HOW TO FIX YOUR SCREW UPS

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Negotiation: You Can't Try Them All, 2007 Marriage Dissolution Institute, El Paso, TX
Managing Client Expectations; Trying the Property Case on a Shoestring; Top Ten Trial Tips, 2007 Nevada State Bar Family Law Course, Ely, NV
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Direct and Cross Examination, 2005 Family Law Basic Training, Dallas, TX
Legislative Update, 2005 Associate Judge's Conference, Austin, TX
Temporary Orders, 2005 Poverty Law Conference, Austin, TX
Reforming Your Client's Expectations, 2004 Legal Assistant's University, Fort Worth, TX
Life of a Grievance, 2004 Advanced Family Law Course, San Antonio, TX
Managing Client Expectations, 2004 Marriage Dissolution Institute, Fort Worth, TX
Dealing With the Client From Hell, 2003 Advanced Family Law Course, San Antonio, TX
Setting and Getting Fees, 2003 Marriage Dissolution Institute, Houston, TX
Spoliation, 2001 Advanced Family Law Course, San Antonio, TX
Closing the File, 2001 Marriage Dissolution Institute, Corpus Christi, TX
Getting the Most Out of Your Discovery, The Ultimate Trial Notebook: Family Law (2000), New Orleans, LA
Top Ten Things in a Family Law Practice, 2000 Advanced Family Law Course**,** San Antonio, TX
Bankruptcy In Divorce, 1999 Advanced Family Law Course, Dallas, TX
Bankruptcy Meets Family Law, Univ. of TX School of Law 2nd Annual TX Marital Property Inst. (1998), Austin, TX
Working as an Expert in Family Law Cases, 1998 Divorce Conference (Dallas Chapter, TX Society of CPA's)
Divorce vs. Bankruptcy--When Worlds Collide, 1998 Farm, Ranch and Agri-business Bankruptcy Inst., Lubbock, TX
Jurisdiction, 1998 Advanced Family Law Course, San Antonio, TX
Parent-Child Third Party Practice, 1998 Marriage Dissolution Institute, Austin, TX
Recent Federal Legislation, 1998 Am. Academy of Matrimonial Lawyers Mid-Year Meeting, San Juan, PR
Creative Divisions of Property, 1997 Advanced Family Course, San Antonio, TX
Trying a Property Case on a Shoestring, 1997 Marriage Dissolution Institute, Dallas, TX
Recent Interesting Cases, 1997 College of Advanced Judicial Studies, Houston, TX
Modification of Rights and Powers of a Joint Managing Conservator, 1996 Adv. Fam. Law Course, San Antonio
Enforcement Workshop, 1996 Marriage Dissolution Institute, Corpus Christi, TX
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HOW TO FIX YOUR SCREW UPS

I. INTRODUCTION

"Know the rules, and the rules shall set you free"—spoken by an unknown lawyer, long ago.

The purpose of this paper is to identify common mistakes that have major impacts at trial, and to help educate the bar about practical ways, provided under the rules of civil procedure, if they exist, to deal with these types of mistakes. The paper covers: (1) common mistakes made in pleading the case; (2) common mistakes made in discovery; (3) common mistakes made during the presentation of evidence; (4) common mistakes made in submitting claims and defenses to the jury; and (5) common mistakes made in submitting claims and defenses to the court.

II. COMMON MISTAKES MADE IN PLEADING THE CASE

Pleadings are the foundation of every lawsuit because they define the scope of the lawsuit, what evidence is relevant at trial, and what questions of fact are authorized to be decided by the trier-of-fact. The Texas Rules of Civil Procedure require that a party's pleadings give "fair notice" to its opponent of the claims and defenses it intends to advance at trail. *See* Tex. R. Civ. P. 45; *Roark v. Allen*, 632 S.W.2d 804, 810 (Tex. 1982). Under the "fair notice" standard for pleading, Texas courts look to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Broom v. Brookshire Bros., Inc*., 923 S.W.2d 57, 60 (Tex. App.—Tyler 1995, writ denied).

There are two common mistakes we all make in pleading claims and defenses: (1) we forget to plead with sufficient detail to give "fair notice" to our opponent; and (2) we forget entire claims or defenses we want to raise at trial.

While it might sound terrible to admit to yourself or someone else that you "forgot" to plead with sufficient detail or raise an entire claim or defense, this common mistake is easy to make. Pleadings are often drafted early in the case with little information provided to the lawyer other than what the client may know and without the benefit of formal discovery. As a case progresses, attorneys often forget to amend their pleadings to include more detailed allegations or assert new claims or defenses that are authorized by the evidence gathered in discovery.

A. Forgetting to plead with sufficient detail

This issue rarely arises in cases filed strictly under the Texas Family Code. It *is* applicable when bringing claims against third parties or when bringing claims other than those set out in Title 1 or 5 of the Code.

Family Code §6.402(a) states that a petition for the dissolution of a marriage is sufficient without the necessity of specifying underlying facts. Part (b) says that allegations seeking a temporary order stated in short and plain terms are not subject to special exception; and, part (c) allows the court to strike the specific allegations of fact on the motion of a party or on its own motion.

When the case is brought under Title 5 the requirements of the pleadings are set out in §102.008 which state at (10) that a statement describing the action the court is requested to take and the statutory grounds for the action is all that is required.

In the instances when it is required and the pleading fails to give "fair notice", it becomes subject to attack by special exception. *See* Tex. R. Civ. P. 91; *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). The party who objects to a pleading has the burden to file special exceptions and "point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations . . .." *See* Tex. R. Civ. P. 91. If special exceptions are filed, then the party advancing the special exceptions has the burden to obtain a hearing to present its special exceptions to the trial court and obtain a ruling. *Hanners v. State Bar*, 860 S.W.2d 903, 912 (Tex. App.—Dallas 1993, no writ); *R.I.O. Sys., Inc. v. Union Carbide Corp.*, 780 S.W.2d 489, 491 (Tex. App.—Corpus Christi 1989, writ denied).

1. How to avoid this type of mistake

The easiest way to avoid leaving out sufficient detail or required elements of a claim is to initially draft your pleadings with one eye on the Pattern Jury Charge or some other publication, such as O'Connor's Texas Causes of Action or Dorsaneo's Texas Litigation Guide, which help describe the elements and proof required to properly plead a claim or defense. If you are forced to make a general allegation as to some essential element of your claim or defense, make a note to yourself that you need to find evidence to support this essential element either from the client or through discovery. It is also suggested that you impose internal deadlines that require you to review your pleadings before trial. Rule 63 of the Texas Rules of Civil Procedure allows amendment of pleadings, without leave of court, up to seven days before trial unless there is a pre-trial scheduling order which mandates a specific date when pleading amendments are due. *See* Tex. R. Civ. P. 63. It is suggested that you set an internal deadline of at least thirty days before trial or the pleading amendment deadline set forth in your pre-trial scheduling order so that you have sufficient time to cure the defects in your pleadings or to move for a continuance if you learn that you are missing evidence of an essential element of a claim or defense.

2. How to deal with this type of mistake

If you have failed to plead with sufficient detail, and your opponent realizes it, then you will likely be confronted with special exceptions to your pleadings. If you determine that the special exceptions are valid, it is advisable to voluntarily amend your pleadings rather than waste time and money having a hearing over an unnecessary matter. If you determine that the special exceptions are not merited, then you can contest them.

Your opponent has the burden to obtain a hearing to present its special exceptions to the trial court and obtain a ruling. *Hanners v. State Bar*, 860 S.W.2d 903, 912 (Tex. App.—Dallas 1993, no writ); *R.I.O. Sys., Inc. v. Union Carbide Corp*., 780 S.W.2d 489, 491 (Tex. App.—Corpus Christi 1989, writ denied). If the record does not show that your opponent obtained a ruling on the special exceptions, then your opponent has failed to preserve this complaint for appellate review. TEX. R. APP. P. 52(a); *Hanners*, 860 S.W.2d at 912. However, if a hearing is held and the trial court determines that the special exceptions are valid, the trial court has two choices about how to deal with the pleading defect. If the pleading defect cannot be cured by pleading amendment, meaning the claim or defense is invalid as a matter of law, then the trial court must dismiss the claim or defense. *Mowbray v. Avery*, 76 S.W.3d 663, 677 (Tex.App.—Corpus Christi 2002, pet. denied). If the pleading defect is curable by amendment, then the trial court must allow you to replead before dismissing the defective claim or defense. *Parker v. Barefield*, 206 S.W.3d 119, 120 (Tex. 2006).

If you have failed to plead with sufficient detail, but your opponent does not realize it, then you may be able to avoid having to replead. This is so because under the rules of civil procedure, a party waives any defect, omission, or fault in a pleading that is not specifically pointed out by a special exception. TEX. R. CIV. P. 90; *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Beeson*, 835 S.W.2d 689, 693 (Tex. App.—Dallas 1992, writ denied). If your opponent fails to specially except, then the court is required to construe the pleadings liberally in favor of the pleader. *See Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993).

There is one caveat you should be aware of if you find yourself in a position where you realize that your pleadings are defective but your opponent does not. If you lose at trial on the claim or defense which is supported by a defective pleading, your opponent can argue on appeal that the pleading defect is a reason for affirming the judgment against you. *See Ward v. Clark*, 435 S.W.2d 621, 624 (Tex.App.--Tyler 1968, no writ); *Dairyland Cty. Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 158-59 (Tex. 1973). This is so because the waiver rule set forth in Rule 90 of the Texas Rules of Civil Procedure only applies to parties trying to reverse a judgment based on a pleading defect to which they did not specially except. *See* Tex. R. Civ. P. 90. The rule is inapplicable to a party who seeks to affirm based on a pleading defect to which the party did not specially except. *See Butler, Williams, & Jones v. Goodrich*, 306 S.W.2d 798 (Tex.Civ.App.—Houston 1957, writ ref'd n.r.e.). This caveat is the best reason why should double check the sufficiency of your pleadings well before the deadline for filing amended pleadings set forth in the rules of civil procedure or your pre-trial scheduling order. The last thing you want to explain to a client is how an adverse judgment got affirmed because of a defect in the pleadings you drafted.

If you do not encounter an objection to a defect in your pleadings until trial, then you will need to request leave to file a trial amendment pursuant to Rule 63. *See* Tex. R. Civ. P. 63. This procedure will be discussed in detail in the section immediately below.

B. Forgetting to plead entire claims or defenses

While no one wants to admit publicly that they ever forgot to plead a claim or defense they intended to rely upon at trial, it sometimes happens to even the best practitioners. Forgetting to plead an entire claim or defense is a disastrous mistake. The rules of evidence allow the trial court to keep out evidence which is not relevant. *See* Tex. R. Evid. 401, 402. Since the question about whether a specific piece of evidence is relevant or not is determined by the pleadings, if you have not pleaded a claim or defense, you will not be allowed to submit evidence to support that claim or defense. Going one step further, if there are no pleadings or evidence to support submission of a claim or defense to the jury, then no jury question can be submitted on that claim or defense. *See* Tex. R. Civ. P. 278 ("The court shall submit the questions, instructions, and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence). This same rule applies to trials before the court. *See* Tex. R. Civ. P. 262 ("The rules governing the trial of causes before a jury shall govern in trials to the court in so far as applicable").

Given the ramifications of failing to plead a claim or defense, it is worth considering how to avoid this type of mistake and what to do if you find that you have inadvertently made this mistake.

1. How to avoid this type of mistake

Initially the best way to avoid this pitfall is to have a checklist of the most common claims made in divorce actions: fault, desire for "custody" visitation or support, separate property, reimbursement, disproportionate division of property, spousal support, temporary orders, and attorney fees. These are the most frequently made claims that without pleadings, there will be no recovery. Your legal assistant should

be reviewing every initial pleading with you and asking if these claims should be brought.

After the initial pleadings have been filed and discovery completed, the only way to avoid this type of mistake is to impose your own internal deadlines to review your pleadings before the deadline for amending pleadings passes. Rule 63 of the Texas Rules of Civil Procedure allows amendment of pleadings, without leave of court, up to seven days before trial unless there is a pre-trial scheduling order which mandates a specific date when pleading amendments are due. *See* Tex. R. Civ. P. 63. It is suggested that you set an internal deadline of at least thirty days before trial or the pleading amendment deadline set forth in your pre-trial scheduling order so that you have sufficient time to cure the defects in your pleadings or to move for a continuance if you learn that you are missing evidence of an essential element of a claim or defense.

2. How to deal with this type of mistake

During trial, if your opponent objects to the admission of evidence or submission of an issue to the trier-of-fact on the grounds that you failed to plead a claim or defense which supports submission of the evidence or issue in question, then your remedy is to seek leave to file a trial amendment to your pleadings. *See* Tex. R. Civ. P. 66 and 67.

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.

III. COMMON MISTAKES MADE IN DISCOVERY

There are two common mistakes made in discovery: (1) failing to object to inadequate discovery responses, objections, or claims of privileges before trial; and (2) failing to timely answer or supplement discovery.

A. Failing to object to inadequate discovery responses, objections, or claims of privileges

Once the party responding to discovery has served his or her objections or claims of privilege on the party seeking discovery, the burden is on the party seeking discovery to obtain a hearing and ruling on any dispute over the inadequacy or impropriety of the responses, objections and claims of privilege asserted by the responding party. *See* Tex. R. Civ. P. 193.4(a); *McKinney v. Nat'l Union Fire ins. Co.*, 772 S.W.2d 72, 75 (Tex. 1989).

Do not be confused by the rule which states that either party may ask for a hearing on the responding party's objections, claims of privilege, motions for protective order, or motion to quash. *See* Tex. R. Civ. P. 176.6(d), (e), 192.6, 193.4. If the responding party does nothing, and you do not pursue the responding party's inadequate or improper responses, objections, claims of privilege, motions for protective order, or motions to quash, before trial, then you waive the defect. *See Meyer v. Cathey*, 167 S.W.3d 327, 333 (Tex. 2005)(holding that party waives any claim for sanctions based on misconduct in discovery if it does not obtain a pretrial ruling on that misconduct); *State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616, 620 (Tex. 1998)(holding that complaint about lack of verification of interrogatory answers was waived when not objected to before trial); *Roberts v. Whitfill*, 191 S.W.3d 348, 361, n.3 (Tex.App.—Waco 2006, no pet.)(holding that party waives any complaint about misconduct in discovery if it does not obtain a pretrial ruling on that misconduct); *Pace v. Jordan*, 999 S.W.2d 615, 622 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)(holding that complaint about motion for protective order quashing depositions was waived where the party seeking discovery did not set the motion for a hearing and obtain a ruling).

1. <u>How to avoid this type of mistake</u>

Avoiding this mistake is easy: read your opponent's discovery responses, objections, and claims of privilege early and often! When the responding party's response, objections, or claims of privilege are inadequate or improper, do something about it sooner, rather than later. More often than not, discovery disputes get waived because the party seeking discovery waits until it is too late to try and compel the answers before trial. Accordingly, practitioners should allow sufficient time prior to trial to: (1) ascertain whether discovery responses are sufficient, (2) file any necessary motions to compel responses to proper discovery requests, (3) obtain a setting on any motions to compel and provide opposing counsel with the

requisite notice of the hearing, and (4) allow the trial court to rule on any motions to compel. The failure to follow this "full circle of discovery" will result in waiver of any complaint arising from discovery misconduct.

2. How to deal with this type of mistake

There are three ways to deal with this type of mistake: (1) set the responding party's objections, claims of privilege, motions for protective order, or motions to quash, for a hearing; (2) file a motion to compel; or (3) file a motion for continuance if there is not enough time to compel adequate and proper discovery responses before trial.

a. Set a hearing on the objections and claims of privilege.

As stated above, the rules of discovery allow either party to ask for a hearing on the responding party's objections, claims of privilege, motions for protective order, or motion to quash. *See* Tex. R. Civ. P. 176.6(d), (e), 192.6, 193.4. The party seeking discovery can put the responding party's objections and claims of privilege at issue by making a global challenge to the responses. *See In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 226-27 (Tex. 2004). At the hearing, however, the trial court can make you specifically challenge the responding party's objections and claims of privilege.

b. File a motion to compel.

When a party refuses to comply with proper discovery requests, the party seeking discovery may file a motion to compel the other party to respond. TEX. R. CIV. P. 215.1(b). As noted above, if you do not ask for a hearing on the other party's objections or motion for protection or on your own motion to compel, you waive your right to the requested discovery. *Pace v. Jordan*, 999 S.W.2d 615, 622 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

In *Pace*, the plaintiffs noticed the depositions of three corporate witnesses. *Id*. at 622. The corporation filed a motion for protective order quashing the deposition notices. *Id*. The plaintiffs filed a response but never set the matter for a hearing. *Id*. On appeal, the plaintiffs argued that the trial court "prevented the depositions" by not ruling on pending motions. *Id*. The court of appeals disagreed, stating:

> [Plaintiffs] should have filed a motion to compel instead of a "response" to the . . . motion for protective order. *See* Tex. R. Civ. P. 215.1. Then, they should have either obtained a ruling on the motion to compel, or objected if the trial court refused to rule. *See* Tex. R. App. P. 33.1(a)(2). [Plaintiffs] did neither . . . .
>
> * * *
>
> There is nothing in the record to demonstrate that the trial court prevented the discovery sought by [plaintiffs].

Pace, 999 S.W.2d at 622.

c. File a motion for continuance.

A motion for continuance for additional discovery must be supported by sworn proof. *See* Tex. R. Civ. P. 251, 252. The motion and sworn proof must describe the specific discovery needed, the type of evidence sought, and who has the information needed (in your case the responding party). *See Gabaldon v. General Motors Corp.*, 876 S.W.2d 367, 370 (Tex.App.—El Paso 1993, no writ). The motion must also show why the discovery is material to a claim or defense, your diligence in obtaining the discovery, and aver that the motion for continuance is not sought for delay, but that justice may be done. *See* Tex. R. Civ. P. 252; *J.E.M. v. Fidelity & Cas. Co.*, 928 S.W.2d 668, 676 (Tex.App.—Houston [1st Dist. 1996, no writ)(holding that a showing of materiality required); *Barron v. Vanier*, 190 S.W.3d 841, 851 (Tex.App.—Fort Worth 2006, no pet.)(holding that verified proof must demonstrate diligence and also holding that failure to file a motion to compel or otherwise obtain disputed discovery may show lack of diligence).

B. Failing to answer or supplement discovery

A party has an affirmative duty to respond to discovery and to reasonably and promptly amend or supplement its responses when it discovers that an amended or supplemented response is necessary to make its responses complete. *See* Tex. R. Civ. P. 193.1 (duty to respond); Tex. R. Civ. P. 193.5 (duty to amend or supplement in a reasonably prompt manner); *Sharp v. Broadway Nat. Bank*, 789 S.W.2d 669 (Tex. 1990)(holding that a party has an affirmative duty to identify expert witnesses in response to an appropriate inquiry); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989)(a party has an affirmative duty to supplement its discovery responses when it learns that its prior responses are no longer adequate).

The consequence for not answering or failing to timely amend or supplement your answers to written discovery is exclusion of your evidence at trial. *See* Tex. R. Civ. P. 193.6; *Sharp*, 789 S.W.2d at 671-72 (entering take nothing judgment on attorney's fees claim where trial improperly admitted evidence of attorney fee expert who was not disclosed in discovery); *F & H Investments Inc. v. State*, 55 S.W.3d 663, 671 (Tex.App.—Waco 2001, no pet.)(reversing judgment where evidence should have been excluded because State did not disclose it in discovery).

Rule 193.6 states:

> A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a party) who was not timely identified, unless the court finds that:
>
> 1. there was good cause for the failure to timely make, amend, or supplement the discovery response; or
> 2. the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

See Tex. R. Civ. P. 193.6.

The exclusion of evidence is automatic once it is established that evidence or witnesses were not timely disclosed in discovery. *See Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911 (Tex. 1992); *Morrow v. H.E.B.*, 714 S.W.2d 297 (Tex. 1986); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989).

It is important to note, however, that courts can and do draw a fine distinction between a complete failure to make, amend, or supplement a discovery response, and a discovery response that is for some reason not adequate. *See State Farm Fire & Cas. Co. v. Morua*, 979 S.W.2d 616, 620 (Tex. 1998)(holding that complaint about lack of verification of interrogatory answers was waived when not objected to before trial); *Interceramic, Inc v. South Orient R. Co.*, Ltd., 999 S.W.2d 920, 929-30 (Tex.App.—Texarkana 1990, pet. denied)(holding that complaint about timeliness of supplementation to interrogatory answers was waived when not raised before trial). Thus, an inadequate response must be challenged before trial, but a complete failure to answer or disclose evidence through a timely amendment or supplement results in automatic exclusion.

Once it is established that evidence or witnesses were not disclosed, and the evidence or witnesses are therefore excluded from trial, the burden shifts to the party seeking to admit the evidence or witnesses' testimony to prove good cause or lack of unfair surprise or unfair prejudice. *See* Tex. R. Civ. P. 193.6(b).

1. <u>How to avoid this type of mistake</u>

Avoiding a complete failure to make, amend, or supplement discovery is easy when you calendar response and supplementation deadlines as the discovery comes into your office. It is best to impose internal deadlines in your office and among your staff to ensure that discovery responses and supplementation gets done in a timely manner. It is best to supplement your discovery responses as you obtain new evidence rather than waiting to the supplementation deadline imposed by the rules of discovery or your pre-trial scheduling order. It is also a best practice to be liberal in giving out extensions to your opponent to make discovery responses because you never know when you will need one yourself.

2. <u>How to deal with this type of mistake</u>

If you have failed to timely make, amend, or supplement a discovery response, and the exclusionary rule has taken effect, there are two things you can do: (1) prove good cause or lack of unfair surprise and prejudice; or (2) move for a continuance.

a. Proving good cause and lack of unfair surprise or prejudice

As stated above, Rule 193.6 allows the trial court to admit evidence and witness testimony that was not disclosed in discovery if the party seeking to admit the evidence proves: (1) there was good cause for the failure to make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties. *See* Tex. R. Civ. P. 193.6.

It is important to note that this standard is different than the standard which existed under former rule 215(5). *See Gutierrez v. Gutierrez*, 2002 WL 179225 at *3 (Tex.App.—El Paso 2002, _____)(noting that Rule 193.6 is less burdensome than former rule 215(5)). Under the former rule, the proponent of the undisclosed evidence had to prove "good cause" for the failure to make, amend, or supplement its discovery responses. *See Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911 (Tex. 1992); *Morrow v. H.E.B.*, 714 S.W.2d 297 (Tex. 1986); *Boothe v. Hausler*, 766 S.W.2d 788 (Tex. 1989). There was no exception based on the fact that admission of the evidence would not "unfairly surprise or unfairly prejudice the other parties". Further, "good cause" was defined so as to exclude: (1) inadvertence of counsel; (2) lack of surprise or prejudice; or (3) uniqueness of the evidence. *See Alvarado*, 830 S.W.2d at 915. In 1999, the discovery rules were amended to relax the draconian sanction of automatic exclusion which resulted in too much evidence being included based on the narrow definition of "good cause." The careful practitioner must remember that cases written before 1999, which discuss the exclusionary rule, are based on a very different, and much tougher legal standard.

In *Gutierrez v. Gutierrez*, the responding party failed to identify an expert witness on the issue of attorney's fees in response to discovery requests asking for disclosure of experts; however, the responding party did list the attorney's fees expert in response to an interrogatory asking for disclosure of fact witnesses. 2002 WL 179225 at 5. The responding also described

the testimony to be given and the explanation showed that the testimony would cover both facts known by and opinions based on the facts. *Id*. The trial court found there was no unfair surprise of prejudice and allowed the testimony. *Id*. On appeal, the court of appeals affirmed, holding that no unfair surprise or prejudice had occurred.

In *Elliot v. Elliot*, the responding party (the former wife) brought an equitable bill of review seeking to set aside a divorce decree and agreement incident to divorce on the grounds that she was mentally incapacitated at the time she signed the decree and agreement incident to divorce. *Id.*, 21 S.W.3d 913, 921 (Tex.App.—Fort Worth 2000, pet. denied). In discovery, the responding party failed to identify all of the experts she intended to call at trial; however, she did disclose the mental healthcare experts she intended to call in response to an interrogatory asking for the identity of all healthcare providers. *Id*. at 921. At the pre-trial hearing to determine if the grounds for seeking a bill of review existed (i.e., the *Baker v. Goldsmith* hearing), the trial court excluded the expert's opinions. *Id*. On appeal, the court of appeals determined that the decision was an abuse of discretion because the evidence demonstrated that no unfair surprise or prejudice could have occurred given the responding party's pleading which put her mental state at issue and her discovery responses which disclosed who her treating doctors were at the time when the decree was signed. Id. The court of appeals did not, however, reverse. The court of appeals affirmed because the error was harmless in light of the responding party's failure to meet the prima facie showing, required for a bill of review, that she had a meritorious defense.

b. Move for a continuance

If you cannot meet the exceptions to the exclusionary rule set forth in Rule 193.6(a) and (b), then fall back to the remedy proved by subpart (c) of the Rule. Rule 193.6(c) states:

> Even if the party seeking to introduce the evidence or call the witness fails to carry the burden under paragraph (b), the court may grant a continuance or temporarily postpone the trial to allow a response to be made, amended, or supplemented, and to allow opposing parties to conduct discovery regarding any new information presented by that response.

See Tex. R. Civ. P. 193.6(c).

As a consequence, even if you cannot prove "good cause" for the failure to make, amend, or supplement the discovery response, or that your failure to timely make, amend, or supplement a discovery response will not "unfairly surprise or unfairly prejudice your opponent", you can still fall back and ask for a continuance or postponement of the trial to cure the error. The trial court has the discretion to do either to remedy the harm caused by late disclosure of evidence and witnesses. *See Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 916 (Tex. 1992)(trial court has discretion to postpone trial so that offending party may timely designate witnesses or respond to discovery).

IV. COMMON MISTAKES MADE DURING THE PRESENTATION OF EVIDENCE

There are many mistakes made during trial, but the paper is only going to focus on four major and relatively common mistakes: (1) failing to object to evidence; (2) failing to make an offer of proof; (3) failing to put on evidence of an essential element of a claim or defense; and (4) failing to preserve a legal sufficiency complaint to evidence admitted.

A. Failing to object

The most common error during trial is the failure to object to evidence that should not be admitted. The party opposing the admission of evidence must object at the time the evidence is offered and not after it has been received. *Fort Worth Hotel Ltd. Partnership v. Ensearch Corp*., 977 S.W.2d 746, 756 (Tex. App. – Fort Worth 1998, no writ). To properly preserve error, the objection must be specific enough to enable the trial court to understand the precise question and to make an intelligent ruling affording the offering party the opportunity to remedy the defect if possible. *McKinney v. Nat'l Union Fire Ins. Co*., 772 S.W.2d 72, 74 (Tex. 1989) (op. on reh'g); *In re C.J.B.*, 137 S.W.3d 814, 818-19 (Tex. App. – Waco 2004, no writ). To preserve an issue for appellate review, a party must make a timely, specific objection and obtain a ruling on that objection. TEX. R. APP. P. 33.1(a); *In re M.D.S.*, 1 S.W.3d 190, 202 (Tex. App. – Amarillo 1999, no pet.).

When an objection is sustained as to testimony that has been heard by the jury, a motion to strike and request for the court to instruct the jury to disregard the testimony should be made to preserve error. *Hukaby v. Henderson*, 635 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

It is worth noting that in some instances no objection may be required at all to preserve error, particularly in appeals involving expert testimony. *See City of San Antonio v. Pollack*, 284 S.W.3d 809, 816 (Tex. 2009) (holding that opinion evidence offered without an underlying factual basis is legally insufficient to support a judgment, even when the opposing party did not object to the testimony); *Coastal Transp. Co. v. Crown Central Petrol. Corp.*,

136 S.W.3d 227, 232 (Tex.2004) (similar holding for conclusory statements by an expert).

But the best practice is to not chance it and object whenever evidence is admitted which you believe is objectionable under the rules or some other rule of law.

1. How to avoid this type of mistake

The best way to avoid this mistake is to know ahead of time what evidence your opponent will likely want to put on and your legal grounds for keeping this out. How do you do this? First, the best practice is to keep a list of what evidence is found in discovery that your opponent is to likely want to use at trial. Second, shortly before trial you should sit down and review all of the discovery responses, witness lists, and exhibits list, and think critically about what your opponent is likely to try and admit. Third, you should have either notes on the rules and case law which supports your objections to your opponent's evidence that you can argue from during trial or copies of the cases or a trial brief in support of your position.

The Family Law Section of the State Bar of Texas publishes "The Family Lawyer's Essential Tool Kit" (the "Tool Kit") which contains a section on objections. This publication is free to anyone who joins the Family Law Section of the State Bar. The Tool Kit is an easy reference tool you can use to remind yourself of the possible objections you can make to evidence. It is strongly recommended that you use the Tool Kit to identify your objections before trial.

2. How to deal with this type of mistake

Unfortunately, there is no way to un-ring the bell. Once objectionable evidence has been received, it is in evidence for all purposes. All you can do is object the next time the evidence is offered or discussed with a witness. If you can get the trial court to sustain the objection then you may leave the impression with the trier-of-fact that the evidence is somehow no good. You can increase this impression by getting the court to grant a motion to strike the evidence and even an instruction to the jury to disregard the evidence. But this is nothing more than window dressing if the jury rules against you because the appellate court will hold that the improper admission of evidence was harmless if you failed to object just once even though the trial court sustained your objections to the evidence every other time it was offered or discussed.

The only true way to cure your failure to object, i.e., the only way to un-ring the bell, is to ask for mistrial (get rid of everyone who heard the bell). Mistrials are rarely declared unless the evidence was so prejudicial that allowing the trial to go forward would be a miscarriage of justice.

B. Failing to make an offer of proof when evidence is excluded

The primary purpose of an offer of proof is to include excluded evidence in the record to allow the appellate court to determine whether the trial erred in excluding the evidence. *Ludlow v. DeBerry*, 959 S.W.2d 265, 269-70 (Tex. App. – Houston [14th Dist.] 1997, no writ); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 484 (Tex. App. – Dallas 1995, writ denied). Additionally, the purpose is to allow the trial court to reconsider its ruling in light of actual evidence. *Ludlow*, 959 S.W.2d at 270. An offer of proof is a trial-time offer of excluded evidence. TEX. R. EVID. 103(a)(2); *Clone Component Distribs. v. State*, 819 S.W.2d 593, 596 (Tex. App. – Dallas 1991, no writ).

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).

To preserve witness testimony, the party should offer a summary of the testimony or make a record 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).

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).

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

1. How to avoid this type of mistake

It is strongly recommended that you utilize trial aids, such as a trial notebook, where you can write notes to yourself about critically important matters you must do before the end of trial. If your trial is only a half-day or one-day you will have little time to prepare

you offer of proof. If your trial is multiple days, then you will have more time to digest the trial court's ruling and assemble your offer. It is strongly recommended that if you believe that a witness's testimony is likely to not be allowed, that you go ahead and have their deposition testimony or excerpts from it assembled and marked so you can offer it as your offer of proof.

2. How to deal with this type of mistake

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).

If the parties agree on the contents of the bill, the judge must sign the bill and file it with the trial court clerk. TEX. R. APP. P. 33.2(c)(2).

If the parties do not agree on the contents of the bill, the trial judge must, after notice and hearing, do one of the following:

1. If the judge finds the bill correct, sign the fill and file it with the trial court clerk (TEX. R. APP. P. 33.2(c)(2)(A)); or

2. Suggest to the complaining party the corrections that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk (TEX. R. APP. P.33.2(c)(2)(B)); or

3. If the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk a bill that, in the judge's opinion, accurately reflects the proceedings in the trial court. TEX. R. APP. P. 33.2(c)(2)(C).

If the complaining party disagrees with the judge's corrections, that party must file the refused bill and a "bystanders bill," in which at least three bystanders, who are not interested in the outcome of the case, state in affidavits they were present and observed the matter that the bill addresses. TEX. R. APP. P. 33.2(c)(3). Filing the bystanders' affidavits without the bill does not preserve error. *Citizens Law Inst. v. State*, 559 S.W.2d 381, 383 (Tex. App. – Dallas 1977, no writ). Filing the refused bill without the bystanders' affidavits does not preserve error. *Boddy v. Canteau*, 441 S.W.2d 906, 914 (Tex. App. – San Antonio 1969, writ ref'd n.r.e.).

A formal bill of exception must be filed no later than 30 days after the filing party's notice of appeal is filed. TEX. R. APP. P. 33.2(e)(1). The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party files a motion in the appellate court. TEX. R. APP. P. 33.2(e)(3).

It is reversible error for the trial court to refuse to allow a party to make an offer of proof or a bill of exceptions. *State v. Biggers*, 360 S.W.2d 516, 517 (Tex. 1962). If the evidence that the party was attempting to preserve, however, was immaterial to the outcome of the suit, then the court's refusal is not reversible error. Dorn *v. Cartwright*, 392 S.W.2d 181, 186 (Tex. App. – Dallas 1965, writ ref'd n.r.e.).

C. Failing to put on evidence of an essential element of a claim or defense

Prior to the present era of tort reform, back in the 1980s when torts were king, it was not uncommon for a plaintiff's attorney to focus the trial so much on proving damages that the plaintiff sometimes forgot to put on evidence of the other essential elements of his or her claim. Today, with the explosion of equitable and legal claims and defenses that get asserted in family law cases it is easy to sometimes forget to put on proof of an essential element of your client's claim or defense. If this happens, you are likely to discover it for the first time when your opponent moves for a directed verdict or begins objecting that a jury question should not be submitted because there was no evidence of an essential element of your client's claim or defense. This can be a stressful moment in a trial which no one likes to deal with, but with a little knowledge of the rules, and a little preparation, you can learn how to deal with this common problem.

1. How to avoid this type of mistake

The way to avoid this problem is to make a proof sheet for every claim or defense you are relying on at trial. What is a proof sheet? It is simply a piece of paper that lists the legal elements you have to prove with a list of the evidence you want to admit to support the elements and a place to place a check mark when you have admitted the evidence and offered proof of the existence of the essential element.

2. How to deal with this type of mistake

The correct way to deal with this problem is to make a motion to reopen for additional evidence pursuant to 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).

D. Failing to preserve legal sufficiency complaints

A "no evidence" or legal insufficiency point is a question of law which challenges the legal sufficiency of the evidence to support a particular fact finding. In reviewing a fact finding for legal sufficiency, the reviewing court must credit evidence that supports the finding 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).

During trial, the method for preserving a legal sufficiency complaint is either by a motion for directed verdict or by way of objection to the jury charge. *See Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985)(holding that legal sufficiency challenge to a fact finding may be preserved during trial by objection to the charge or motion for directed verdict).

A motion for directed 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).

When an essential element is not supported by legally sufficient evidence, you must object on the record at the formal charge conference to the submission of the jury question and point out in your objection the specific element for which there is legally insufficient evidence. *Tesfa v. Stewart*, 135 S.W.3d 272, 275-76 (Tex.App.—Fort Worth 2004, pet.

denied); *Davis v. Sheerin*, 754 S.W.2d 375, 385 (Tex.App.—Houston [1st Dist.] 1988, writ denied).

1. How to avoid this type of mistake

The way to avoid this mistake is to prepare a proof sheet which has all of the essential elements of the claims and defenses your opponent is advancing. If your opponent fails to submit evidence in support of an essential element, if the evidence submitted to prove an essential element is no more than a scintilla, if the court is barred by rules of law from considering the evidence submitted, or if the evidence you submitted conclusively negates the essential element your opponent is trying to prove, then you should move for a directed verdict or object to the submission of a jury question which includes the element for which there is legally insufficient evidence.

2. How to deal with this type of mistake

There are five recognized ways to preserve a legal sufficiency challenge to a finding of fact: (1) objection to the jury charge; (2) motion for directed verdict; (3) motion for JNOV; (4) motion to disregard; and (5) motion for new trial. *See Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985); *see also, 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 challenge may be preserved in a motion for new trial, but if sustained will result in remand and not rendition).

If you fail to move for a directed verdict and fail to object to jury charge which submits questions on an issue for which there is legally insufficient evidence, then your remaining remedies are to urge your legal sufficiency complaints in: (1) a motion for JNOV; (2) a motion to disregard; and (3) a motion for new trial. But remember, if you make a legal sufficiency complaint for the first time in a motion for new trial, your only remedy is a new trial. *Heibsen*, 754 S.W.2d at 348-49.

V. COMMON MISTAKES MADE IN SUBMITTING CLAIMS AND DEFENSES TO THE JURY

Jury cases can be rare in family law matters. However, when they occur, it is wise to proceed with caution and to either school yourself on the complicated steps necessary to preserve error during the charge conference or hire an appellate specialist.

The jury charge is composed of jury questions and definitions and instructions that are either included with the individual questions or are part of the general instructions and definitions given by the court to the jury.

The trial court has great discretion in submitting questions to the jury. *See Baker Marine Corp. v. Moseley*, 645 S.W.2d 486, 489 (Tex.App.–Corpus Christi 1982, writ ref'd n.r.e.); TEX. R. CIV. P. 277. This discretion is subject to the requirement that the questions submitted must control the disposition of the case, be raised by the pleadings and evidence, and properly submit the disputed issues for the jury's deliberation. A party is entitled to a jury question if the pleadings and evidence raise an issue. TEX. R. CIV. P. 278; *Texas Dept. of Transp. v. Ramming*, 861 S.W.2d 460, 463 (Tex.App.– Houston (14 Dist.) 1993, writ denied). A trial court may refuse to submit a question only if no evidence exists to warrant its submission. TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex.1992). If there is some evidence to support a jury question and the court does not submit it, the court commits reversible error. *Elbaor*, 845 S.W.2d at 243; *Cherokee Water Co. v. Freeman*, 145 S.W.3d 809, 820, n.5 (Tex.App.– Texarkana 2004, pet. denied). A requested question must be substantially correct, otherwise it preserves nothing for review. "Failure to submit a question shall not be deemed a ground for reversal of the judgment unless a substantially correct question has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278. When a trial court refuses to submit a proper question, reversal is not required unless the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 170 (Tex.2002).

A trial court must submit "such instructions and definitions as shall be proper to enable the jury to render a verdict." TEX. R. CIV. P. 277. A party is entitled to a jury instruction or definition if the pleadings and evidence raise an issue. TEX. R. CIV. P. 278. An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. TEX. R. CIV. P. 278; *see also Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex.2000). A requested instruction or definition must be substantially correct, otherwise it preserves nothing for review. "Failure to submit [an instruction] shall not be deemed a ground for reversal of the judgment unless a substantially correct [instruction] has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278; *see also Knoll v. Neblett*, 966 S.W.2d 622, 638 (Tex.App.–Houston [14th Dist.] 1998, pet. denied). To preserve error, the complaining party must tender a written copy of the substantially correct instruction or definition it wants submitted to the jury. Failure to do so risks waiver of this ground for appeal. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987). However, even if the complaining party properly tenders a substantially correct instruction or definition, any error in refusing the instruction or definition will not be automatically reversible. Instead, the trial court's error is reversible only if it "probably caused the rendition of an improper

judgment." TEX.R.APP. P. 44.1; *Union Pacific R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002).

There are three common mistakes made in submitting claims and defenses to the jury: (1) failing to request questions, definitions, and instructions; (2) failing to object to improperly worded questions, definitions, and instructions; and (3) failing to submit questions in broad or granulated form as required by the circumstances.

A. Failing to request questions, definitions, and instructions omitted from the charge

At the formal charge conference, you must tender a question in substantially correct form (i.e., make a written request) when you have the burden of proof and the trial court omits a question you desire to be included in the charge. *See W.O. Bankston Nissan, Inc. v. Walters*, 75 S.W.2d 127, 128 (Tex. 1988). If you tendered a written request before trial it may be okay to merely object and identify your former written request, but the best practice is to ask that the court mark the prior written request as "refused" or tender a new written request. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995); *Munoz v. Berne Group*, 919 S.W.2d 470, 472 (Tex.App.—San Antonio 1996, no writ).

In addition, you must make a written request, no matter who has the burden of proof, when the trial court omits an instruction or definition. *See* Tex. R. Civ. P. 274, 278; *Gerdes v. Kennamer*, 155 S.W.3d 523, 534 (Tex.App.—Corpus Christi 2004, pet. denied).

It is important to note that there two circumstances when you are allowed to either request or object to defects in the charge: (1) when the court's charge omits part of your opponent's cause of action or defense; and (2) when the court's question improperly places the burden of proof. *See State Dept. of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 239 (Tex. 1992)(holding that request preserved error when essential element was omitted from opponent's question); *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 613-14 (Tex. 1992)(holding that objection preserved error when court omitted a proper damage question); *see also*, *Morris v. Holt*, 714 S.W.2d 311, 312-13 (Tex. 1986)(holding that complaint as to improper burden of persuasion was preserved by written request); *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex.App.—Houston [1st Dist.] 1991, writ denied)(holding that complaint as to improper burden of persuasion was preserved by objection).

1. How to avoid this type of mistake

Making proper written request to the court for inclusion in the charge is complicated. You must learn the foregoing rules or hire an appellate specialist to help you preserve error. If your client cannot afford to hire an appellate specialist, the best practice is to create your own charge before trial and submit it to the court regardless of whether the court asks for it. You should also get a copy of your opponent's requested charge. During the informal charge conference you will get an opportunity to explain to the court why your questions, definitions, and instructions should be submitted and why your opponents should not. Once the court publishes its proposed charge you must quickly but carefully review it to located errors which require you to make a written request in order to preserve error.

2. How to deal with this type of mistake

Unfortunately, all errors in the language used in the charge are waived once the charge is read to the jury. *See* Tex. R. Civ. P. 272; *Missouri Pac. R.R. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). However, it should be noted, as discussed in Section IV., D., above, if you failed to make a legal sufficiency challenge to the submission of a jury question, you can still urge that complaint in: (1) a motion for JNOV; (2) a motion to disregard; and (3) a motion for new trial.

B. Failing to object to defective questions, definitions, and instructions

Whenever the court submits an erroneous or defective question, definition, or instruction, you must object regardless of who has the burden of proof. *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 525 (Tex. 2002)(holding that complaint about erroneous definition was preserved by objection); *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994)(holding that complaint about defective instruction was preserved by objection); Johnson v. Johnson, 869 S.W.2d 490 (Tex.App.—Eastland 1993, writ denied)(holding that complaint about defective question preserved by objection).

1. How to avoid this type of mistake

Making proper objections to the court's charge can be complicated because of the confusion surrounding when to object and when to request. You must learn the foregoing rules or hire an appellate specialist to help you preserve error. If your client cannot afford to hire an appellate specialist, the best practice is to create your own charge before trial and submit it to the court regardless of whether the court asks for it. You should also get a copy of your opponent's requested charge. During the informal charge conference you will get an opportunity to explain to the court why your questions, definitions, and instructions should be submitted and why your opponents should not. Once the court publishes its proposed charge you must quickly but carefully review it to located errors which require you to make an objection in order to preserve error. Always object to

any defect or omission, but when in doubt object and make a written request.

2. How to deal with this type of mistake

Unfortunately, all errors in the language used in the charge are waived once the charge is read to the jury. *See* Tex. R. Civ. P. 272; *Missouri Pac. R.R. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). However, it should be noted, as discussed in Section IV., D., above, if you failed to make a legal sufficiency challenge to the submission of a jury question, you can still urge that complaint in: (1) a motion for JNOV; (2) a motion to disregard; and (3) a motion for new trial.

C. Failing to submit questions in broad or granulated form as required by the circumstances.

For decades the rule in Texas was that issues had to be submitted "distinctly and separately" to the jury. *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). Texas began to move away from granulated jury issues, and toward broad form submission, with the 1973 amendment to Texas Rule of Civil Procedure 277. Under the amended rule, the trial court was given discretion to decide whether to submit jury issues in granulated or broad form. *Mobil Chem Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974). Over the next decade, the court repeatedly expressed its preference for broad form submission. *Brown v. American Trans. & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980)*; Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1984); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). In 1988, Texas made broad form submission the preferred method of jury charge submission when it amended Rule 277 to read that broad form questions "shall" be submitted "whenever feasible." TEX. R. CIV. P. 277.

Under broad form practice, jury questions can submit multiple legal and factual theories of liability under one question to which a jury has to answer "yes" or "no." A "yes" answer to a broad form question is often problematic when the question contains multiple legal and factual grounds some of which are supported by evidence and others which are not. For example, a jury question asking whether a person's parental rights should be terminated could include a number of the grounds for termination and then ask the jury to give one "yes" or "no" answer for the entire list of grounds for termination. Obviously, if one of the grounds is not supported by any evidence, then it becomes doubtful whether there is a proper verdict since it is ambiguous with regard to whether ten jurors have agreed upon a single proper ground for termination.

In *Texas Dep't of Human Services v. E.B.*, the Supreme Court was faced with this problem, but the court refused to grapple with the issue, concluding that it did not matter whether ten jurors agreed on the specific grounds for termination so long as they answered the broader question of termination in the affirmative. This was the high-water mark for broad form submission in Texas. The penchant for simple-to-read jury questions had led some practitioners to the dubious conclusion that the reasons behind a "yes" answer to a broad form question did not matter as much as the "yes" answer itself. The form of the jury's answer had literally triumphed over its substance.

Two years later, the Texas Supreme Court handed down two decisions which conceded that broad form submission was not a cure-all for solving all the problems related to trying a legally and factually complex case to a bunch of lay people. *H.E. Butt Grocery Co.*, 845 S.W.2d 258 (Tex. 1992); *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448 (Tex. 1992). In both cases, the court relented from its broad form preference and held that an otherwise correct separate and distinct submission would not be reversed for failure to follow broad form. In a footnote, the court opined that separate and distinct submission was appropriate when the law is unsettled as to one or more theories of recovery. *Westgate*, 843 S.W.2d at 455, n. 6.

In 2000, the Supreme Court began the first of several retreats from broad form practice. In *Crown Life Ins. Co. v. Casteel*, the court held that it was harmful error to submit a single broad form liability question which erroneously commingles valid and invalid liability theories when it cannot be determined whether the improperly submitted liability theories formed the sole basis for the jury's "yes" answer. *Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). Two years later, the court extended its holding in *Casteel* to damage questions which incorporate multiple elements of damage some of which are valid and others which are invalid. *Harris County v. Smith*, 96 S.W.3d 230, 236-36 (Tex. 2002). If an objection is made to the broad form submission of such a question, and an element of damage is shown to be erroneous on appeal, then the appellate court must reverse if the court is unsure whether the jury's damage award was based on the improperly submitted invalid element of damage. Three years after its decision in *Smith*, the court extended its holding in *Casteel* to questions used to apportion liability in tort cases. In *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212, 215 (Tex. 2005), the trial court submitted two separate theories of liability to the jury both of which flowed into a single apportionment question and a single damage question. The Supreme Court concluded that there was no evidence supporting one of the two theories of liability. The court then reversed the case for a new trial since it was unsure whether the apportionment and damage findings were based on the invalid theory of liability.

1. How to avoid this type of mistake

Here is the general principle you should follow when deciding to submit a jury question in broad or granulated form, or when you are deciding to object to an erroneous broad form submission: if there is doubt about the governing law or the legal sufficiency of the evidence to support submission of an essential element of a claim or defense to the jury, then you should ask the court to either eliminate the doubtful element or submit it in a separate question. *Casteel*, 22 S.W.3d at 390; *Smith*, 96 S.W.3d at 235-36; *Romero*, 166 S.W.3d at 215.

2. How to deal with this type of mistake

All errors in the language used in the charge are waived once the charge is read to the jury. *See* Tex. R. Civ. P. 272; *Missouri Pac. R.R. v. Cross*, 501 S.W.2d 868, 873 (Tex. 1973). This applies to complaints about broad form submission. *In re A.V.*, 113 S.W.3d 355, 362 (Tex. 2003)(holding that complaint about broad form submission waived in termination of parental rights case when not made before the charge was read to the jury). As a result, there is no way to cure this mistake if made.

VI. COMMON MISTAKES MADE IN SUBMITTING CLAIMS AND DEFENSES TO THE COURT

This paper ends its substantive component with a discussion of some common but major errors in submitting claims and defenses to the court in a bench trial. These errors are the things judges complain about the most: (1) failing to inform the court about what legal and factual questions need to be decided; (2) failing to tell the court why your client wins; and (3) failing to tell the court what your client wants the court to do.

A. Failing to inform the Court about what legal and factual questions need to be decided

Today, the docket of most trial courts' are clogged. Whether the court is in an urban area where the courts are dedicated to nothing but family law, or the court is in a less urban setting where the court has general jurisdiction, the courts are hard pressed to devote a lot of time to deciding your client's case. If your case has gone through a lot of pre-trial motions, hearings, and agreements, it may be difficult to tell from the record what issues still remain contested by the time of trial. It is incumbent upon you as the advocate to clearly explain to the court what rulings need to be made. For example, if your client's legal position requires the court to interpret a written agreement a certain way, then you must ask the court to interpret the agreement before it decides, based on the facts heard at trial, whether a breach of the agreement has occurred.

1. How to avoid this type of mistake

The best way to avoid this mistake is to sit down with all of the live pleadings before trial and identify what claims and defenses are still in dispute, and what legal and factual issues those claims and defense require the court to decide. During this process you should ask yourself: "Am I asking the court to decide a question of fact, a question of law, or a mixed question of fact and law". If you are asking the court to decide a question of law, and an answer to that question could dispose of the case, then you should bring this question to the court's attention immediately and in a manner where it easy for the court to understand the question and its impact on the trial.

2. How to deal with this type of mistake

If the court renders a decision which shows that it clearly did not decide issues of fact or law which need to be decided, then your remedy is to file a motion for judgment or a motion for reconsideration asking the court to rule on the issues that were not addressed. If you do not realize the error until after a judgment is entered, then you must bring you complaints by way of a motion to modify, correct, or reform, or a motion for new trial.

B. Failing to inform the Court about why you win

Opening argument is your opportunity to explain what the case is about. Closing argument is your opportunity to explain why you win. Closing argument should focus on the specific evidence admitted which supports the essential elements of the claim or defense you are relying upon.

Today, most family courts have turned to imposing time limits on trials in order to conserve judicial resources. If this happens to your case, you either have to boil your argument down to its essentials so you can make an oral argument, or you must forego oral argument in favor of a written argument.

1. How to avoid this type of mistake

Preparation is the key. Spend the necessary time to know and understand your case, and to be able to put into as few words as possible why you win. If you tend to wander off subject in oral argument, write your argument out and rehearse it until you can stay on subject. If all else fails, read it or just submit it as a written argument.

2. How to deal with this type of mistake

If the court renders a decision which shows that it clearly did not understand your position for why you win, then your remedy is to file a motion for judgment or a motion for reconsideration asking the court to rule on the issues that were not addressed. If you do not realize the error until after a judgment is entered, then

you must bring you complaints by way of a motion to modify, correct, or reform, or a motion for new trial.

C. Failing to inform the court what relief your client wants

There is nothing more annoying to a court than to sit through a trial listening to long-winded argument and evidence about very complicated or esoteric issues while wondering what do the parties want me to do about this?

1. How to avoid this type of mistake

Force yourself to draft a demonstrative exhibit entitled "Relief Requested" where you set forth what your client wants the court to do and what form of relief you want such as order directing delivery of property, a money judgment, an injunction, an order of contempt, a writ of habeas corpus for the return of a child, etc.

2. How to deal with this type of mistake

If the court renders a decision which shows that it clearly did not understand the relief your client wanted from the court, then your remedy is to file a motion for judgment or a motion for reconsideration asking the court to rule on the issues that were not addressed. If you do not realize the error until after a judgment is entered, then you must bring you complaints by way of a motion to modify, correct, or reform, or a motion for new trial.

VII. CONCLUSION

Mistakes are inevitable. However, the point of being a professional, and the point of this paper, is to know ahead of time the ways to correct mistakes when they occur. In addition, the point of this paper is to stress the types of mistakes for which there are no remedies once they are made in the hope of burning into our collective memory the types of mistakes for which there are no remedies For example, it is much easier to cure errors in the form of pleadings or errors made in excluding or failing to submit evidence during trial, than it is to cure errors made in failing to object to the admission of evidence or failing to object to erroneous or defective worded questions, instructions, or definitions before the charge is read to the jury. By comparing and contrasting the types of mistakes that can be cured with those that cannot, we learn which phases of a case require the most caution in order to avoid serious problems down the road.

It is sincerely hoped by the authors that this paper will help you avoid mistakes or deal with them once they are made.

A final observation is this. You can be a very successful advocate by being respectful and courteous to both the Court and your opposing counsel. Experience will teach that it is not always effective to object to a question because it can technically be made. Nor is it always appropriate to gouge your opponent with rules when the opportunity presents itself. Some objections and some failure to follow the letter of the rules will have no bearing on the outcome of the case. The result in pointing out defects which are not harmful is that your opposing counsel will be embarrassed in front of his client and the court will be perturbed by your insistence on a technical issue which takes the court's time. It also has the effect of unnecessarily embittering parties to attorneys and to our system of jurisprudence because they believe they were not heard or the justice was not served because of a technicality.

You effectiveness in the long run and over an entire career may be better served by forgoing some of the nuances of the rules when they will not affect the outcome of the case. If that is your practice and reputation you will find it far easier to get the discretionary rulings and the forbearance from the court when you find yourself in a potentially precarious position.