 624, 180 S.W.2d 339 (1944); *Wolfe v. Wolfe,* 918 S.W.2d 533 (Tex.App.–El Paso 1996, writ denied). It is incumbent upon the objecting party to make a specific objection to the inadmissible portion and then request a limiting instruction. *Ramirez v. Wood,* 577 S.W.2d 279 (Tex.Civ.App.–Corpus Christi 1978, no writ). If a specific objection is made, the trial court can strike the objectionable portion. In the absence of a specific objection, error is waived. *Zamora v. Romero,* 581 S.W.2d 742 (Tex.Civ.App.–Corpus Christi 1979, writ ref'd n.r.e.).

2. Complaint as to exclusion

Where evidence is tendered, only a portion of which is admissible, and an appropriate and specific objection is sustained, it is the burden of the party offering it to separate the admissible from inadmissible testimony. In *Hurtado v. Texas Employers Insurance Association,* 574 S.W.2d 536 (Tex. 1978), TEIA sought to introduce 280 pages of medical records. Over objection, the trial court admitted the records in their totality. The court of appeals concluded the problem was one of determining which party had the burden of separating the inadmissible portions of the exhibit from the admissible portions. It decided that the trial court had the discretion to determine which party should specifically point out the objectionable portions. In his dissent, the chief justice declared that a specific objection had been made as to the inadmissible nature of the records and that the admission was error. The Supreme Court agreed with the dissent. If that burden is not met by the tendering party, the trial court does not err in excluding it in its entirety, and a point of error challenging the exclusion will not be preserved. *Perry v. Teras Municipal Power Agency,* 667 S.W. 2d 259 (Tex.App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.).

F. Motions to Strike and Motions for Mistrial

Witnesses often motor on while counsel objects to questions and testimony. The jury hears the answer, and the testimony appears in the appellate record. Also, evidence sometimes becomes properly objectionable later in a trial. It is insufficient in these instances to merely object; a motion to strike is required in order to prevent the jury from considering the testimony, and to prevent the appellate court from considering it on a sufficiency review. *Hur v. City of Mesquite,* 893 S.W.2d 227, 231 (Tex.App.–Amarillo 1995, no writ); *Prudential Ins. Co. v. Uribe,* 595 S.W.2d 554, 564 (Tex.Civ.App.–San Antonio 1979, writ ref'd n.r.e.); *City of Denton v. Mathes, 528* S.W.2d 625, 634 (Tex.Civ.App.–Fort Worth 1975, writ ref'd n.r.e.).

1. No resurrection of error after waiver

Basically speaking, since untimely objections are frowned upon, a motion to strike will be of little assistance in preserving error where an objection could have been made at the time the evidence was offered but none was forthcoming. Neither the motion to strike nor the motion for mistrial will prevent waiver of an objection when the grounds for the mistrial or the motion to strike do not clearly indicate the objectionable portion of the testimony. *Top Value Enterprises v. Carlson Marketing,* 703 S.W.2d 806 (Tex. App.–El Paso 1986, writ ref'd n.r.e.).

2. When required

When an objection is made and sustained as to testimony which has been heard by the jury, the testimony is before the jury unless they are instructed to disregard it. *Chavis v. Director, State Worker's Compensation Div.,* 924 S.W.2d 439 (Tex.App.–Beaumont 1996, no writ). If an objection to an answer is made but there is no ruling and no motion to strike is urged, there is no error. *Prudential Insurance Company of America v. Uribe,* 595 S.W.2d 554 (Tex.Civ.App.—San Antonio 1979, writ ref'd n.r.e.). Where objection is made to expert testimony after the testimony is admitted, any error in admitting the testimony over the objection is waived if no motion to strike is made. *City of Denton v. Mathes,* 528 S.W.2d 625 (Tex.Civ.App.–Fort Worth 1975, writ ref'd n.r.e.).

Thus, a motion to strike may become necessary in the following instances, as noted by both Jordan, TEXAS TRIAL HANDBOOK 2D, §§243 (Exclusion of Evidence) and Pope and Hampton, *Presenting and Excluding Evidence,* 9 TEX.TECH L. REV. 403 (1978):

- to exclude an answer of a witness made before an objection could be made;
- to exclude volunteer statements of the witness;
- to exclude non-responsive answers;
- to exclude prior testimony admitted conditionally upon counsel's promise to connect up the testimony or to lay a foundation;
- to exclude testimony which later turns out to be improper, such as hearsay, or in violation of the best evidence rule; and
- to exclude testimony of a witness, who by reason of sickness, death, or refusal, fails to submit to cross examination.

G. Offers of Proof

Up to this point we have largely discussed how to preserve your client's complaints about damaging evidence that is admitted by the trial court. Now our focus shifts to preserving your client's complaints about helpful evidence your client desires to admit, but the trial court decides to exclude. The primary way of preserving complaints about the exclusion of evidence is through offers of proof and bills of exception.

1. Step 1—offer the evidence and record your theory of admissibility.

The first step in making an offer of proof that will properly preserve error is to offer the evidence your client desires to admit and to ensure that the record reflects a theory of admissibility that is correct under the rules of evidence. Where evidence is admitted over objection, the reporter's record will provide the court of appeals with sufficient information to rule upon the point of error. So, as a proponent, the first procedural

step in preserving evidentiary error is to offer the evidence. There is no refusal to admit evidence if there is no offer of that evidence. *Giles v. Cardenas,* 697 S.W.2d 422, 424 (Tex.App.–San Antonio 1985, writ ref'd n.r.e.). The burden is on the proponent to show the admissibility of evidence. *Ruth v. Imperial Ins. Co.,* 579 S.W.2d 523, 525 (Tex.Civ.App.–Houston [14th Dist. 1979, no writ). Often the evidence itself reveals the basis for the offer, but if it is unclear, the proponent should insure that the record contains the rule of evidence under which the offer is made and sufficient facts to establish admissibility. *Vandever v. Goettee,* 678 S.W.2d 630, 635 (Tex.App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see McInnes v. Yamaha Motor Corp.*, 659 S.W.2d 704, 710 (Tex.App.–Corpus Christi 1983), *aff'd,* 673 S.W.2d 185 (Tex. 1984), *cert. denied,* 469 U.S. 1107 (1985).

Evidence may be admissible for a more narrow purpose when an objection is sustained to a general offer. The proponent bears the burden on appeal of showing that no basis existed to exclude the evidence. *Minnesota Mining & Mfg. Co. v. Nishika, Ltd.*, 885 S.W.2d 603, 630 (Tex.App.–Beaumont 1994), *rev'd on other grounds*, 953 S.W.2d 733 (Tex. 1997). This is avoided by narrowing the offer until the evidence is admissible. Failure to do so waives any complaint that the evidence was admissible given some more limited offer. *Brown v. Gonzalez,* 653 S.W.2d 854, 864 (Tex.App.–San Antonio 1983, no writ). In the same vein, when evidence is objectionable on some grounds, but admissible on other grounds, there is no error if the trial court sustains an objection to a general offer; the proponent must re-offer the evidence on some admissible ground. *Ferguson v. DRG/Colony North, Ltd.*, 764 S.W.2d 874, 882 (Tex.App.–Austin 1989, writ denied).

2. Step 2—making sure the excluded evidence appears in the record for appellate review.

When evidence is excluded by the trial court, the proponent of the evidence must preserve the evidence in the record in order to complain of the exclusion on appeal. *Weng Enterprises, Inc. v. Embassy World Travel,* 837 S. W. 2d 217, 221 (Tex.App.–Houston [1st Dist. 1992, no writ); *see* TEX.R.EVID. 103. Compliance with the evidentiary rules on an offer of proof preserves error for appellate review. TEX.R.APP.P. 33.1(a)(1)(B). The reason for the offer of proof is explained in *Anderson v. Higdon,* 695 S.W.2d 320 (Tex.App.–Waco 1985, no writ):

> When tendered evidence is excluded, whether testimony of one's own witness on direct examination or testimony of the opponent's witness on cross examination, in order to later complain it is necessary for the complainant to make an offer of proof on a bill of exception to show what the witness' testimony would have been. Otherwise, there is nothing before the appellate court to show reversible error in the trial court's ruling. *Id.* at 325.

Thus, to preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show (1) the substance of evidence sought to be admitted was relevant and made known to the court; and (2) the court either adversely ruled, or after timely request affirmatively refused to rule. *Lopez v. Southern Pacific Transportation Company,* 847 S.W.2d 330 (Tex.App.–El Paso 1993, no writ). An objection to the trial court's refusal to rule is sufficient to preserve error for appeal under TEX.R.APP.P. 33.1(a)(2)(B). Remember, however, that the offer of proof or the objection to the court's refusal to rule must be made prior to the court's charge being read to the jury, or it is waived. *See Raw Hide Oil & Gas, Inc. v. Maxus Exploration Company,* 766 S.W.2d 264 (Tex.App.–Amarillo 1988, writ denied).

a. Offer of Proof.

Whenever possible, a party should preserve excluded evidence through an offer of proof. To preserve error in the exclusion of evidence through an offer of proof, a party must: (1) offer the evidence at trial; (2) if an objection is lodged, specify the purpose for which the evidence is offered and the reasons why the evidence is admissible; (3) obtain a ruling from the court; and (4) if the judge rules the evidence inadmissible, make an offer of proof. *Estate of Veale v. Teledyne Indus.*, 899 S.W.2d 239, 242 (Tex. App.—Houston [14th Dist.] 1995, writ denied). The offer must show the substance of the evidence that was excluded; formal proof is not required, and courts prefer a concise statement over a lengthy presentation. *In re N.R.C.*, 94 S.W.3d 799, 806 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

1) Oral Testimony.

The excluded evidence is presented in the form of a summary or in a question-answer format outside the presence of the jury. TEX. R. EVID. 103(b); *Babcock v. Northwest Memorial Hosp*., 767 S.W.2d at 708. If the substance of the evidence is apparent from the record, however, an offer of proof is not necessary. TEX. R. EVID. 103(a)(2); *Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 143 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 106 S.W.3d 724 (Tex. 2003).

2) Documentary Evidence.

To preserve documentary evidence, the party should ask the court reporter to mark the document as an offer of proof, identify it with an exhibit number, and file it with the exhibits in the reporter's record. *See* TEX. R. CIV. P. 75a; *Owens-Illinois Inc. v. Chatham*, 899

S.W.2d 722, 731 (Tex. App.—Houston [14th Dist.] 1995, writ dism'd).

3) Deadline.

An offer of proof must be made before the court reads the charge to the jury. TEX. R. EVID. 103(b).

b. Bill of Exceptions.

A bill of exceptions is a post-trial offer of evidence in written form and is necessary only when the complaint or evidence is not preserved in an offer of proof. *See* TEX. R. APP. P. 33.2. It should state the party's objection and the trial court's ruling. *See* TEX. R. APP. P. 33.2(a). The bill must then be presented to the trial judge for a ruling. TEX. R. APP. P. 33.2(c)(1). The procedure for obtaining an approved Bill of Exceptions is time consuming and complicated. *Id.* It is therefore important to make your offer of proof timely during trial.

H. Motion for Instructed Verdict

Rule 268 of the Texas Rules of Civil Procedure authorizes a motion for instructed/directed verdict. *See* Tex.R.Civ.P. 268. The purpose of the motion is for the trial court to "instruct" or "direct" the jury to enter judgment in favor of one party. The trial court is authorized to do so for three basic reasons: (1) the movant is entitled to judgment as a matter of law because there is no evidence to support a finding in favor of its opponent's claim or defense; (2) the movant is entitled to judgment as a matter of law because the evidence in support of its own claim or defense is conclusive; and (3) the movant is entitled to judgment as a matter of law because some rule of law requires that movant prevails or some rule of law prevents movant's opponent from prevailing. *Prudential Ins. Co. v. Fin. Rev. Servs.*, 29 S.W.3d 74, 77 (Tex.2000); *Dietrich v. Goodman*, 123 S.W.3d 413, 419 (Tex.App.–Houston [14th Dist.] 2003, no pet.).

In a bench trial there is no jury to instruct or direct, so the motion should simply be called a "motion for judgment" rather than a motion for "instructed" or "directed" verdict. *McKinney Iron Works v. TEC*, 917 S.W.2d 468, 469-70 (Tex.App.–Fort Worth 1996, no writ).

A motion for instructed verdict may be oral rather than written, provided specific grounds are given therefor. Lack of specificity is not fatal if no fact issues are raised by the evidence. *Texas Employers Insurance Association v. Page*, 553 S.W.2d 98 (Tex.1977). If, after the motion for instructed verdict is presented and overruled, the moving party presents evidence, the motion is waived unless it is re-urged at the conclusion of all of the evidence. *Nelson Cash Register v. Data Terminal*, 671 S.W.2d 594 (Tex.App. San Antonio 1984, no writ); *Wenk v. City National Bank*, 613 S.W.2d 345 (Tex.Civ.App. Tyler 1981, no writ). A ruling on the motion must be obtained before the verdict is returned in order to preserve error. *State v. Dikes*, 625 S.W.2d 18 (Tex.Civ.App. San Antonio 1981, no writ).

I. Motion to Amend Pleadings

If your opponent objects to the admission of evidence or submission of the case to the court for decision on the grounds that you failed to plead a claim or defense, then you must make a motion seeking leave to file a trial amendment to your pleadings. *See* Tex.R.Civ.P. 66 and 67. This step is a necessary prerequisite to having the court of appeals review whether the trial court erred in granting or denying the motion for leave to amend pleadings. *Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 664-65 (Tex.1992); *Hardin v. Hardin*, 597 S.W.2d 347, 349-50 (Tex.1980).

Rule 66 provides:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault, or omission in a pleading, either of form or substance, is called to the attention of the court, then the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant postponement to enable the objecting party to meet such evidence.

See Tex.R.Civ.P. 66.

Rule 67 provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure to so amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of [jury] questions as is provided by Rules 277 and 279.

See Tex.R.Civ.P. 67.

As shown by the text of Rule 66 and 67, the Texas Rules of Civil Procedure are extremely liberal in allowing amendments for the cure of defects, faults, or omissions in a pleading, either of form or substance, provided that there is no prejudice to the opposing party. *See Id.*; *see also, In re Laughlin*, 153 Tex. 183, 265 S.W.2d 805 (1954). Moreover, even if prejudice is demonstrated, the trial court may be able to cure the prejudice by granting a continuance for additional discovery and preparation to respond to the new claim or defense. *See Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex.1986); *Thompson v. Caldwell*, 22 S.W.2d 720 (Tex.Civ.App.—Eastland 1929), *aff'd*, 36 S.W.2d 999 (Tex.Comm'n App.1931); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 185-86 (Tex.App.—Houston [14th Dist.] 2002, no pet.).

To obtain a trial amendment, you must make a motion for leave to amend your pleadings. The motion may be oral. *See Pennington v. Gurkoff*, 899 S.W.2d 767, 771 (Tex.App.—Fort Worth 1995, writ denied). However, the amended pleading must be in writing, signed by the attorney, and tendered to the court for filing. *See* Tex.R.Civ.P. 45(d), 63; *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 73 (Tex.2000)(holding that as a general rule trial amendment must be in writing but also holding that error was waived when opposing party failed to object to oral pleading amendment before the case was submitted to the jury).

Trial amendments are available to cure procedural or formal defect in your pleadings. *See Chapin & Chapin, Inc. v. Texas Sand & Gravel Co.*, 844 S.W.2d 664, 664-65 (Tex.1992)(trail amendment sought to cure lack of verified denial); *Smith Detective Agency & Nightwatch Serv. v. Stanley Smith Sec., Inc.*, 938 S.W.2d 743, 748-49 (Tex.App.—Dallas 1996, writ denied)(trial amendment sought to cure lack of verified denial). It is often held to be an abuse of discretion for a trial court to refuse a trial amendment that is aimed at curing a procedural or formal defect in a pleading. *Ramsey v. Cook*, 231 S.W.2d 734 (Tex.Civ.App.—Fort Worth 1950); *Reiser v. Jennings*, 143 S.W.2d 99 (Tex.Civ.App.—Amarillo 1940, writ dism'd). Further, the courts have held that it is mandatory to allow a trial amendment when necessary to conform the pleadings to the evidence admitted at trial. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 839 (Tex.App.—Houston [14th Dist.] 2000, pet. denied).

Trial amendments are also available to cure substantive defects in your pleadings, such as failure to plead a claim or defense, but only if one of two conditions are met:

1. The trial amendment does not surprise or prejudice your opponent or, if it does surprise or prejudice your opponent, then the resulting surprise prejudice can be cured by a continuance or other remedy fashioned by the trial court. *See* Tex.R.Civ.P. 63, 66; *Francis v. Coastal Oil & Gas Corp.*, 130 S.W.3d 76, 91-92 (Tex.App.—Houston [1st Dist.] 2003, no pet.); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 185-86 (Tex.App.—Houston [14th Dist.] 2002, no pet.); or
2. The trial amendment is authorized because the claim or defense was tried by express or implied consent. *See* Tex.R.Civ.P. 67, *Ingram v. Deere*, 288 S.W.3d 886, 893 (Tex.2009); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex.1991); *Hirsch v. Hirsch*, 770 S.W.2d 924, 926 (Tex.App.—El Paso 1989, no writ).

A trial amendment asserting a new claim or defense is prejudicial on its face if it: (1) asserts a new substantive matter that reshapes the nature of the trial itself; (2) is of such a nature that the opposing party could not have anticipated it in light of the development of the case; and (3) detrimentally affects the opposing party's presentation of the case. *Stephenson*, 16 S.W.3d at 839. The party opposing the trial amendment must object and prove why the amendment is prejudicial. *Hardin v. Hardin*, 597 S.W.2d 347, 349-50 (Tex.1980); *Diesel Fuel Injection Serv. v. Gabourel*, 893 S.W.2d 610, 611 (Tex.App.—Corpus Christi 1994, no writ). If the opposing party fails to demonstrate that the new matter causes surprise or prejudice, or is prejudicial on its face, then the court has no discretion to deny the amendment. *Francis*, 130 S.W.3d at 91. Further, if it is shown that evidence was admitted in support of each element of the new claim or defense, without objection from the opposing party, then the issue was tried by consent and the court has no discretion to refuse the amendment. *See* Tex.R.Civ.P. 67, *Ingram*, 288 S.W.3d at 893; *Roark*, 813 S.W.2d at 495; *Hirsch*, 770 S.W.2d at 926.

J. Motion to Re-Open Evidence

If your opponent moves for a directed verdict claiming there is no evidence to support an essential element of your client's claim or defense, and you have any doubt as to whether or not you submitted evidence as to the challenged element, then you should make a motion to re-open the evidence for additional testimony. Likewise, if you move for a directed verdict claiming that your opponent submitted no evidence of an essential element of a claim or defense then you should be prepared to argue why the evidence should not be re-opened. The standard for granting or denying motions to re-open the evidence are set forth below.

Motions to reopen for additional evidence are governed by Texas Rule of Civil Procedure 270. *See* Tex.R.Civ.P. 270; *MCI Telecomm. v. Tarrant Cty. Appr. Dist.*, 723 S.W.2d 350, 353 (Tex.App.—Fort Worth 1987, no writ)(holding that trial court correctly reopened evidence where motion to reopen was made in

response to motion for directed verdict). Rule 270 states:

> When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.

See Tex.R.Civ.P. 270.

In determining whether to permit additional evidence under Rule 270, a court should consider:

1. the movant's diligence in obtaining the additional evidence;
2. the decisiveness of the evidence;
3. whether reception of the evidence would cause undue delay; and
4. whether the granting of the motion would cause injustice.

See Greater Fort Worth & Tarrant Cty. Cmty. Action Agency v. Mims, 627 S.W.2d 149,151 (Tex.1982)(holding that on re-trial of remanded issue of damages, trial court should have re-opened evidence to receive evidence of wages earned over three years since prior trial); *Lopez v. Lopez*, 55 S.W.3d 194, 201 (Tex.App.—Corpus Christi 2001, no pet.)(explaining standard to be followed in ruling on motion to reopen evidence); *Word of Faith World Outreach v. Oechsner*, 669 S.W.2d 364, 366-67 (Tex.App.—Dallas 1984, no writ)(reversing trial court's refusal to re-open evidence when party seeking to re-open proved all of the foregoing elements).

The decision to reopen is committed to the sound discretion of the trial court. *Lopez*, 55 S.W.3d at 201; *MCI Telecomm.*, 723 S.W.2d at 353. Rule 270 expressly directs the court to reopen the evidence when necessary to the due administration of justice and the courts of appeal have encouraged trial courts to be liberal in the exercise of their discretion. *See* Tex.R.Civ.P. 270; *Lopez*, 55 S.W.3d at 201. Thus, it can be an abuse of discretion for the trial court to deny a motion to reopen where the record shows that the party seeking to reopen proved all of the elements to obtain relief. *Oechsner*, 669 S.W.2d at 366-67.

In a jury case, the motion to reopen must be made before the jury returns the verdict. *See* Tex.R.Civ.P. 270. In a bench trial it is advisable to do it as soon as possible. If the court enters a judgment before you move to reopen, it will be very hard to prove an abuse of discretion if the motion is denied. *See e.g.*, *Fisher v. Kerr Cty.*, 739 S.W.2d 434, 437 (Tex.App.—San Antonio 1987, no writ).

III. DECIDING WHETHER TO FILE A POST-TRIAL MOTION

A. You Gotta Think like an Appellate Lawyer

The first and most important step in deciding whether to file a post-trial motion is to look at the trier of fact's factual determinations and the court's legal rulings from the perspective of an appellate lawyer and to analyze whether there is reversible error which needs to be brought to the court's attention either because it is the last opportunity to get the court to change its mind without the cost and expense of an appeal, or because the complaint has not been preserved and therefore must be brought to the court's attention by a post-trial motion in order to preserve the complaint for appeal. In other words, you have to re-examine the case and you gotta think about it the way an appellate lawyer would. Thinking like an appellate lawyer involves identifying potential appellate complaints, and then developing arguments designed to persuade the appellate court that your client should prevail.

B. Elements of an Appellate Complaint.

Every appellate complaint has a relatively standard set of elements: (1) an adverse ruling; (2) the preservation of complaint about the ruling; (3) authority that shows the ruling is erroneous under the appropriate standard of review, and (4) a showing that the error is harmful. 10 TEX. LIT. GUIDE; 146.02[2]. All appellate complaints must be developed with these basic elements in mind. It will do no good to complain about adverse rulings that are not preserved in the record, rulings that cannot be shown to be erroneous under the appropriate standard of review, or rulings that are not harmful. Asserting these types of complaints is a self-defeating endeavor and does not serve the interests of your clients. Thus, the basic elements of an appellate complaint dictate that appellate counsel must rigorously analyze all potential appellate complaints to ensure that the attorney will be asserting a complaint that entitles the client to relief.

C. Identifying Potential Appellate Complaints.

The starting point of appellate analysis is the identification of potential appellate complaints. This can only be done by reviewing the record for potential errors and then researching the law to confirm your hunches about whether the potential errors are probable errors. Although trial counsel usually has a good working idea of where error occurred at trial, this does not mean that trial counsel can neglect the obligation to perform a formal legal analysis of the record to identify potential appellate complaints. To do this, counsel must begin by examining the trial record as it will be seen by the appellate court. The common mistake made by trial counsel is to confuse the case file and counsel's memory about the trial or hearing with the appellate record. The formal appellate record includes the clerk's record (i.e.,

the items in the court's file which includes the docket sheet, the pleadings, the motions, pre-trial orders, the charge or the trial court's findings of fact and conclusions of law, and the judgment), and the reporter's record (i.e., the transcript of any hearing where a record was requested and the transcript from the trial). *See* TRAP 34.1. The only errors that matter are the ones contained in the appellate record.

One useful tool in analyzing potential appellate complaints is to study the judgment's "constituent elements." Richard R. Orsinger & Justice Ann Crawford McClure, *Appeals from Summary Judgments and Non-Jury Trials*, Nuts & Bolts of Appellate Practice 2001, Ch. 7, p. 37 (2001) (hereinafter "Appeals from Non-Jury Trials"). "The trial court's judgment is the capstone of the case, built upon elements which are themselves built upon other elements." *Id*. For example, the judgment must be supported by conclusions of law applied to specific findings of fact that are themselves supported by evidence and by pleadings. *Id., citing, Light v. Wilson*, 663 S.W.2d 813, 814 (Tex.1984)("conclusions of law which are not based on findings of fact and supported by pleadings will not sustain a judgment"). If the appellant has properly preserved error at each stage of the litigation, reversal may occur because the trial court's judgment is not supported by its constituent elements. Appeals from Non-Jury Trials, at 37; *see also*, TRCP 301 (holding that the trial court's judgment shall conform to the pleadings, the nature of the case proved and the verdict, if any).

D. Preservation of Error.

When reviewing the appellate record, counsel's focus must be on the identification of preserved error. Generally, an appellate complaint will not succeed unless the error complained of in the appellate court was first presented in the trial court. TRAP 33.1. The appellate record must reflect that a timely request, objection or motion was presented to the trial court, and that it was ruled upon. TRAP 33.1(a); *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex.1999). The request, objection or motion must state the specific grounds for the desired ruling if those grounds are not apparent from the context of the request, objection or motion. TRAP 33.1(a)(1)(A); *McKinney v. Nat'l Union Fire Ins. Co*., 772 S.W.2d 72, 74 (Tex.1989)(specific objections are ones that enable the trial court to understand the precise grounds so as to make an informed ruling and affords the opposing party an opportunity to remedy the defect, if possible). If the trial judge refused to rule, an objection to that failure preserves the complaint. TRAP 33.1(a)(2)(B). The requirement of a ruling does not apply to the overruling by operation of law of a motion for new trial or motion to modify judgment, unless the taking of evidence was necessary to properly present the complaint in the trial court. TRAP 33.1(b).

A corollary to the foregoing rule is the rule that an appellate complaint must conform to the complaint made in the trial court. *See Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex.1982)("the reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time"); *Texas Dept. of Public Safety v. Bond*, 955 S.W.2d 441, 448 (Tex.App.—Fort Worth 1997, no pet.)("the complaint on appeal must be the same as that presented in the trial court").

There is one exception to the foregoing general rule about preservation of error-fundamental error may be raised for the first time on appeal. *Pirtle*, 629 S.W.2d at 919-20. However, fundamental error is a rarity. *American Gen. Fire & Cas. Co. v. Wineburg*, 639 S.W.2d 688, 689 (Tex.1982). Fundamental error survives today only in those rare instances in which the record on appeal shows on its face that the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared and the statutes or the Texas Constitution. *Pirtle*, 629 S.W.2d at 919; *Wal-mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex. 1993); *New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990).

E. Assessing the Strength and Quality of Potential Appellate Complaints.

Once counsel has identified the appellate complaints that are preserved for review, counsel must then assess the strength of the potential complaints. In evaluating the strength of these complaints, counsel must focus on two factors: (1) whether the potential complaint constitutes error under the appropriate standard of review; and (2) whether the harmless error rule is likely to be applied to defeat the complaint.

1. Standards of Review.

Standards of review distribute power within the judicial branch. W. Wendell Hall, Standards of Review in Texas, 29 St. Mary's L.J. 351, 356 (1998). These standards guide an appellate court in deciding what level of deference should be accorded to the lower court's action or decision. All too often, litigants ignore or pay lip service to the applicable standard of review. This is a critical mistake. "Because the reviewing court will undoubtedly determine the relevant standard on its own and review the appeal accordingly, litigants who do not meaningfully address the standard of review risk that they will not persuade the court that the standard, as applied to the facts and the law, requires reversal." *Id*. Accordingly, identifying and applying the appropriate standard of review to your potential appellate complaints is very important.

Although there are numerous standards of review that apply to certain specific types of appellate complaints, there are generally two major standards of review that impact family law cases: (1) the abuse of discretion standard; and (2) the sufficiency of the evidence standards.

a. Abuse of Discretion.

An appeal directed toward showing an abuse of discretion is one of the tougher appellate propositions. *Jenkins v. Jenkins*, 16 S.W.3d 473, 477-78 (Tex.App.—El Paso 2000, no pet.). Unfortunately for family lawyers, most of the appealable issues in a family law case are evaluated against an abuse of discretion standard, be it the issues of property division incident to divorce or partition, conservatorship, visitation, or child support. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981)(property division); *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex.1982)(conservatorship); *Worford v. Stamper*, 801 S.W.2d 108 (Tex. 1990)(child support). "It is an understatement to suggest that the abuse of discretion standard is 'not easily defined'." Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. at 359. "Judicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective and conclusory." *Id*.

The abuse of discretion standard is usually stated as follows: The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts presented an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *See Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-42 (Tex.1985). Another way of stating the test is whether the act was arbitrary or unreasonable. *Smithson v. Cessna Aircraft Co*., 665 S.W.2d 439, 443 (Tex. 1982). The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner then an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer*, 701 S.W.2d 238.

The Texas Supreme Court has explained that the abuse of discretion standard has different applications depending on the circumstances of each case. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). On the one hand, if the appellant seeks to overturn a trial court's decision based on factual issues or matters committed to the trial court's discretion, the standard is very deferential towards the trial court (i.e., the appellant must show that the trial court could have reached only one decision under the facts). *Id*. at 839-40; *see also, Scott v. Twelfth Court of Appeals*, 843 S.W.2d 439, 440 (Tex.1992). On the other hand, if the appellant seeks to overturn a trial court's legal determinations, the standard is much less deferential because the trial court has no discretion to determine the law or apply the law to the facts. *Walker*, 827 S.W.2d at 840; *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 437 (Tex.1997).

b. Sufficiency of the Evidence.

A "no evidence" or legal insufficiency point is a question of law which asks whether there is legally sufficient evidence to support a particular fact finding. In reviewing a verdict for legal sufficiency, the reviewing court must credit evidence that supports the verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005). "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact. *Id*., citing, Robert W. Calvert, *"No Evidence" & "Insufficient Evidence" Points of Error*, 38 TEX. L.REV. 361 (1960); *see also, King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997); *Juliette Fowler Homes, Inc. v. Welch Assocs*., Inc., 793 S.W.2d 660, 666 n. 9 (Tex.1990).

There are basically two separate "no evidence" claims. *Tate v. Tate*, 55 S.W.3d 1, 4 (Tex.App.—El Paso 2000, no pet.). When the party having the burden of proof suffers an unfavorable finding, the point of error challenging the legal sufficiency of the evidence should be that the fact or issue was established as "a matter of law". *Id*. When the party without the burden of proof suffers an unfavorable finding, the challenge on appeal is one of "no evidence to support the finding". Id In considering a "no evidence" point, an appellate court considers only the evidence which tends to support the challenged finding and disregards all evidence and inferences to the contrary. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex.1965); Tate, 55 S.W.3d at 4). In considering a "matter of law" point, the appellant must overcome two hurdles. *Zeptner v. Zeptner*, 111 S.W.3d 727, 734 (Tex.App.—Fort Worth 2003, no pet.). First, the record must be examined for evidence that supports the finding, while ignoring all evidence to the contrary. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 940 (Tex.1991). Second, if there is no evidence to support the finding, then the entire record must be examined to see if the contrary proposition is established as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex.1989).

"Insufficient evidence" or factual insufficiency involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. *Tate*, 55 S.W.3d at 5. When the party having the burden of proof complains of an unfavorable

finding, the point of error should allege that the findings "are against the great weight and preponderance of the evidence". *Kimsey v. Kimsey*, 965 S.W.2d 690, 700 (Tex.App.—El Paso, pet. denied). The "insufficient evidence" point of error is appropriate only when the party without the burden of proof on an issue complains of the court's findings. *Tate*, 55 S.W.3d at 5. In reviewing a factual sufficiency complaint, an appellate court must consider all of the evidence, both the evidence which tends to prove the existence of a vital fact as well as evidence which tends to disprove its existence. *Id*. It is for the jury to determine the weight to be given to the testimony and to resolve any conflicts in the evidence. *Id*. Thus, the jury's finding will be sustained if there is some probative evidence to support it and provided it is not against the great weight and preponderance of the evidence. *In re Kings Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951); *Kimsey*, 965 S.W.2d at 700.

A number of issues in family law cases require the trier of fact to find a fact by clear and convincing evidence (i.e., characterization of property as separate property or termination of parental rights). For a number of years, there was a dispute among the appellate courts regarding the proper standard of appellate review for findings made under the clear and convincing standard. *In re B.R.*, 950 S.W.2d 113, 117-18 (Tex.App.—El Paso 1997, no pet.). Recently, that dispute was resolved. *In re J.F.C.*, 96 S.W.3d 256, 264-66 (Tex. 2002)(addressing the legal sufficiency standard on appeal when the burden of proof at trial is by clear and convincing evidence), and *In re C.H.*, 89 S.W.3d 17, 25 (Tex.2002)(addressing the factual sufficiency standard on appeal when the burden of proof at trial is by clear and convincing evidence). Now, when a fact finding is made at trial under the clear and convincing evidence standard, the appellate standard of review requires the appellate court to determine "whether the evidence is sufficient to produce in the mind of the fact finder a firm belief or conviction as to the truth of the allegations sought to be established". *J.F.C.*, 96 S.W.3d 256, 264-66 C.H., 89 S.W.3d 17, 25 *Id*.

c. Hybrid Standards of Review in Family Law Cases

In family law cases, the trial court is often asked to resolve issues of fact before it is given the discretion to take action. *See*, e.g., Tex. Fam. Code Ann. § 156.101 (Vernon Supp.2004)(allowing trial court to modify conservatorship if the court first finds that certain facts exist). When this occurs, the abuse of discretion standard often overlaps the traditional sufficiency standards of review. Several courts have concluded that when the trial court's ruling on the merits is reviewed under an abuse of discretion standard, the normal sufficiency of the evidence review is part of the abuse of discretion review and not an independent ground for reversal. *Zeptner v. Zeptner*, 111 S.W.3d 727, 734 (Tex.App.—Fort Worth 2003, no pet.); *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex.App.—Amarillo 1995, writ denied); *Thomas v. Thomas*, 895 S.W.2d 895, 898 (Tex.App.—Waco 1995, writ denied); *In the Matter of the Marriage of Driver*, 895 S.W.2d 875, 877 (Tex.App.—Texarkana 1995, no writ).

Some courts have questioned this approach and resorted to a hybrid form of the abuse of discretion and traditional sufficiency standards of review. *Echols v. Olivarez*, 85 S.W.3d 475, 477-78 (Tex.App.—Austin 2002, no. pet.); *Jenkins v. Jenkins*, 16 S.W.3d 473, 479-80 (Tex.App.—El Paso 2000, no pet.). Under this hybrid standard, these courts engage in a two-pronged inquiry: (1) did the trial court have sufficient information upon which to exercise its discretion and (2) did the trial court err in its application of discretion. *Jenkins*, 16 S.W.3d at 478. Under the first inquiry, the trial court's factual determinations are reviewable under a traditional sufficiency standard. *Id*. Under the second inquiry, an appellate court proceeds to determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Id*.

2. Harmless Error Rule.

Even if error occurred in the trial court, it is not automatically "reversible error". No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment, or that the error probably prevented the appellant from properly presenting the case on appeal. TRAP 44.1. In determining whether an error rises to the level of reversible error, the courts do not apply a "but for" test; instead, they apply a test of probability. Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. at 369. The appellate court must determine whether it is more likely than not that the error led to an improper judgment. *City of Brownsville v. Alvarado*, 897 S.W.2d 750 (Tex. 1997); *King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). If so, the judgment is reversed; if not, the judgment is affirmed. Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. at 369.

A classic example of the harmless error rule can be seen in the appellate review of mischaracterization complaints. On appeal there is only one type of mischaracterization error that is harmful as a matter of law (i.e., when the trial court mischaracterizes the separate property of one spouse and awards the property to the other spouse). *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex.1977); Tate, 55 S.W.3d at 6-7. When the trial court mischaracterizes property, but does not divest a spouse of his or her separate property, the party complaining about the mischaracterization error must show harm (i.e., that the mischaracterization error caused the overall property division to be manifestly

unjust). *Tate*, 55 S.W.3d at 6-7; *Vandiver v. Vandiver*, 4 S.W.3d 300, 302 (Tex.App.—Corpus Christi 1999, pet. denied). If the mischaracterization error affects the just and right division of the community estate, the appellate court must remand the entire community division. *Evans v. Evans*, 14 S.W.3d 343, 345 (Tex.App.—Houston [14th Dist.] 2000, no pet. hist.). If the mischaracterization error has a de minimis effect on the division, then there has been no showing of an abuse of discretion. *Tate*, 55 S.W.3d at 11. It is only when the trial court mistakenly characterizes property that is of such magnitude that it materially affects the just and right division of the community estate that reversible error is demonstrated. *In re Marriage of Taylor*, 992 S.W.2d 616, 621 (Tex.App.—Texarkana 1999, no pet.).

There is one rare exception that applies to the harmless error rule—the doctrine of cumulative error. The doctrine is seldom used to reverse a case. Generally, when an appellant argues that a case should be reversed because of cumulative error, the appellant is alleging that the trial court's errors, nonreversible or harmless errors individually, pervade the trial, and in the aggregate cause the rendition of an improper verdict. Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. at 371, citing *Strange v. Treasure City*, 608 S.W.2d 604, 609 (Tex. 1980); *Scoggins v. Curtiss & Taylor*, 148 Tex. 15, 19, 219 S.W.2d 451, 454 (1949). Reversal based upon cumulative error is still governed by Rule 44.1. TRAP 44.1; *Mercy Hosp. v. Rios*, 776 S.W.2d 626, 637 (Tex.App.—San Antonio 1989, writ denied). That is, the errors complained of must amount to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment or prevented the appellant from making a proper presentation of the case to the court. *McCormick*, 751 S.W.2d at 892.

IV. GENERAL TIPS FOR DRAFTING POST-TRIAL MOTIONS

A. Drafting an Effective Post-Trial Motion.

What separates a well-drafted post-trial motion or response from its competitors is clarity. A motion or response is effective when it clearly communicates what error has occurred, why the error is reversible, and the desired result. There should be no confusion about these matters. Every portion of the motion should contribute to your ultimate goal - persuading the court to correct the error and enter the judgment you desire. The words, sentence structure, and paragraph breaks should assist the court in understanding your point. Most judges will make some effort to understand your arguments, but if the effort required is too much, you will lose your opportunity to persuade the court. Thus, the key to writing a wining brief is to write clearly and with a point.

1. Remember the Overall Purpose of the Motion.

When you are deciding whether an argument needs to be included in your motion, keep in mind the basic functions of the motion. The motion must:

a. identify the alleged error;
b. present the facts necessary to show that error has occurred;
c present the relevant law showing that the error is harmful and therefore reversible; and
d. instruct the court how to dispose of the case.

If the argument helps to achieve any one of those essential functions, then it probably should be included.

2. Follow the Rules.

The rules at issue are the Texas Rules of Civil Procedure. Read them. Know them. Use them and abide by them. Rules 300 to 306 address the process of moving for judgment and moving to disregard jury findings or moving for jnov. *See* TEX. R. CIV. P. 301-306. Rules 320 to 329b govern motions for new trial and motions to modify, correct, and reform the judgment. *See* TEX. R. CIV. P. 320-329b. These rules will guide you in crafting an effective post-trial motion if you will follow their lead.

3. Make it Short, Concise and Readable.

When you consider the sheer volume of paperwork that a judge should be reading on a weekly basis: (1) motions set for hearing; (2) written evidence submitted at hearings; (3) trial briefs; (4) jury charges; (5) legal periodicals; (6) advance sheets; (7) Supreme Court Reporter; (8) post-trial motions, etc., it is easy to understand why judges advocate short and concise motions.

Follow a simple familiar form. Judges categorize and differentiate. Therefore, they want to know: What kind of case is this? What am I being asked to do? Why am I being asked to do it? Have other courts done what I am being asked to do? Have some refused? Why did they refuse? How is this case different from those cases?

The simpler the argument, the clearer and more persuasive it will be to the reader. A short motion, encourages the court to spend more time with your selective assertions. Undue length, on the other hand may cause your strongest assertions to get lost in the pages.

Do not write like a lawyer; instead write in order to be understood. Avoid technical jargon and long complicated points of error in favor of short affirmative points.

Use active voice rather than passive, e.g., "Thomas appeals . . ." as compared to "this is an appeal by Thomas." This generally will be more persuasive

because it shows action and sells ideas. Make positive statements and avoid negative sentence forms.

Lawyers have a tendency to use three or four words when one will do. Therefore, edit your work to omit needless words, e.g.:

- This is a case which involves...
  This case involves . . .
- The fact that he failed to give notice...
  His failure to give notice . . .
- He consulted with a doctor in regard to his injuries.
  He consulted a doctor about his injuries.
- The continuance was requested in order to obtain the presence of a witness who was not then available.
  The continuance was requested because a witness was unavailable.

Use subheadings particularly in complicated cases. This will improve the organization of the motion as well as add considerable white space. The space tends to make the page more readable.

Omit modifiers because these words needlessly delay the reader. For instance, there is no need to say that something is clearly, obviously, plainly, etc.

Do not bore the reader by repeating the same words, e.g., Thomas argues; Thomas further argues; Jones argues. Spice it up with contend, assert, insist, maintain, etc.

Always remember that short sentences are easier to read. There is no real purpose served in using big words unless you just want to interrupt the process by sending the judges to the dictionary.

An important element of drafting an effective post-trial motion is correct punctuation and spelling. Regardless of how well a brief is written, misspellings will detract from its overall effect. Likewise, punctuation marks are road signs to help the reader understand the thought or concept. Misplaced punctuation marks are confusing to the reader.

Spelling and punctuation mistakes are not fatal and are therefore, "harmless error." However, you should be aware that a motion with grammatical and typographical errors leaves a court with the impression that the legal research and analysis have been as hurried as the actual writing.

Before a motion is submitted to the court, at least two and preferably more, people should proofread the final draft. At least one of these people should not have any knowledge of the case and should review it for consistency, clarity and logic. The uninformed proofreader should be able to grasp the facts, the issues, and the resolution of the issues readily.

4. Citations, Quotations and Footnotes.

Always cite to the record. Use correct citation form and avoid the use of "supra" and "infra." Further, use jump cites by referring to the page or pages where your point is discussed.

Avoid string citations because they are not that impressive and they tend to disrupt the continuity. If you ignore this advice, an explanatory parenthetical should follow every cited case in order to briefly explain the case's relationship to the proposition asserted.

When citing a case as controlling authority or when distinguishing a case relied upon by the other side, discuss the relevant facts of the case and compare those facts with the facts of your case.

Never cite a case you have not read. Do not rely upon a headnote or synopsis of the opinion. Always, always check the writ history and shepardize or keycite the cited authority. Finally, make sure you do not mischaracterize the holdings of the cases you cite.

Exercise caution when using quotations. When quotations from case law are selectively used, they can be extremely effective. Do not, however, use excessively long quotes or take a quote out of context. Inclusion of too many quotes results in a loss of your impact.

There is a great deal of controversy concerning the use of footnotes. Many people find them to be a distraction. They make reading more difficult. A good number of judges adhere to the theory that if the information is important enough to mention, it is of sufficient importance to include in the actual body of the brief. This is not to say that footnotes are unnecessary or should be eliminated. The best advice is use footnotes sparingly or not at all.

5. Don't be Abusive.

There is no room in a motion for impolite attacks on the personality or professional competency of your opponent. Judges do not like it. A shrill tone in a motion diminishes its persuasive force. Judges wonder why this is necessary if your particular position is so good.

When judges read a brief, they do not need to be told that there is a dispute or that each side is outraged at the other. Judges need a reliable, rational basis for a decision and are genuinely grateful to the side who provides them one.

Furthermore, remember you are writing the motion for the judge, not your client. An effective advocate adopts a "friend of the court" approach, not an emotional tirade. In the event that your opponent has misstated the record or has attempted to mislead the court, simply point out the mistake without drawing the court's attention to you.

6. Give the Court What it Needs.

While the motion is a persuasive document, it is also a reference tool for the court to use in resolving the case. Give the court what it needs to rule for you. Attach copies of the significant evidence, portions of the clerk's or reporter's record, and the relevant case law which shows why your client should prevail. Through record references and citations to authorities, the motion directs the court to the alleged error and the applicable facts and law which show that the alleged error is, in fact, harmful and therefore reversible error. Counsel cannot neglect this aspect of the motion. A motion that does not win on persuasiveness alone may win once the references to the record or evidence and legal citations have been digested.

V. MOTIONS FOR JNOV/MOTION TO DISREGARD

A. Introduction.

Rule 301 of the Texas Rules of Civil Procedure authorizes the trial court to disregard any jury finding on a question that has no support in the evidence. Tex. R. Civ. P. 301. Although the rule is framed in terms of "no evidence", a motion to disregard is used to address jury issues that should not have been addressed in the first place, or that have been rendered immaterial by other findings. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 5; *see also, Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *Spencer v. Eagle Star Ins. Co*., 876 S.W.2d 154, 157 (Tex. 1994).

There are four reasons for granting a motion for JNOV or motion to disregard a jury finding. One, there is no evidence to support a jury finding. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex.2003). Two, a factual issue was established as a matter of law which is contrary to a jury finding. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex.App.—Houston [1st Dist.] 1992, writ denied). Three, a legal principle prevents a party from prevailing on its claim or defense regardless of whether the plaintiff proves all the allegations in its pleadings. *Id*. at 173. Four, a jury finding is immaterial. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex.1995).

Since the motion for JNOV and the motion to disregard jury findings are governed by the same rules of law, both motions will be collectively referred to as a motion for JNOV in the discussion to follow.

B. The Basic Things to Know about the Motion.

1. Deadline for Filing?

Although Rule 301 expressly authorizes a party to file a motion for JNOV, the rule does not expressly set forth a procedure for doing so. This ambiguity has left many unanswered questions. For example, what is the nature of a motion for JNOV? Is it governed by the deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure which governs other types of post-trial motions (i.e., motions for new trial and motions to modify, correct, or reform the judgment) Is there a deadline for filing such a motion? *See* Tex. R. Civ. P. 301. The answer depends upon which court you are in.

Some courts hold that a motion for JNOV is timely filed if it is filed any time after judgment is announced so long as the trial court has plenary power to grant the motion. *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex.App.—Houston [14th Dist.] 1987, no writ); *Cleaver v. Dresser Indus*., 570 S.W.2d 479, 483 (Tex.Civ.App.—Tyler 1978, writ ref'd n.r.e.).

While other courts hold that the motion must be filed within thirty days after the judgment is signed. *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex.App.—Dallas 1992), judgment vacated by agr., 843 S.W.2d 486, (Tex.1993)(reasoning that a motion for JNOV is the equivalent of a motion to modify, correct or reform the judgment and must therefore be filed within the time deadlines set forth in Rule 329b of the Texas Rules of Civil Procedure).

Until the Texas Supreme Court resolves the issue over when to file a motion for JNOV, the best practice is to make sure you file such a motion within thirty days after the judgment is signed. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3.

2. Deadline for Obtaining Ruling?

The next question to be asked about motions for JNOV is when is the deadline for obtaining a ruling on these types of motions?

If no motion for new trial is filed, then a motion for JNOV must be filed and ruled upon within thirty days of when the court signs its judgment. *Walker v. S & T Truck Lines, Inc*., 409 S.W.2d 942, 943 (Tex.Civ.App.—Corpus Christi 1966, writ ref'd); *see also*, Tex.R.Civ.P. 306a; 329b. Although some courts have equated motions for JNOV with motions to modify, correct, or reform a judgment, you should not assume that all courts will do this and therefore risk not having your motion heard and ruled upon in a timely manner. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

If a motion for new trial is filed (and plenary power is therefore extended), then the motion for JNOV should be ruled upon before the motion for new trial is overruled, either by written order or by operation of law. *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex.App.—Houston [14th Dist.] 1987, no writ); *Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Ins. Co.*, 509 S.W.2d 387, 392 (Tex.Civ.App.—Corpus Christi 1974, writ ref'd n.r.e.). Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

3. Effect of Filing on Appellate Deadlines

Rule 26 of the Texas Rules of Appellate Procedure governs when an appeal must be perfected. *See* Tex. R. App. P. 26.1 (setting forth deadlines for filing notice of appeal in civil cases). Motions for JNOV are not expressly mentioned in Rule 26. Thus, the straightforward answer to the question as to whether a motion for JNOV extends the deadline for filing a notice of appeal is: "No." This position is the traditional position maintained by Texas courts. *See Walker v. S & T Truck Lines, Inc*., 409 S.W.2d 942, 943 (Tex.Civ.App.—Corpus Christi 1966, writ ref'd); *First Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d 168, 170 (Tex.App.—Houston [14th Dist.] 1986, no writ); *see also*, Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4.

However, the strength of this traditional position has been called into doubt. *See Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex.App.—San Antonio 1998, no pet.)(treating motion for JNOV as motion to modify, correct, and reform, and holding that timely filed motion for JNOV extended appellate timetable); *see also, Lane Bank Equip. Co. v. Smith Southern Equip., Inc*., 10 S.W.3d 308, 312 (Tex.1999); *Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176, 177 (Tex.1995). In her paper on preservation of error, Joann Storey notes that the Texas Supreme Court "has created some confusion with its pronouncement in a bill of review case that 'any post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal.'" Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4, (citing *Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176, 177 (Tex. 1995), and *Lane Bank Equip. Co. v. Smith Southern Equip., Inc*., 10 S.W.3d 308, 312 (Tex. 1999)).

Until this issue is resolved, the best practice is to take Rule 26.1 literally and not assume that a motion for JNOV will extend the deadline for filing a notice of appeal.

4. Effect of Filing on Court's Plenary Power

Rule 329b of the Texas Rules of Civil Procedure provides that a trial court's plenary power is extended if a motion for new trial or motion to modify, correct, or reform the judgment is filed within thirty days after the judgment is signed. *See* Tex. R. Civ. P. 329b. The amount of time that a trial court's plenary power is extended depends upon whether the motion for new trial or to modify, correct, or reform is overruled by written order or by operation of law. *Id*. However, if the motion is overruled by operation of law, then the court's plenary power lasts for 105 days after the judgment is signed. *Id*.

Rule 329b makes no mention of motions for JNOV. Thus, Texas courts have traditionally held that a motion for JNOV, by itself, does not extend the court's plenary power over its judgment. *Walker v. S & T Truck Lines, Inc*., 409 S.W.2d 942, 943 (Tex.Civ.App.—Corpus Christi 1966, writ ref'd); *see also*, Tex. R. Civ. P. 306a; 329b.

Recently, the Texas Supreme Court held that a motion for JNOV qualified as a Rule 329b motion because it sought to modify any later-entered judgment and it also asked for a new trial. *See Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 665-66 (Tex. 2011). The Court has also held that a motion seeking a "bill of review" qualified as a motion for new trial under Rule 329b. *Gomez v. Tex. Dep't of Criminal Justice, Inst'l Div.*, 896 S.W.2d 176, 176B77 (Tex.1995).

Given the Texas Supreme Court's recent rulings it seems as if a motion for JNOV may be relied upon to extend the trial court's plenary power if the substance of the motion seeks to modify a later-entered judgment or seeks a new trial. However, prudent counsel should not take any chances by assuming that a motion for JNOV will always be regarded as a 329b motion that extends the trial court's plenary power. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 4. Either cite the rule and ask for that relief in your motion for JNOV or file a 329b motion once judgment is entered.

5. Preservation of Error.

A motion for JNOV is one of five recognized ways to preserve a legal sufficiency challenge to a jury finding. *See Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985)(holding that legal sufficiency challenge is preserved by: (1) objection to the charge; (2) motion for directed verdict; (3) motion for JNOV; (4) motion to disregard; and (5) motion for new trial. *Heibsen v. Nassau Development Co.*, 754 S.W.2d 345, 348-49 (Tex.App.—Houston [14th Dist.] 1988, writ denied)(holding that a legal sufficiency point may be preserved in a motion for new trial, but if sustained will result in remand and not rendition).

A motion for JNOV can be used to preserve four different types of appellate complaints:

> First, it will preserve a contention that the evidence is legally insufficient to support the verdict of the jury. Tex.R.Civ.P. 301; *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Aero Energy Corp. v. Circle C Drilling Co*., 699 S.W.2d 821, 822 (Tex.1985). WARNING: a motion for JNOV will not preserve a factual sufficiency point, which must be preserved in a motion for new trial. Tex.R.Civ.P. 324(b)(2)-(3).
>
> Second, a motion for JNOV will preserve for appeal an argument that a jury finding must be disregarded because the evidence conclusively establishes as a matter of law the

opposite factual proposition found by the jury. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex.App.—Houston [1st Dist.] 1992, writ denied).

Third, a motion for JNOV will preserve for appeal an argument that a legal rule bars recovery even though all elements of a cause of action have been proven. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3, citing *Holland v. Wal-Mart Stores, Inc*., 1 S.W.3d 91, 94-95 (Tex.1999); *Schindley v. Northeast Tex. Comm. Coll*., 13 S.W.3d 62, 65 (Tex.App.—Texarkana 2000, pet. denied) (statute of limitations raised in motion for JNOV); Walker v. Tafralian, 107 S.W.3d 665 (Tex.App—Fort Worth 2003, pet. denied)(motion for JNOV raising statute of frauds defense to contract claim).

Fourth, a motion for JNOV will preserve for appeal an argument that a jury finding is immaterial. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995).

It is important to note that a party may request JNOV even if it requested the submission of the very jury questions it seeks to have disregarded. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3, citing *Holland v. Wal-Mart Stores, Inc*., 1 S.W.3d 91, 94-95 (Tex. 1999), and *Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.—Houston [1st Dist.] 1995, writ ref'd).

In *Holland v. Wal-Mart Stores, Inc*., the Texas Supreme Court held that a party could raise, for the first time, by way of a motion for JNOV, the argument that attorney's fees were barred as a matter of law because they were not recoverable under the statute plaintiffs sought recovery under. *Id*., 1 S.W.3d at 94-95.

Consistent with the foregoing rule, an objection to the charge is not necessary to preserve a legal sufficiency complaint. Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 3, citing *Kirschke*, 922 S.W.2d at 187.

6. Standard of Review on Appeal.

When the motion for JNOV addresses the sufficiency of the evidence to support one or more essential elements of a claim or defense, the grant or denial of the motion is evaluated on appeal under the legal sufficiency standard of review. *Garza v. Alviar*, 395 S.W.2d 821, 823-24 (Tex. 1965). The basic test for legal sufficiency is whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting a legal sufficiency analysis, the reviewing court must credit favorable evidence if reasonable jurors could do so and disregard contrary evidence unless reasonable jurors could not. *Id*. A motion for JNOV should be granted when the moving party has established that there is no evidence to support an essential element of a claim or defense, or when the moving party has established each element of her defense so conclusively that reasonable minds could not differ as to the truth of the controlling facts. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *Watts v. St. Mary's Hall, Inc*., 662 S.W.2d 55, 59 (Tex.App. San Antonio 1983, writ ref'd n.r.e.).

When the motion for JNOV raises a non-evidentiary point, such as a legal proposition which would determine the case, the appellate court must look to see if, as a matter of law, the proposition advanced in the motion entitles the movant to judgment notwithstanding the jury's findings. *ARCO v. Misty Prods., Inc*., 820 S.W.2d 414, 420-21 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

When the motion for JNOV addresses an immaterial jury finding, the appellate court should determine whether the finding is immaterial and, if so, whether the movant is entitled to judgment when the finding is disregarded. *Spencer v. Eagle Star Ins. Co*., 876 S.W.2d 154, 157 (Tex. 1994).

Where a motion for JNOV raises several grounds, and the order sustaining the motion does not specify the grounds upon which the motion was granted, the party seeking to overturn the JNOV on appeal must show that the JNOV cannot be sustained on any of the grounds stated in the motion for JNOV. *Fort Bend Co. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991).

C. Tips for Drafting.

The party seeking to disregard jury findings, or seeking a JNOV, must file a written motion requesting such relief. *See* Tex.R.Civ.P. 301. A trial judge may not ordinarily disregard a jury finding on its own initiative. *St. Paul Fire & Marine Ins. Co. v. Bjornson*, 831 S.W.2d 366, 369 (Tex.App.—Tyler 1992, no writ). If no motion to disregard a jury finding is filed and the trial court sua sponte disregards a jury finding, the court's action will be upheld only where the disregarded finding is immaterial. *See Id*. A question is immaterial when it should not have been submitted or, though properly submitted, is rendered immaterial by other findings. *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex.1994). Thus, a written motion is required unless the court disregards an immaterial finding.

A motion for JNOV or motion to disregard is a relatively straight forward motion to draft. The motion must identify the jury findings that are under attack, assert one of the four recognized grounds for setting the findings aside, cite the court to the evidence (if any) and law necessary to prove that the ground for setting aside

the jury finding has been established, and then explain the judgment the court should render.

As discussed above the four recognized grounds for setting aside a jury finding are: (1) there is no evidence to support a jury finding; (2) a factual issue was established as a matter of law which is contrary to a jury finding; (3) a legal principle prevents a party from prevailing on its claim or defense regardless of whether the plaintiff proves all the allegations in its pleadings; and (4) a jury finding is immaterial. Thus, the motion should be directed at proving that one of these four grounds exist and either a jury finding must be set aside and/or a JNOV granted.

On appeal, the reviewing court will look to the substance of the motion, and not its form, in determining what jury findings were attacked and judgment for which the movant asked. *Myers v. Crenshaw*, 134 Tex. 500, 137 S.W.2d 7, 13 (Tex.1940). However, there should be no doubt as to what you are asking the trial court to do. It is recommended that you specifically identify, by retyping, the actual jury questions and answers you are attacking. If you are seeking to disregard some jury findings, and then obtain judgment on the remaining findings, then your motion should set forth the legal grounds for setting aside each jury finding and then explain what judgment should be entered on the remaining findings. If you are seeking a JNOV, then you should set forth each legal ground for why JNOV is proper.

If you are defending against a motion to disregard jury findings, or motion for JNOV, then you should respond to each ground raised in the motion and assert any other ground necessary to deny the motion. If the motion is based on a legal sufficiency complaint, then explain why there is legally sufficient evidence to support the finding or why the opposite finding has been conclusively established as a matter of law. If the motion is based on a legal principle the movant claims is a bar to recovery, then explain why it does not apply. If the motion is based on a claim that the jury's answer is immaterial, then explain why it is material.

Rule 301 requires that reasonable notice be given of the motion for JNOV/disregard jury findings. Tex.R.Civ.P. 301. Absent such notice, the motion cannot be granted. *Wilson v. Burleson*, 358 S.W.2d 751, 753 (Tex.Civ.App. Waco 1962, writ ref'd n.r.e.). However, if reasonable notice is given, a formal hearing does not have to be held before the court can grant the motion. *City of Port Lavaca v. Fisher*, 355 S.W.2d 785 (Tex.Civ.App.—San Antonio 1962, no writ).

VI. MOTION FOR RECONSIDERATION

A motion to reconsider is merely a motion to get the trial court to take another look at its ruling after it is announced but not yet put in the form of a judgment or decree. There is no such motion under the rules of civil procedure. However, a motion to reconsider is essentially a motion for judgment since it asks the court to reconsider its decision and render the judgment your client desires. A motion to reconsider can be used as an opportunity to file a brief that more fully sets out a legal argument made by counsel orally at trial or to better explain a party's position on the evidence, such as why a particular piece of property is separate, rather than community. Such a motion should always be considered and used if the trial court renders a ruling in the opposing party's favor or if the practitioner has reason to believe that the court did not understand its legal arguments or the evidence. At a minimum, this is the time for trial counsel to consult with an appellate attorney and not wait for the judgment to be entered.

VII. MOTION FOR ENTRY OF JUDGMENT

A. Introduction.

There are several rules which partially address the process for entering judgment. For example, Rule 301 of the Texas Rules of Civil Procedure addresses the court's duty to enter judgment. It generally requires that "[t]he judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity." *See* Tex. R. Civ. P. 301. In addition, Rules 304, 305, and 306, of the Texas Rules of Civil Procedure describe what should go in a judgment, where it should be entered, and the process for submitting a proposed judgment to the court. *See* Tex. R. Civ. P. 304, 305, and 306.

However, there is no rule which specifically governs motions for entry of judgment or the exact process that should be followed to obtain judgment in your client's favor. As a result, the procedure for such motions is governed primarily by case law. *See* Joann Storey, PRESERVATION OF ERROR POST-TRIAL: PRACTICE AND STRATEGIES, State Bar of Texas Appellate Boot Camp, Chapter 2, page 1 (September 2006).

B. The Basic Things to Know about the Motion.

1. Deadline for Filing.

There is no deadline for filing a motion for judgment.

2. Effect of Filing on Appellate Deadlines.

A motion for entry of judgment does not extend the appellate deadlines. *See Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex.App.—Dallas 1987, no writ); *see also*, Tex.R.Civ.P. 329b (enumerating motions that extend the trial court's plenary power and the appellate deadlines); Tex.R.App.P. 26.1(a) (describing motions and other actions taken in the trial court which extend the appellate deadlines).

3. Effect of Filing on Court's Plenary Power.

A motion for entry of judgment does not extend the trial court's plenary power. *Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex.App.—Dallas 1987, no writ). *see also*, Tex.R.Civ.P. 329b (enumerating motions that extend the trial court's plenary power and the appellate deadlines); Tex. R. App. P. 26.1(a) (describing motions and other actions taken in the trial court which extend the appellate deadlines).

4. Preservation of Error.

A motion for entry of judgment does preserve error when the trial court enters a judgment that differs from the judgment sought by a party. *Emerson v. Tunnel*, 793 S.W.2d 947 (Tex. 1990); Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 1.

C. Drafting Tips.

When your client prevails on all of his or her theories at trial, requesting a judgment is easy. Simply ask for judgment on all your claims and/or defenses. Unfortunately, this does not happen as frequently as we like and we are often required to come to grips with the fact that the trial court or jury has rejected all or some of our client's claims and/or defenses. When your client has prevailed on some, but not all of his or her claims and/or defenses, be careful what you ask for in a motion for entry of judgment! You may get what you ask for and it may act as a waiver of error as to complaints you would otherwise like to raise in a subsequent appeal.

The Texas Supreme Court has held that a motion for judgment on the verdict is an affirmation of the jury's verdict and waives any subsequent complaint that the verdict is not supported by evidence. *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *see also, Cruz v. Furniture Technichians of Houston, Inc.*, 949 S.W.2d 34, 35 (Tex.App—San Antonio 1997, pet denied); Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 1.

There is a split of authority among the courts of appeal as to the extent of waiver caused by a motion for judgment based on the fact finder's verdict. Some courts hold that only challenges to the sufficiency of the evidence are waived. *See Stewart & Stevenson Servs., Inc. v. Enserve, Inc.*, 719 S.W.2d 337 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(ruling that sufficiency challenges were waived, but error in jury charge was not); *Harry v. Univ. of Texas Sys.*, 878 S.W.2d 342 (Tex.App.—El Paso 1994, no writ)(accord). However, other courts adhere to a more-strict rule that an unqualified motion for entry of judgment preserves nothing for further review. *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-91 (Tex.App.—Hosuton [1st Dist.] 1995, writ denied). Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 1.

There are three exceptions to the foregoing waiver rule: (1) when the jury's findings are ambiguous; (2) when the points of error on appeal are not inconsistent with the motion for entry of judgment; or (3) when the movant expressly reserves the right to complain about certain findings while seeking entry of judgment on other, favorable findings. *See Miner-Dederick Constr. Corp. v. Mid-County Rental Serv., Inc*., 603 S.W.2d 193, 197-99 (Tex. 1980)(holding that party did not waive complaint about jury findings where findings were ambiguous); *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984)(holding that party did not waive complaint about jury finding where complaint on appeal was not inconsistent with motion for entry of judgment); *First Nat'l Bank of Beeville v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989)(holding that party did not waive complaint about findings where party expressly reserved the right to challenge the trial court's judgment on appeal); *see also*, Storey, PRESERVATION OF ERROR POST-TRIAL, Chapter 2, page 2.

To avoid waiver, it is strongly recommended that counsel expressly identify the findings and/or rulings his or her client disagrees with and then state that by tendering a proposed judgment your client agrees with the form of the judgment but does not agree with the substance of the judgment and expressly reserves the right to challenge the identified findings and/or rulings by post-trial motion or appeal. The Supreme Court's decision in *Fotjik* is required reading for anyone planning to file a motion for entry of judgment. *Fotjik*, 775 S.W.2d at 633 (holding that party did not waive complaint about jury findings where party stated in its motion for judgment, "While plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to entry of judgment, plaintiffs pray the court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and the result.").

VIII. MOTION FOR NEW TRIAL

A. Introduction.

Rules 300 and 320 of the Texas Rules of Civil Procedure authorizes the Court to set aside a judgment and grant a new trial "for good cause" on motion of a party or its own motion. *See* Tex. R. Civ. P. 300 and 320. The trial court has broad discretion in granting a new trial and, as Rule 320 states, the trial court may grant a new trial "for good cause", provided that if the court sets aside a jury verdict and orders a new trial, after a jury verdict it must clearly identify the specific reasons for granting a new trial. *In re Columbia Med. Ctr*., 290 S.W.3d 204, 210 (Tex. 2009). Rule 329b of the Texas Rules of Civil Procedure also addresses the Court's power to vacate its judgment and grant a new trial. Rule

329b provides that the Court may vacate its judgment and grant a new trial within thirty days of when the judgment is signed, or, if a motion for new trial is filed within thirty days of when the judgment is signed by the Court, then the Court's power to grant such a motion is extended until thirty days after all such motions are overruled. *See* Tex. R. Civ. P. 329b(d), (e), and (g). The court may do so pursuant to a motion filed by a party or pursuant to its own motion. *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003).

The purpose of a motion for new trial is to ask the court to reconsider and correct errors by granting a new trial of the case. *Barry v. Barry*, 193 S.W.3d 72, 74 (Tex.App.—Houston [1st Dist.] 2006, no pet.). There are at least three reasons to file such a motion: (1) to give the trial court another chance to correct what the appellant will claim is error on appeal; (2) to preserve error for appeal; and (3) to extend the appellate deadlines. Michol O'Connor, *O'Connor's Texas Rules, Civil Trials*, p. 789 (2013).

It must be remembered that although the purpose of a motion for new trial is to point out to the trial court where it has erred so that it may have an opportunity to review its decision and, if need be, correct it, a motion for new trial is not however, a vehicle through which the case may be tried over or tried differently. *Stillman v. Hirsch*, 128 Tex. 359, 99 S.W.2d 270; *Jones v. Jones*, 391 S.W.2d 102, 104 (Tex.Civ.App.—Amarillo 1965, no writ).

B. Basic Things to Know about the Motion.

1. Deadline for Filing.

a. Initial Motion.

The motion for new trial must be filed within 30 days after judgment is signed by the court. Tex. R. Civ. P. 329b(a); *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995). The deadline is jurisdictional, if the motion is filed late it is void and cannot be considered. *Equinox Enters. Associated Media, Inc*., 730 S.W.2d 872, 875 (Tex.App.—Dallas 1987, no writ). Further, the rules of civil procedure prohibit the trial court from extending the deadline for filing a motion for new trial. Tex.R.Civ.P. 5. As a result, the 30-day deadline cannot be missed.

b. Amended Motion.

An amended motion for new trial may be filed without leave of court, provided it is filed within the 30-day period and before the original motion is overruled. The Dallas Court of Appeals has considered the distinction between an amended motion and a supplemental motion. In *Sifuentes v. Texas Employers' Insurance Association*, 754 S.W.2d 784 (Tex.App.—Dallas 1988, no writ), the appellant filed a motion for new trial on May 29, 1987 and a "Plaintiffs Second Motion for New Trial" on June 4, 1987. While the initial motion complained of factual insufficiency of the evidence, the second did not. Claiming waiver, TEIA urged that the second motion was in fact an amended motion that superseded the original motion, so that there was no "live" motion for new trial raising factual insufficiency of the evidence as required by the rules. The court of appeals disagreed, noting that the title of the motion gave no indication that is should be considered an amended motion. Instead, the language indicated that the second motion had been filed shortly after the trial court had conducted a hearing and orally overruled the first motion. No written order was signed. Because there was no written order overruling the original motion for new trial, the court chose to treat the second motion as a supplemental motion. The factual insufficiency points were accordingly preserved. Although this case involves a complaint of factual sufficiency in an appeal from a jury trial, the construction of an amended vs. supplemental motion for new trial may be equally applied in nonjury appeals.

c. Citation by Publication.

Where the respondent has been served by publication, the time for filing a motion for new trial is extended by Tex.R.Civ.P. 329. The court may grant a new trial upon petition showing good cause and supported by affidavit, filed within two years after the judgment was signed. The appellate timetable is computed as if the judgment were signed 30 days before the date the motion was filed. [Query: Can the respondent request findings of fact and conclusions of law, which normally must be done by the 20th day?]

2. Deadline for Obtaining Ruling.

In order to grant a new trial, the trial court must sign a written order that expressly grants a new trial. Mere reference in an order that a hearing was held on the motion for new trial without specifically granting the motion will not suffice. *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009)(holding that oral pronouncement and docket entry cannot qualify as a signed order granting a new trial). If the motion is not determined by written order, it shall be deemed overruled by operation of law 75 days after judgment is signed. *See* Tex. R. Civ. P. 329b(c); *Balazik v. Balazik*, 632 S.W.2d 939 (Tex.App.–Fort Worth 1982, no writ). The automatic overruling of a motion for new trial on which there has been no trial court hearing is constitutional. *Texaco, Inc. v. Pennzoil Company*, 729 S.W.2d 768 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.).

3. Effect of Filing on Appellate Deadlines.

Ordinarily, the notice of appeal is due thirty days after the trial court signs its judgment. *See* Tex. R. App. P. 26.1. However, a timely filed motion for new trial extends the deadline for filing the notice of appeal from thirty to ninety days. *See* Tex. R. App. P. 26.1(a). A

party has the right to file a motion for new trial merely to extend the timetables for appeal, even if there are no reasonable grounds for new trial. *Id*.; *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993).

4. Effect of Filing on Court's Plenary Power.

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after judgment is signed, regardless of whether an appeal has been perfected. Tex.R.Civ.P. 329b(d); *Lane Bank Equip. Co. v. Smith S. Equip., Inc*., 10 S.W.3d 308, 310 (Tex.2000). This power is extended when a motion for new trial is filed, such that the court may alter its original judgment at any point until 30 days after all motions have been overruled, either by written order or operation of law, whichever occurs first. Tex.R.Civ.P. 329b(e); *Lane Bank Equip. Co*., 10 S.W.3d at 310. Thus, the maximum length of time which the trial court's plenary power could exist is 105 days (e.g., 75 days + 30 days = 105 days). Once thirty days has run from the date the motion for new trial is overruled, whether by written order or by operation of law, the order may not be set aside except by bill of review. Tex.R.Civ.P. 329b(f).

5. Preservation of Error.

Tex.R.Civ.P. 324(a) provides that a motion for new trial is not required in either a jury or nonjury case except as provided in subsection (b). Subsection (b) provides:

- a complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
- a complaint of factual insufficiency of the evidence to support a jury finding;
- a complaint that a jury finding is against the overwhelming weight of the evidence;
- a complaint of inadequacy or excessiveness of the damages found by the jury; or
- a complaint of incurable jury argument if not otherwise ruled on by the trial court.

See Tex. R. Civ. P. 324(b).

Rule 33.1(d) of the Texas Rules of Appellate Procedure makes clear what is implied in Texas Rule of Civil Procedure 324(b). Compare Tex.R.App.P. 33.1(d) with Tex. R. Civ. P. 324(b). Rule 33.1(d) provides that in a non-jury case, a complaint regarding the legal or factual insufficiency of the evidence, including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a finding of fact or to make an additional finding of fact, may be made for the first time on appeal. Tex.R.App.P. 33.1(d). Thus, after a bench trial an appellate is not required to raise legal and factual sufficiency complaints in the trial court. Nonetheless, you and your client may decide to raise such arguments in the hope of seeking swifter and less costly relief from the trial court.

The overruling of a motion for new trial, by operation of law, preserves error unless the taking of evidence was necessary to present the complaint in the trial court. Tex.R.App.P. 33.1(b).

An appellant should be especially careful about errors occurring for the first time in rendition of judgment. Tex.R.App.P. 33.1 requires that complaints on appeal must have been presented to the trial court. The trial court may err in rendering judgment and the motion for new trial may be used to raise such error. However, as explained below, a motion to modify judgment may be the more appropriate vehicle.

6. Entitlement to an Evidentiary Hearing.

The party seeking a new trial must request a hearing to receive evidence in support of the motion when the motion includes grounds complaining about jury misconduct, newly discovered evidence, failure to set aside a default judgment, and any other ground that requires you to prove facts not already in the record to succeed on appeal. A movant is entitled to an evidentiary hearing only when the motion for new trial alleges facts which, if proved true, would entitle the movant to a new trial. *Hensley v. Salinas*, 583 S.W.2d 617, 618 (Tex. 1979). However, as a prerequisite to obtaining an evidentiary hearing, the motion must be supported by an affidavit specifically showing the truth of the grounds of the attack or the motion must explain why an affidavit could not be procured. *See Callahan v. State*, 937 553, 560 (Tex.App.—Texarkana 1996, no pet.); *Freeman Packing Co. V. Harris*, 160 S.W.2d 130, 133 (Tex.Civ.App.—Galveston 1942, writ ref'd w.o.m.).

7. Standard of Review on Appeal.

The standard of review for the trial court's ruling on a motion for new trial is abuse of discretion. *Director, State Employees Worker's Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). The level of discretion afforded to the trial court in ruling on a motion for new trial depends upon the grounds alleged for a new trial. For example, the trial court is given broad discretion in making factual determinations after hearing conflicting evidence and it is very difficult to reverse a pre-trial ruling based on conflicting evidence, whereas it is much easier to reverse a trial court's decision which refuses to set aside a default judgment when the *Craddock* elements have been established by the movant but not controverted by the non-movant. *See, Infra*. Thus, the amount of discretion the trial court will be allowed to exercise depends upon the specific grounds asserted in the motion for new trial.

C. Recognized Grounds for New Trial

As discussed above, motions for new trial may be granted by the trial court so long as it comes within the umbrella of "good cause". Tex.R.Civ.P. 320. While the rules of civil procedure identify some traditional grounds for seeking a new trial, and impose requirements on what should go into a motion based on those grounds, the rules of civil procedure do not attempt to define or limit what grounds can be raised in a motion for new trial and not limited to the grounds set forth in the applicable rules. *See* Tex. R. Civ. P. 320 to 329b. "The numbers and varieties of complaints to be made in motions for new trial are as endless as the possibilities of judicial error and the ingenuity of zealous counsel. Thus, an attempt to catalogue all the grounds that may be urged in support of a motion for new trial would be futile." 5 McDonald & Carlson Tex. Civ. Prac. § 28:16 (2d. ed.).

Speaking in terms of the broadest generality, motions for new trial can be categorized into two species, a motion seeking a new trial on: (1) legal grounds; or (2) equitable grounds. "A legal ground is premised upon trial court error that warrants the granting of a new trial. An equitable motion, on the other hand, seeks to invoke the power of the court to grant a new trial even though the movant failed to timely act and suffered an adverse judgment. That is, the movant acknowledges that its own actions or inactions resulted in the judgment but asks the court out of fairness to allow a new trial. Typically, the defendant seeks this relief following a default judgment and a plaintiff will do so after dismissal for want of prosecution." 5 McDonald & Carlson Tex. Civ. Prac. § 28:17 (2d. ed.).

While certain matters have been raised in this state in virtual perpetuity, the laundry list set forth below is by no means exclusive.

1. Errors in the Charge.

Charge error is a ground for seeking a new trial. Error in the jury charge is only reversible if it probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case on appeal. Tex.R.App.P. 44.1(a); *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012). Harm is presumed when the trial court submits a broad-form question with multiple theories of liability or multiple elements of damages, some of which are valid and some of which are not. *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000); *Harris v. Cty. v. Smith*, 96 S.W.3d 230, 234 (Tex. 2002). However, in all other cases, the party seeking a new trial must prove harm.

The submission of an erroneous jury question, instruction, or definition is generally reversible error if it relates to a contested issue in the case and the judgment cannot be sustained by the jury's answers to other questions. *Transcontinental Ins. v. Crump*, 330 S.W.3d 211, 224-25 (Tex. 2010); *Boatland v. Bailey*, 609 S.W.2d 743, 749-50 (Tex. 1980). Likewise, the refusal to submit a jury question, instruction, or definition is reversible error if it was reasonably necessary to enable the jury to render a proper verdict. *Texas Worker's Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000).

Remember that to preserve error for appeal, you must make specific objections to the charge as prepared, either in writing, or by dictating them to the court reporter. Tex.R.Civ.P. 272, 274. Issues, definitions or instructions which are requested to be submitted but refused must be reduced to writing and must be endorsed by the judge "Refused". Tex.R.Civ.P. 276.

2. Jury Misconduct.

A motion for new trial based on jury misconduct is governed by Tex.R.Civ.P. 327 and Tex. R. Evid. 606(b). Due to the restrictions placed by these rules on juror testimony, proving juror misconduct is very difficult.

a. Requirements.

The movant for new trial must prove that:

- misconduct occurred;
- the misconduct was material; and
- based on the record as a whole, the misconduct probably resulted in harm to the movant.

Redinger v. Living, Inc., 689 S.W.2d 415, 419 (Tex. 1985); Perry v. Safeco Ins. Co., 821 S.W.2d 279, 280 (Tex.App.–Houston [1st Dist.] 1991, writ denied); *Snyder v. Byrne*, 770 S.W.2d 65, 68 (Tex.App.–Corpus Christi 1989, no writ). Additionally, Rule 327 requires the motion in this instance be accompanied by affidavit. It requires an evidentiary hearing demonstrating that the misconduct was material and that from a review of the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party. *Rodarte v. Cox*, 828 S.W.2d 65 (Tex.App.–Tyler 1991, writ denied); *Terminix v. Lucci*, 670 S.W.2d 657 (Tex.App.–San Antonio 1984, writ ref'd n.r.e.); *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385 (Tex.Civ.App.–Houston [14th Dist.] 1981, writ ref d n.r.e.).

Tex.R.Evid. Rule 606 (b) likewise deals with juror misconduct:

> (b) Inquiry Into Validity of Verdict.
> Upon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or

> indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

Jury misconduct includes outside influence on jurors and incorrect answers by jurors during voir dire examination. Tex.R.Civ.P. 327. To preserve error regarding jury misconduct, the complaining party must present evidence proving the misconduct at a hearing on a motion for new trial. *See Id*.; Tex.R.Civ.P. 324(b)(1). Although this evidence may generally include testimony from any person with knowledge of the misconduct, jurors may not testify about their deliberations or their mental processes during deliberations, but only about any outside influence that was improperly brought to bear on any juror. Tex.R.Civ.P. 327; Tex.R.Evid. 606(b); *Weaver v. Westchester Fire Ins. Co.,* 739 S.W.2d 23, 24 (Tex. 1987). As was noted in *Wooten v. Southern Pacific Trans. Co*.. 928 S.W.2d 76 (Tex.App.–Houston [14th Dist.] 1995, no writ), this approach represents a departure from prior law:

Under former Rule 327(b), effective until April 1, 1984, a juror was permitted to testify as to matters and statements, or 'overt acts,' which occurred during deliberations. Under the former rule, only the actual mental processes of the jurors were excluded from consideration. Now, however, under the new rule a party can only inquire into whether an 'outside influence' affected the deliberations, and all testimony, affidavits, and evidence are limited to this issue. Robinson Elec. *Supply v. Cadillac Cable Corp*., 706 S.W.2d 130, 132 (Tex.App.–Houston [14th Dist.] 1986, writ ref d n.r.e.).

Where juror misconduct is attributable to a juror who voted favorably for the complaining party, there is no harmful error.

b. Outside Influence.

All testimony in a motion for new trial hearing founded upon juror misconduct is excluded unless it can be shown that outside influence was brought to bear. *Texaco, Inc. v. Penzoil Co*., 729 S.W.2d 768 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.). Thus, the juror may not testify as to the effect of anything or anyone upon his/her mental processes unless "outside influence" is shown. Where a juror on a panel was a registered nurse who informed the other jurors during deliberation that certain medications the plaintiff was taking at the time of her injury could have made her dizzy and cause her to fall, no outside influence was demonstrated. The comments of the nurse were "inside" influence. *Baker v. Wal-Mart Stores*, 727 S.W.2d 53 (Tex.App.–Beaumont 1987, no writ). Likewise, in *Kendall v. Whataburger, Inc*., 759 S.W.2d 751 (Tex.App.–Houston [1st Dist.] 1988, no writ), comments by one of the jurors who happened to be a paralegal did not amount to juror misconduct. In this instance, the paralegal had told the jurors that the plaintiff would recover damages even though the jury answered "no" to the negligence and proximate cause issues. Outside influence must not only arise from information and expertise not in evidence, but it must also emanate from outside the jury and its deliberations. Thus, jury misconduct may only be proved by evidence of overt acts which are open to the knowledge of all the jury, and not alone within the personal conscience of one. *Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963). The mental processes of a juror are indicated when jurors use such words as "I thought", "I understood", "I wanted", "I felt", "I was concerned", "The impression I got", or "I considered". *In re Marriage of Yarbrough*, 719 S.W.2d 412 (Tex.App.–Amarillo 1986, no writ).

One court has even determined that outside influence requires a showing that the source of the information must be one who is outside the jury, i.e. a non-juror, who introduces the information to affect the verdict. In *Baley v. W/W Interests, Inc*., 754 S.W.2d 313 (Tex.App.–Houston [14th Dist.] 1988, writ denied), a civil action was brought against the owner of a nightclub arising out of the murder of a patron. The appellants complained that two of the jurors went to the scene of the murder and related to the other jurors the personal experience and special knowledge which was obtained from the visit. They also complained of jurors discussing a newspaper article which was not in evidence and which was brought into the jury room. The court concluded that the post-trial testimony of the jurors was inadmissible because outside influence was not demonstrated:

> 'Outside influence' is not defined by the rules, but the term has been construed by the courts. An 'outside influence' must emanate from outside the jury and its deliberations… It does not include all information not in evidence unknown to the jurors prior to trial, acquired by a juror and communicated to one or more other jurors between the time the jurors received their instructions from the court and the rendition of the verdict…Information gathered by a juror and introduced to other jurors by that juror—even if it were introduced specifically to prejudice the vote—does not constitute outside influence.

Similarly, in *Wooten v. Southern Pacific Trans. Co*., 928 S.W.2d 76 (Tex.App.–Houston [14th Dist.] 1995, no writ), the Wootens complained that the trial court

erred in denying their motion for new trial because a juror, James Brau, told the other jurors during deliberations that, based on his past experiences and observations, he thought the intersection in which the accident occurred was safe. They also contended that, during trial, Brau told a non-juror that he felt the tracks were safe. These actions were alleged to be harmful because Brau acted, in effect, as a secret witness influencing the jury regarding the crossing's safety. The Wootens argued for a departure from *Baley*, suggesting that the term "outside influence" should be construed to mean any influence emanating from outside the evidence, and not be limited to situations when a non-juror influences the jury. The appellate court declined to do so, noting that in amending Rule 327(b) to its current version, the Texas Supreme Court expressly deleted a proposal that would have also allowed testimony on whether "extraneous prejudicial information was improperly brought to the jury's attention." *See* former Tex.R.Civ.Evid. 606(b) (1982 liaison committee proposal); *Robinson*, 706 S.W.2d at 132-33. It thus concluded that, to constitute outside influence, information must come from outside the jury, i.e., from a non-juror who introduces information to affect the verdict, and not from within the jury's deliberations or as part of the jury's mental process. The comments Brau made to other jurors regarding the intersection related to the jury's mental processes and deliberations; although these comments violated the trial court's instructions and were clearly improper, they emanated from inside the jury, and did not constitute an outside influence. As to Brau's communications with the non-juror, the relevant evidence indicated only that Brau expressed his opinion to the non-juror, and not that the non-juror conveyed any information or opinions to Brau or any other juror. Therefore, this communication did not amount to an outside influence either.

c. "During the Course of the Deliberations."

Both the rules of procedure and the rules of evidence speak in terms of conduct occurring during the course of the jury's deliberations. In *Baley*, 754 S.W.2d at 313, the appellants contended that the testimony of the jurors was admissible because the alleged misconduct had not occurred during the course of deliberations. Instead, they argued, it occurred (1) before the charge was read and before the formal deliberations had begun and (2) on lunch and coffee breaks which are not a part of the "deliberations". The court of appeals determined that this was not a valid distinction. Any conversation concerning the case which occurs among jurors is part of the deliberations, regardless of the time and place where it occurs.

d. Misconstruction of the Charge.

A juror is not guilty of misconduct and the verdict need not be set aside when one or more jurors simply misconstrue a portion of the court's charge and state the erroneous interpretation to the other members of the jury. *Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963).

e. Concealment of Information.

The issue of juror misconduct also arises where it becomes evident that a juror concealed vital information during voir dire. However, it must be demonstrated that the juror concealed the information and that his concealment resulted in probable injury. *Wooten v. Southern Pacific Trans. Co*., 928 S.W.2d 76 (Tex.App.–Houston [14th Dist.] 1995, no writ); *T.A.B. v. W.L.B.*, 598 S.W.2d 936 (Tex.Cv.App.—El Paso 1980, writ ref'd n.r.e.). Before there can be concealment through erroneous or false answers given on voir dire, the questions asked must have called for disclosure and must have been direct and specific. *Texaco, Inc. v. Penzoil Co*., 729 S.W.2d 768 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.).

f. Information Overheard.

In some instances, juror misconduct may occur during the course of the trial and in the courtroom itself. In those circumstances, an objection is required. In *Rodarte v. Cox*, 828 S.W.2d 65 (Tex.App.–Tyler 1991, writ denied), Rodarte's status as an illegal alien became an issue in a termination case. The attorney ad litem expressed concern to the judge in a conference before the bench and sought to introduce testimony which had previously been subject to an order in limine. The jury was in the box when the bench conference was held and a few of the jurors overheard the discussion. Misconduct was alleged on appeal. The appellate court determined there had been no error because no objection had been timely lodged. The purported misconduct had occurred at the bench in the full presence of counsel, who had even warned the ad litem to keep his voice down. A timely objection, had it been made, could have resulted in an instruction which would have cured the error. *See also, Texas & N.O.R. Co. v. Foster*, 266 S.W.2d 206 (Tex.Civ.App.–Beaumont 1954, writ ref'd n.r.e.)(failure to object to side bar comments overheard by the jury waives complaints of juror misconduct).

g. Standard of Review.

Whether jury misconduct has occurred is a question of fact to be determined by the trial court; absent an abuse of discretion, an appellate court will not overturn the court's ruling. Tex.R.Civ.P. 327; *Ortiz v. Ford Motor Credit Co.*, 859 S.W .2d 73 (Tex.App.–Corpus Christi 1993, writ denied); *Texas Gen. Indem. Co. v. Watson*, 656 S.W.2d 612, 615 (Tex.App.–Fort Worth 1983, writ ref'd n.r.e.); *McAllen Coca Cola*

Bottling Co., Inc. v. Alvarez, 581 S.W.2d 201, 204 (Tex.Civ.App.–Corpus Christi 1979, no writ).

3. Newly Discovered Evidence.

Generally speaking, a new trial based upon newly discovered evidence in a civil proceeding will not be granted unless:

- the movant discovered admissible and competent evidence after trial;
- the late discovery of the new evidence was not due to lack of diligence;
- the evidence is not merely cumulative of other evidence;
- the evidence is not merely for impeachment; and
- the evidence is so material that it would probably produce a different result at a new trial.

See Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex.1983), overruled on other grounds, *Moritz v. Preiss*, 121 S.W.3d 715 (Tex.2003); *New Amsterdam Cas. Co. v. Jordan*, 359 S.W.2d 864, 866 (Tex.1962); *Keever v. Finlan*, 988 S.W.2d 300, 315 (Tex.App.—Dallas 1999, pet. dism'd.).

Motions for new trial on the ground of newly discovered evidence are not favored by the courts and are viewed with careful scrutiny. *Posey v. Posey*, 561 S.W.2d 602, 605 (Tex.Civ.App.—Waco 1978, writ dism'd). The burden is on the movant to rebut the presumption that the judgment is correct and that there has been a lack of diligence and to establish the other essential elements required to obtain a new trial. *Davis Bumper to Bumper, Inc. v. Roberts*, 331 S.W.2d 762, 767 (Tex.Civ.App.—Amarillo 1959, writ ref'd n.r.e.).

Whether a motion for new trial on the ground of newly discovered evidence will be granted or refused is generally a matter addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of such discretion. *Jackson*, 660 S.W.2d at 809. In passing on a motion for new trial on the ground of newly discovered evidence, the court will take into consideration the weight and the importance of the new evidence and its bearing in connection with the evidence received at trial. *Id.* "The inquiry [is] not whether, upon the evidence in the record, it apparently might have been proper to grant the application in the particular case, but whether the refusal of it has involved the violation of a clear legal right or a manifest abuse of judicial discretion." *San Antonio Gas Co. v. Singleton*, 59 S.W. 920, 922 (Tex.Civ.App. 1900, writ ref'd). Every reasonable presumption will be made on review in favor of orders of the trial court refusing new trials. *Hartford Accident and Indemnity Co. v. Gladney*, 335 S.W.2d 792, 795 (Tex.Civ.App.—Waco 1960, writ ref'd n.r.e.). Only when there could be no doubt that the party has really discovered new evidence of a conclusive tendency is it an abuse of discretion for the trial court to deny a new trial. *Jackson*, 660 S.W.2d at 810.

Courts may be more inclined to accept the theory of newly discovered evidence in cases involving child custody because of the welfare and well-being of the children in issue. *See Gaines v. Baldwin*, 629 S.W.2d 81 (Tex.App.–Dallas 1981, no writ)(evidence presented must demonstrate that the original custody order would have a serious adverse effect on the welfare of the child and that presentment of that evidence would probably alter the outcome); *C. v. C.*, 534 S.W.2d 359 (Tex.Civ. App.–Dallas 1976, no writ)(in an extreme case where the evidence is sufficiently strong, failure to grant the motion for new trial may well be an abuse of discretion).

A motion for new trial based on newly discovered evidence must be supported by affidavits proving each element of the test for newly discovered evidence otherwise, the trial court is justified in overruling the motion. *In re Thoma*, 873 S.W.2d 477, 512 (Tex.1994); *Rivera v. Countrywide Home Loans, Inc*., 262 S.W.3d 834, 844 (Tex.App.—Dallas 2008, no pet.); *see also Kirkpatrick v. Memorial Hosp. of Garland*, 862 S.W.2d 762, 775 (Tex.App.—Dallas 1993, writ denied) (holding that trial court should not grant a new trial based upon new evidence where movant fails to prove all essential elements of the test for newly discovered evidence); *Posey*, 561 S.W.2d at 605-06 (affirming trial court's decision to exclude testimony and overrule motion for new trial where movant failed to prove that evidence qualified as newly discovered evidence that would warrant a new trial).

4. Default Judgments.

The granting or denying of a motion for new trial is committed to the trial court's discretion. *Director, State Employees Workers' Compensation Div. v. Evans*, 889 S.W.2d 266, 268 (Tex.1994). In *Craddock v. Sunshine Bus Lines, Inc*., the Texas Supreme Court established the guiding rule and principle which trial courts must follow when presented with a motion for new trial after a default judgment has been entered. *Id*., 134 Tex. 388, 393, 133 S.W.2d 124, 126 (Com.App.1939). A default judgment should be set aside and a new trial ordered in any case in which: (1) the failure of the defendant to appear was not intentional or the result of conscious indifference on his part, but due to a mistake or accident; provided the motion for new trial (2) sets up a meritorious defense and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock*, 133 S.W.2d at 126. Although *Craddock* involved a no-answer default judgment, the same requirements apply to a post-answer default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987), *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex. 1986).

The first and third prongs of the *Craddock* test involve fact issues which are to be tried by the court

when conflicting evidence is presented as to those prongs. *Evans*, 889 S.W.2d at 268; *Griffin v. Duty*, 286 S.W.2d 229 (Tex.Civ.App.—Galveston 1956, no writ). The second prong does not involve a fact dispute which the trial court gets to decide. Rather, it involves a question of law regarding whether the movant has alleged facts sufficient in law to raise a meritorious claim or defense which would require a trial if the allegations were proved true at trial. *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex.1993). The defaulting party has the burden of proving all three prongs of the *Craddock* standard before a trial court is required to grant a motion for new trial. *Sunrizon Homes v. Fuller*, 747 S.W.2d 530 (Tex.App.—San Antonio 1988, writ denied). A trial court abuses its discretion only if it refuses to grant a new trial when the movant prevails in establishing all three prongs of the *Craddock* test. *Evans*, 889 S.W.2d at 268.

It must be pointed out, however, that if the default judgment was procured based upon defective service of process, then there is no requirement that a litigant establish a meritorious defense. Such a requirement violates due process rights under the Fourteenth Amendment to the federal constitution. *Peralta v. Heights Medical Center, Inc*., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez*, 757 S.W.2d 751 (Tex. 1988).

a. Failure to Appear Was Not Intentional or the Result of Conscious Indifference.

In determining whether the failure to appear was due to accident or mistake or was due to intentional conduct or conscious indifference, the court must look to the knowledge and acts of the defaulting party or the knowledge and acts of the defaulting party's attorney. *Evans*, 889 S.W.2d at 269; *Strackbein v. Prewitt*, 671 S.W.2d 37, 38-39 (Tex. 1984); *Cont'l Cas. Co. v. Davilla*, 139 S.W.3d 374, 382 (Tex.App.—Fort Worth 2004, pet. denied).

PRACTICE TIP: A number of courts of appeals have written that "conscious indifference has been defined as the failure to take some action that would seem indicated to a person of reasonable sensibilities under the circumstances." *Johnson v. Edmonds*, 712 S.W.2d 651, 652-53 (Tex.App.—Fort Worth 1986, no writ); *Dreisbach v. Reed*, 780 S.W.2d 901, 903 (Tex.App.—El Paso 1989, no writ). This statement of law was disapproved in *Levine v. Shackelford, Melton & McKinney, L.L.P*., 248 S.W.3d 166, 168 (Tex. 2008). The Texas Supreme Court held that the correct standard is not a negligence standard. *Id*. at 169. Rather, the standard is "one of intentional or conscious indifference—that the defendant knew it was sued but did not care." *Id*.

If the factual assertions in the defaulting party's affidavits are not controverted by the opposing party, then the defaulting party satisfies her burden if her affidavit sets forth facts that, if true, negate intentional or consciously indifferent conduct by the defendant. *Strackbein*, 671 S.W.2d at 38-39. However, if the opposing party files affidavits or other evidence tending to show intentional or consciously indifferent conduct, then a fact issue arises for the trial court to determine. *See Young v. Kirsch*, 814 S.W.2d 77, 80-81 (Tex.App.—San Antonio 1991, no pet.); *Jackson v. Mares*, 802 S.W.2d 48, 50 (Tex.App.—Corpus Christi 1990, writ denied). The court looks to all the evidence in the record in determining whether the defaulting party's factual assertions are controverted. *Evans*, 889 S.W.2d at 269. In deciding whether a defaulting party's failure to appear was intentional or the result of conscious indifference, the court may not rely upon conclusory allegations. *Holt Atherton Industries, Inc. v. Heine*, 835 S.W.2d 80, 82 (Tex.1992); *Folsom Investments, Inc. v. Troutz*, 632 S.W.2d 872, 875 (Tex.App.—Ft. Worth 1982, writ ref'd n.r.e.).

PRACTICE TIP: The ultimate decision as to whether to grant or deny a new trial under *Craddock* is supposed to be made using equitable principles. *Cliff v. Hudgins*, 724 S.W.2d 778, 779 (Tex. 1987); *United Beef Products, Inc. v. Lookingbill*, 528 S.W.2d 310, 312 (Tex.Civ.App.—Amarillo 1975), writ ref'd per curiam, 532 S.W.2d 958 (Tex. 1976). The *Craddock* test, itself, is supposed to be the guiding rule and principle the trial court refers to in deciding whether a prima facie case for a new trial has been made. The motion seeks to invoke the power of the court to grant a new trial even though the movant failed to timely act and suffered an adverse judgment. That is, the movant acknowledges that its own actions or inactions resulted in the judgment but asks the court out of fairness to allow a new trial. 5 McDonald & Carlson Tex. Civ. Prac. § 28:17 (2d. ed.). The first element of the *Craddock* standard is critical because there is often a very fine line between the conduct that constitutes negligence on the part of the defaulting party and what conduct pushes the defaulting party's actions into the realm of intentional conduct or consciously indifferent conduct that shows that "it was sued but did not care" or had notice of its duty to appear for trial but did not care. Thus, knowledge of the excuses that have been held sufficient to prove "accident or mistake" and the excuses that have been held to show "intentional or conscious disregard to the duty to answer or appear is critical.

Examples of excuses that qualify as a mistake or accident justifying relief under *Craddock*:

- Defendant's agent did not remember being served and therefore failed to turn over suit papers to defendant's attorney which was his normal procedure. *Milestone Operators, Inc. v. ExxonMobil Corp*., 388 S.W.3d 307, 310 (Tex. 2012)

- Attorney informed court of conflicting setting in another county before trial and reasonably believed court would delay trial. *Dolgencorp v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009).
- Attorney for defendant was misled by her predecessor as to trial date. *Evans*, 889 S.W.2d at 268.
- Executors failure to answer was not intentional where they were unaware that Secretary of State was served on their behalf. *Estate of Pollack*, 858 S.W.2d 391.
- Miscommunication between defendant and his office staff led to mistaken belief that staff had mailed the citation and petition to defendant's attorney when in fact they had not, and office staff thereafter misplaced the citation it was supposed to send to defendant's attorney. *Strackbein*, 671 S.W.2d at 39.
- Defendant did not know he had been served and took suit papers to insurance agent within one day after learning of service. *Ward v. Nava*, 488 S.W.2d 736 (Tex. 1972)
- Court clerk mailed correspondence regarding case to wrong address even though defendant's attorney listed correct address in attorney's court filings. *Texas Sting, Ltd. v. R.B. Foods, Inc*., 82 S.W.3d 644, 651-52 (Tex.App—San Antonio 2002, no pet.).
- Plaintiff's attorney's letter misled defendant's attorney as to trial date. *Box v. Associates Inv. Co*., 352 S.W.2d 315 (Tex.Civ.App.—Dallas 1961, no writ.)

Examples of excuses that did not qualify as an accident or mistake under *Craddock* and were held to be evidence that failure to appear was intentional or the result of conscious indifference:

- Defendant's pattern of ignoring deadlines and warnings from opposing party about need to file an answer amounted to conscious indifference. *Levine*, 248 S.W.3d at 68-69.
- Defendant's reliance on insurance agent to file answer held to be insufficient excuse where there was no evidence to prove agent was not guilty of conscious indifference. *Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992).
- Plaintiff introduced evidence showing that third notice of trial setting was taped to pro se' defendant door, and defendant thereafter failed to offer testimony that (1) he did not receive notice of the trial setting, (2) he did not know about the trial setting, and (3) he would have attended the hearing if he had known about the trial setting. *Osborn v. Osborn*, 961 S.W.2d 480, 412-13 (Tex.App.—Houston [1st Dist.] 1997, pet. denied).
- Affidavit which contained only general statements about error in handling citation after receipt, and which lacked any detail about who handled it, where it went, and the dates regarding its receipt and handling, held to be insufficient to prove accident or mistake. *Liberty Mut. Fire Ins. Co. v. Ybarra*, 751 S.W.2d 615, 618 (Tex.App.—El Paso 1988, no writ.).
- Defendant misunderstood citation and thought he would get a notice of trial setting; however, he did nothing and failed to seek advice about the papers he received. *Johnson v. Edmonds*, 712 S.W.2d 651, 652-53 (Tex.App.—Fort Worth 1986, no writ.).
- Three bank officers read writ of garnishment but did not understand the need to file sworn written response; bank froze account but did not answer. *First Nat'l Bank of Bryan v. Peterson*, 709 S.W.2d 276, 278-79 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).
- Defendant read citation but did not understand citation and did nothing. *Butler v. Dal Tex Mach. & Tool Co., Inc*., 627 S.W.2d 258, 260 (Tex.App.—Fort Worth 1982, no writ.).
- Defendant admitted he learned about trial setting two days before trial and tried to excuse his failure to appear by asserting that prior commitments made it impossible for him to attend and he tried to phone his attorney but could not reach him. Court did not buy excuse since defendant failed to offer any evidence as to his impossibility defense. *Spencer v. Affleck Co*., 620 S.W.2d 831, 832-33 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.)

The Texas Supreme Court has held that a mistake of law is one of the types of excuses that may satisfy the first prong of the *Craddock* test. *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex.1992)(emphasis added). However, the Court made clear in its opinion that "[t]his is not to say that every act of a defendant that could be characterized as a mistake of law is a sufficient excuse." *Id.* "Were that not the case, a party could, in any case, claim a mistake of law and be entitled to relief." *See Walker v. Gutierrez*, 111 S.W.3d 56, 65 (Tex.2003)(holding that an attorney's mistaken belief that an expert report complied with the statute governing medical malpractice suits did not negate the conscious indifference prong of the *Craddock* test because the statute was clear as to what was required to be in the report and the report failed to include two out of the three required elements).

Case law makes clear that ignorance of the law does not constitute a "mistake of law" where a simple reading of the law would have avoided the default in question. *Banales v. Jackson*, 610 S.W.2d 732 (Tex.1980) (holding that party's failure to read and understand rules of appellate procedure which required

the filing of a motion for rehearing before filing petition with Texas Supreme Court did not constitute a "reasonable explanation" or valid excuse for the failure to timely file such motion); *Novosad v. Brian K. Cunningham* , P .C., 38 S.W .3d 76 7 , 7 71 (Tex.App.– Houston [14th Dist.] 2001, no pet.)(holding that defendant's attorney's belief that automatic stay relieved him of duty to file answer did not constitute an accident or mistake under *Craddock* where attorney offered no evidence to prove that automatic stay applied to defendant's case under the bankruptcy code); *Carey Crutcher, Inc. v. Mid-Coast Diesel Services, Inc*., 725 S.W.2d 500, 502 (Tex.App.—Corpus Christi 1987, no writ) (holding that new trial was properly denied where failure to answer was a result of attorney's failure to read petition and realize that petition was filed against one out of two similarly named entities and petition sued the entity not subject to a bankruptcy stay); *Furr v. Furr*, 721 S.W.2d 565, 566 (Tex.App.—Amarillo 1986, no writ)(holding that party's obvious failure to read "the applicable, easily available rules setting out the requisite steps necessary to perfect an appeal shows a lack of proper diligence and falls short of establishing [a] reasonable explanation" for failing to file cost bond in a timely manner); *First National Bank of Bryan v. Peterson*, 709 S.W.2d 276, 279 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding that new trial was properly denied where three bank officers testified that they read the writ of garnishment, which included clear language requiring bank to file written and sworn answer to writ, but bank nonetheless failed to do anything other than freeze accounts); *Butler v. Dal Tex Mach. & Tool Co., Inc*., 627 S.W.2d 258, 260 (Tex.App.—Fort Worth 1982, no writ) (holding that new trial was properly denied where defendant read petition and citation but did not understand citation and did nothing).

b. Meritorious Defense

A meritorious defense is established, so as to meet the second *Craddock* prong, if the facts alleged in the movant's motion and supporting affidavits set forth facts which in law constitute a meritorious defense, regardless of whether those facts are controverted. *Evans*, 889 S.W.2d at 270. The affidavits or evidence relied upon by the movant must allege facts which, if true, would establish a claim or defense. *Id*. Conclusory statements or generalities are insufficient to establish a meritorious claim or defense. *Griffin v. Duty*, 286 S.W.2d 229 (Tex.Civ.App.—Galveston 1956, no writ).

In *Griffin*, the defendant gave the following testimony:

> "If I had been present at the time this case was tried, I would have defended this suit on the grounds that the boat 'Margie' was sold to Duty on an 'as is' basis and I made no warranties to Duty as to her condition and further that the boat 'Margie' was never offered back to me before it was sold by Duty to someone else. I would have had testimony and evidence at the trial to support my defense."

Griffin, 286 S.W.2d at 232.

The court of appeals concluded that this testimony did not establish a meritorious defense because it did not contain any specific facts. The court of appeals stated "It is at most a mere statement of a 'grounds' of defense and of defendant's conclusion and opinion that testimony and evidence would be available to support such 'grounds' of defense. *Griffin*, 286 S.W.2d at 233. Thus, any affidavits offered to prove a meritorious defense under *Craddock* must allege facts which in law would set up a meritorious defense.

PRACTICE TIP: The movant must "set up" a meritorious claim or defense by alleging facts, supported by affidavits or other evidence, that would constitute a claim or defense affecting the default judgment. Applying *Craddock* to family law cases is difficult due to the lack of recognizable claims or defenses which are more prevalent in civil litigation. In a divorce case, if your client is complaining about a default judgment as to the property division it is advisable to have your client submit his or her own sworn inventory and appraisement along with affidavits or other evidence explaining what evidence exists to show that harmful error was made in characterizing, valuing, and dividing the marital estate including failure to divide marital property. In addition, if your client has reimbursement claims, defenses to reimbursement claims, defenses to separate property claims, or any other claims or defenses that might affect a just and right division of the marital estate, your client should provide detailed factual allegations to support a claim or defense that shows the division is not just and right. *See* Section "d." for more detailed discussion about the problems created by applying *Craddock* to SAPCR cases.

c. No delay or injury

The purpose of this element is to protect the non-movant from the sort of delay that would cause it to be disadvantaged in the trial of its case. *Dolgencorp*, 288 S.W.3d at 929; Evans, 889 S.W.2d at 270.

In order to comply with the requirement that a new trial will not delay or prejudice the non-movant, the moving party must state that a new trial will not cause the plaintiff any injury or delay. *Dolgencorp*, 288 S.W.3d at 925. In addition, the movant must show that it is ready, willing and able to go immediately to trial. *O'Connell v. O'Connell*, 843 S.W.2d 212, 215 (Tex.App.—Texarkana 1992, no writ)(holding that new trial was properly denied where movant filed motion for

new trial 28 days after judgment and then told trial court at the hearing on the motion that movant needed an additional thirty days to prepare for trial); *Stone Resources, Inc. v. Barnett*, 661 S.W.2d 148, 152 (Tex.App.—Houston [1st Dist.] 1983, no writ)(concluding that motion for new trial was properly denied where movant did not offer any proof that she was ready, willing, and able to go to trial immediately).

Once the movant alleges that the granting of a new trial will not delay or otherwise injure the non-movant, the burden shifts to the non-movant to show proof of injury. *Dolgencorp*, 288 S.W.3d at 929. However, once the non-movant tenders evidence in opposition, the issue becomes a question of fact which the trial court must decide on a case by case basis applying equitable principles to the facts proved. *Cliff v. Hudgins*, 724 S.W.2d 778, 779 (Tex. 1987); *United Beef Products, Inc. v. Lookingbill*, 528 S.W.2d 310, 312 (Tex.Civ.App.—Amarillo 1975), writ ref'd per curiam, 532 S.W.2d 958 (Tex. 1976); *Griffin*, 286 S.W.2d at 231. In making this decision, the trial court may consider the entire record. *Id*.

PRACTICE TIP: Since the ultimate decision to grant or deny a motion for new trial is supposed to be made upon equitable principles, do not forget to argue the equities in favor or against granting a new trial.

d. The Problem with Applying *Craddock* in SAPCR Cases.

It is also important to recognize that default judgments in family law proceedings are quite different from civil cases generally. In *Considine v. Considine*, 726 S.W.2d 253 (Tex.App.–Austin 1987, no writ), a default judgment was taken on a motion to modify managing conservatorship. The court noted the distinction:

> In the usual case, the defendant who fails to file an answer is said to confess to the facts properly pleaded in the petition. *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979). In such a case, the non-answering defendant cannot mount an evidentiary attack against the judgment on motion for new trial or on appeal.
>
> In a divorce case, however, the petition is not taken as confessed for want of an answer. Tex.Fam.Code Ann. §3.53. Even if the respondent fails to file an answer, the petitioner must produce proof to support the material allegations in the petition. Accordingly, the judgment of divorce is subject to an evidentiary attack on motion for new trial and appeal.
>
> This Court knows of no Family Code provision relating to modification of prior orders that is comparable to §3.53. Reason suggests, nonetheless, that the same policy considerations underlying §3.53, applicable to original divorce judgments appointing conservators and setting support for and access to children, should also obtain in §14.08 proceedings to modify like provisions in prior orders. . . As a result, in a case of default by the respondent, the movant must prove up the required allegations of the motion to modify.

The court treated the issue as if it were one of first impression and made no reference to *Armstrong v. Armstrong*, 601 S.W.2d 724 (Tex.Civ.App.–Beaumont 1980, no writ), which was directly on point and comes to the same conclusion.

In 1998, the Fourteenth Court of Appeals questioned the wisdom of applying the *Craddock* principles, which spring from traditional civil litigation, to the peculiarities of family law. In *Lowe v. Lowe*, 971 S.W.2d 720, 725-27 (Tex.App.–Houston [14th Dist.] 1998, pet. denied), the mother appealed a default judgment which had appointed her husband as managing conservator of two young children. Although finding that Mrs. Lowe had indeed satisfied the *Craddock* elements, the court noted that it did not find *Craddock* to be an appropriate test for suits involving the parent-child relationship. Discussing several reasons why that premise is true, the court noted that although the Texas Family Code provides that the paramount inquiry shall be the best interest of the child, the *Craddock* test omits the child's interests and looks only to the actions of whichever parent happens to be the defaulting party. The opinion concludes by inviting the Supreme Court to fashion a more workable rule and urging the family bar to propose a more appropriate rule.

The Texas Supreme Court has never weighed in on the issue. As a result, Texas appellate courts have routinely applied the *Craddock* test to SAPCRs. *See*, e.g., *In re R.H.*, 75 S.W.3d 126, 130 (Tex.App.—San Antonio 2002, no pet.); *In re A.P.P.*, 74 S.W.3d 570, 573 (Tex.App.—Corpus Christi 2002, no pet.); *Lowe v. Lowe*, 971 S.W.2d 720 (Tex.App.—Houston [14th Dist.] 1998, pet. denied).

Notably, several courts of appeals have stated that *Craddock* should be applied liberally to SAPCR cases. *Comanche Nation v. Fox*, 128 S.W.3d 745, 749-50 (Tex.App.–Austin 2004, no pet.); *Sexton v. Sexton*, 737 S.W.2d 131, 133 (Tex.App.—San Antonio 1987, no writ.)("Courts should exercise liberality in favor of a defaulted party ... in passing on a motion for new trial ... particularly [in] suits affecting the parent-child relationship. The extremely important decision of a trial court to change a managing conservatorship should not be made casually based on the procedural advantage of one of the parties."); *Little v. Little*, 705 S.W.2d 153,

154 (Tex.App.—Dallas 1985, writ dism'd)("best interests of the child override strict application of the *Craddock* test," citing *C. v. C.*, 534 S.W.2d 359, 361 (Tex.Civ.App.—Dallas 1976, writ dism'd)).

5. Mistakes Made Before or During Trial.

This area includes but is not limited to pre-trial rulings, the improper admission or exclusion of evidence, errors in trial procedure, and incurable jury argument. If it can be demonstrated that the trial court's errors probably caused the rendition of an improper judgment or probably prevents the movant from presenting its case to the appellate court, then a new trial may be granted. Tex.R.App.P. 44.1(a).

6. No Reporter's Record Available.

Under the former rules of appellate procedure, an inability to obtain the statement of facts would automatically entitle the complaining party to a new trial provided the appellant made a timely request and provided the appellant was not at fault for the loss or destruction of the court reporter's notes. Former Tex.R.App.P. 50(e); *Goodman v. Goodman*, 611 S.W.2d 738 (Tex.Civ.App.–San Antonio 1981, no writ). *See also*, *Labiche v. Krawiec*, 692 S.W.2d 167 (Tex.App.–Dallas 1985, no writ) (holding that findings of fact and conclusions of law made by the trial court would not substitute for the statement of facts where the court reporter's equipment had malfunctioned and the statement of facts could not be prepared.)

Under new Tex.R.App.P. 34.6(f), if part of the reporter's record is missing, without appellant's fault, then a new trial will be ordered, but only if a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed. The same is true if the trial was electronically recorded and a significant portion of the recording has been lost or destroyed.

D. Tips for Drafting.

Motions for new trial may be granted by the trial court for almost any reason so long as it comes within the umbrella of "good cause". Tex.R.Civ.P. 320. As discussed above, the standard of review for the trial court's ruling on a motion for new trial is abuse of discretion and the level of discretion afforded to the trial court in ruling on a motion for new trial depends upon the grounds alleged for a new trial. Thus, the grounds asserted in the motion are extremely important and it goes without saying that some grounds are better than others.

Your job as the drafter is to identify the ruling your client alleges is an error, explain why the ruling is legally incorrect, explain how the ruling harms your client, and demonstrate that the error will result in reversal if the case goes to appeal. Use this paper as a guide to identifying some of the traditional grounds for seeking a new trial. However, remember that the list contained in this paper is not exhaustive. Any error can be asserted as a ground for new trial if there is case law demonstrating that the error is reversible if the case is appealed. As a consequence, study the law and be prepared to be creative in asserting error or explaining why alleged errors are not error or, alternatively, not harmful error.

Remember that an evidentiary hearing is required when the motion for new trial includes grounds complaining about jury misconduct, newly discovered evidence, failure to set aside a default judgment, or any other ground that requires you to prove facts not already in the record which are necessary for the movant to succeed on appeal. The law is strict, a movant is entitled to an evidentiary hearing only when the motion for new trial alleges facts which, if proved true at trial, would entitle the movant to a new trial. *Hensley v. Salinas,* 583 S.W.2d 617, 618 (Tex. 1979). To meet this test you must submit affidavits or other evidence specifically showing the truth of the grounds of the attack or the motion must explain why an affidavit could not be procured. *See Callahan v. State,* 937 553, 560 (Tex.App.—Texarkana 1996, no pet.); *Freedman Packing Co. v. Harris*, 160 S.W.2d 130, 133 (Tex.Civ.App.—Galveston 1942, writ ref'd w.o.m.). Failure to produce evidence that, if proved true at trial, would entitle the movant to a new trial is a sufficient basis for denying a motion for new trial. So whether you are prosecuting or defending a motion for new trial, pay careful attention to the evidence produced to show entitlement to a new trial.

IX. MOTIONS TO MODIFY, CORRECT, OR REFORM

A. Introduction.

One method of complaining of error in rendition of judgment is to file a motion to modify, correct, or reform the judgment ("motion to modify"). This method would be appropriate when the relief you want is a modified or new judgment, as opposed to a new trial.

Examples of the types of complaints that should be raised in a motion to modify include:

(1) complaints about the failure to award sanctions, *Lane Bank Equip. Co. v. Smith Southern Equip.*, Inc., 10 S.W.3d 308, 312 (Tex. 1999);
(2) complaints about the failure to award a prevailing party prejudgment interest, *Miller v. Kendall*, 804 S.W.2d 933, 945 (Tex.App.–Houston [1st Dist.] 1990, no writ);
(3) complaints about the award or calculation of prejudgment interest, *Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 100-01 (Tex.App.–El Paso 1986, writ ref'd n.r.e.)(op. on rhg);

(4) complaints about the failure to award costs to the prevailing party, *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 541 (Tex.Civ.App.–El Paso 1976, writ ref'd n.r.e.); or

(5) complaints about the failure to award attorney's fees. *WLR, Inc. v. Borders*, 690 S.W.2d 663, 668-69 (Tex.App.–Waco 1985, writ ref'd n.r.e.).

B. Basic Things to Know About the Motion.

1. Deadline for Filing.

A motion to modify must be filed on or before thirty days after the judgment is signed. Tex.R.Civ.P. 329b(a), (g); *L.M. Healthcare, Inc. v. Childs*, 920 S.W.2d 286 (Tex.1996). In addition, an amended motion to modify must be filed within thirty days after the judgment is signed. Tex.R.Civ.P. 329b(b).

2. Deadline for Obtaining Ruling.

Tex. R. Civ. P. 329b(g) provides that motions to modify shall be determined in the same manner as a motion for new trial. If the motion is not determined by written order, it is deemed overruled by operation of law 75 days after judgment is entered. *Health Care Ctrs. v. Nolen*, 62 S.W.3d 813, 816 (Tex.App.–Waco 2001, no pet.).

3. Effect of Filing on Appellate Deadlines.

Tex.R.Civ.P. 329b(g) provides that a motion to correct, reform or modify a judgment has the same effect upon the appellate timetable as a motion for new trial. The rule seems simple enough; however, two courts of appeal have reached different conclusions as to the meaning of this rule.

In *First Freeport National Bank v. Brazoswood National Bank*, 712 S.W.2d 168 (Tex.App.–Houston [14th Dist.] 1986, no writ), the appellant filed a motion for a modified judgment after rendition of the trial court's judgment. The appellate court concluded that the motion was really a motion for judgment n.o.v. and that such a motion is not one which will extend the appellate timetable pursuant to Rule 329b(g). It dismissed the appeal for want of jurisdiction.

In *Brazos Electric Power Co-Op v. Callejo*, 734 S.W.2d 126 (Tex.App.–Dallas 1987, no writ), the appellant filed a motion to modify judgment n.o.v. The appellee, relying on First Freeport, claimed that the motion did not operate to extend the appellate timetable. The Dallas court expressly declined to follow the Houston case and concluded that any post-judgment motion is effective in extending the time to perfect the appeal.

The Dallas court raised another issue in *A.G. Solar & Co., Inc. v. Nordyke*, 744 S.W.2d 647 (Tex.App.–Dallas 1988, no writ). Here a motion for new trial was filed as to the first judgment of the court. That motion was overruled by operation of law. Afterwards, but while still having plenary power, the trial court entered a reformed judgment dated June 30. The cost bond was filed on September 22. Was it timely filed? The appellant argued that it was, because a motion for new trial had been filed. But the court held that the second judgment was a separate and new judgment. Since no motion for new trial was filed with regard to the second judgment, the cost bond was required to be filed 30 days later, i.e., by July 30. The filing on September 22 was untimely and the appeal was dismissed.

The subject was revisited by the Supreme Court in L.*M. Healthcare, Inc. v. Childs*, 920 S.W.2d 286 (Tex. 1996). Judgment was rendered against the plaintiff on January 28, 1994 and on February 7, 1994 the plaintiff filed a motion for new trial. At a March 3rd hearing, the trial court signed a judgment on the January 28th pronouncement and an order denying the motion for new trial. On April 4th, the plaintiff filed a motion to modify judgment, requesting that the court include in its judgment a recitation that the dismissal was without prejudice to the plaintiff refiling its suit. Hearing on this motion was held on May 11th and on May 17th, the trial court granted the relief requested and signed a modified judgment. The defendant alleged that the trial court signed the modified judgment after the expiration of its plenary power. The court of appeals concluded that a motion to modify judgment, although filed timely, cannot extend plenary power if it is filed after the trial court overrules a motion for new trial. As a result, the appellate court held that the trial court lacked jurisdiction to modify the judgment. The Supreme Court disagreed. The rules provide that a motion to modify judgment shall be filed within the same time constraints as a motion for new trial, which must be filed no later than the 30th day after judgment is signed. Tex.R.Civ.P. 329b(b) and (g). "That the trial court overruled Longmeadow's motion for new trial does not shorten the trial court's plenary power to resolve a motion to modify judgment." *L.M. Healthcare, Inc. v. Childs*, 920 S.W.2d 286, 287 (Tex. 1996). The Court concluded that the rules provide that a timely filed motion to modify judgment extends plenary power separate and apart from a motion for new trial.

4. Effect of Filing on Court's Plenary Power.

Tex.R.Civ.P. 329b(g) provides that a motion to correct, reform, or modify a judgment has the same effect upon the court's plenary power as a motion for new trial. The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within 30 days after judgment is signed, regardless of whether an appeal has been perfected. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). This power is extended when a motion for new trial is filed, such that the court may alter its original judgment at any point until 30 days

after all motions have been overruled, either by written order or operation of law, whichever occurs first. *Id.* Thus, the maximum length of time which the trial court's plenary power could exist is 105 days (e.g., 75 days + 30 days = 105 days). Once thirty days has run from the date the motion for new trial is overruled, whether by written order or by operation of law, the order may not be set aside except by bill of review.

If the trial court signs a modified judgment within its plenary power, the appellate timetable is restarted. *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988); *Pursley v. Ussery*, 982 S.W.2d 596, 598 (Tex.App.–San Antonio 1998, pet. denied).

5. Preservation of Error.

Preserving error by motion to modify judgment was approved by the San Antonio Court of Appeals in *Bulgerin v. Bulgerin*, 724 S.W.2d 943 (Tex.App.–San Antonio 1987, no writ). The appellee urged by cross point that she was entitled to prejudgment interest. She had prepared a judgment including it, which the trial court denied by deleting the provision from the order. The appellee then filed a motion to modify the judgment specifically including a request for prejudgment interest. Her motion was denied. The appellate court held that the right to recover was waived if not asserted in the trial court, but the filing of the motion to modify was sufficient to preserve error for review.

PRACTICE TIP: It appears that the Texas Supreme Court has endorsed the idea that a motion to modify, correct, or reform, can be used to preserve legal sufficiency challenges to the judgment. *See Rylander Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 665-66 (Tex. 2011)(holding that pre-judgment motion for JNOV qualified as a 329b motion because it assailed any later-entered judgment by asserting that jury findings were not supported by legally sufficient evidence). Logic would suggest that a legal sufficiency challenge can be preserved by a motion to modify, correct, or reform, since such an argument does seek to modify a judgment. However, it is still prudent to preserve your legal sufficiency challenges by as many avenues as possible.

C. Tips for Drafting.

The motion to modify, correct, or reform must identify harmful legal error that has occurred in rendering judgment and then explain what judgment is appropriate under the circumstances. Typically, the motion is used to address technical errors such as failure to award pre-judgment interest. However, the motion should be used to preserve any form of legal challenge to the judgment entered, including legal sufficiency challenges. It is advisable in a jury case that if you filed a motion to disregard jury findings or a motion for JNOV, and the court overruled the motions, that you change the title of the motions and re-file them as motions to modify, correct, or reform the judgment, so that you preserve your client's ability to argue for rendition of judgment on appeal and so you extend the court's plenary power and the appellate deadlines.

X. CONCLUSION.

The purpose of this paper was to discuss preservation of error during trial and the various post-trial motions that are available for attacking an adverse ruling including tips for how to draft an effective post-trial motion or response thereto. The author hopes the paper has shed some light on what you as the lawyer needs to know and be thinking about when objecting at trial and drafting post-trial motions and responses. Good luck!