PRESERVATION OF ERROR POST-TRIAL: HOW TO AVOID THAT SINKING FEELING

STEVEN K. HAYES
Law Office of Steven K. Hayes
Fort Worth, Texas 76102

Updated at various times by

DABNEY BASSEL
Law Office of Dabney Bassel
Fort Worth, Texas 76102

CONNIE K. HALL
Law Office of Constance K. Hall
Arlington, Texas 76011

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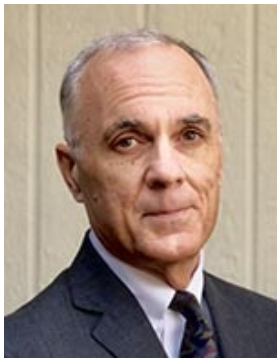

STEVEN K. HAYES

LAW OFFICE OF STEVEN K. HAYES
500 Main Street, Suite 340
Fort Worth, Texas 76102
Direct Phone: 817/371-8759 Facsimile: 817/394-4436
www.stevehayeslaw.com
E-mail: shayes@stevehayeslaw.com

Education:
- Harvard Law School, J.D. in 1980
- Austin College, B.A. in 1977, *summa cum laude*

Public Service:
- Briefing Attorney assigned to the Honorable Charles Barrow, Supreme Court of Texas, 1980-1981
- Assistant County Attorney, Bell County, Texas, 1984-1985

Practice:
- Civil Appeals

Admitted:
- State Bar of Texas
- Supreme Court of the United States
- Fifth Circuit Court of Appeals
- United States District Courts (all Districts in Texas)

Member:
- American Law Institute (2005-present)
- Bell-Lampasas-Mills Counties Bar Association (1984-1992; former Director) and Young Lawyers Association (former President, Director)
- Eldon B. Mahon Inn of Court (Emeritus, 2010-present; President 2009-2010; Executive Committee, 2010-2013)
    - Serjeant's Inn of Court of North Texas (2012-present)
- State Bar of Texas
    - Appellate Law Section (Chair, 2016-2017; Council, 2008-2011; Course Director, Advanced Civil Appellate Law Seminar, 2012).
    - Litigation Section Council (2011-2017); Co-Chair, Online CLE Committee (2013-2016) and News for the Bar (2011-2013)
    - Life Fellow, Texas Bar Foundation
- Tarrant County Bar Association (1993-present; Director, 2005-2008, 2013-2015)
    - Appellate Law Section (Chair, 2007-2008)
    - Mentor of the Year, 2009-2010, Fort Worth-Tarrant County Young Lawyers' Association.
- Texas Association of Defense Counsel

Publications: www.stevehayeslaw.com/resume

This paper is updated from a paper presented to the STATE BAR OF TEXAS APPELLATE LAW 101 conducted in September 2012. The author has relied heavily on, has tried to credit in the body of this paper, and wishes to express his appreciation to, the authors of several other papers on this subject, to wit: Jeffrey L. Oldham *Preservation of Error Post-Trial*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE NUTS AND BOLTS SEMINAR (2009)), updated and presented from the paper by JoAnn Storey, Alan Daughtry, updated by Allison Ho, *Preservation of Error Post-Trial: Practice and Strategies*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2007); Nissa M. Sanders, *Preservation - Post-Trial*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2004); Justice Ann Crawford McClure, Chris Nickelson, *Preservation of Error: Building a Soap Box on Which You Can Stand,*.TARRANT COUNTY BAR ASSOCIATION BROWN BAG SERIES APPELLATE SEMINAR (February 2008); David Keltner, Paula Perkins, *Findings of Fact & Conclusions of Law: Do They Really Matter?*, UNIVERSITY OF TEXAS SCHOOL OF LAW CONFERENCE ON STATE AND FEDERAL APPEALS (2008) (updated by David Keltner for the STATE BAR OF TEXAS 39th ADVANCED CIVIL TRIAL COURSE (2016); Scott P. Stolley and Alex H. Bailey, *Mandamus Update*, 21st UNIVERSITY OF TEXAS SCHOOL OF LAW CONFERENCE ON STATE AND FEDERAL APPEALS (2011),

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Post Trial Preservation of Error.

1. Introduction and Recognition

In order to effectively use the post-trial tools available to preserve error, preparation and planning ahead–when you are given the time to do so– are key to the process. This paper discusses the means to preserve error after the trial, loosely defined as the end of the evidence. It borrows heavily from, and makes reference to, prior papers on this subject, to wit: JoAnn Storey, Alan Daughtry, updated by Allison Ho, *Preservation of Error Post-Trial: Practice and Strategies*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2007), and subsequently updated by Jeffrey Oldham and presented by him to the STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE NUTS AND BOLTS SEMINAR (2009); Nissa M. Sanders, *Preservation - Post-Trial*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2004); Justice Ann Crawford McClure, Chris Nickelson, *Preservation of Error: Building a Soap Box on Which You Can Stand,*.TARRANT COUNTY BAR ASSOCIATION BROWN BAG SERIES APPELLATE SEMINAR (February 2008); David Keltner, Paula Perkins, *Findings of Fact & Conclusions of Law: Do They Really Matter?*, UNIVERSITY OF TEXAS SCHOOL OF LAW CONFERENCE ON STATE AND FEDERAL APPEALS (2008). At the time of presenting this paper, I hope you can find all of them on the website of the Appellate Section of the State Bar of Texas, located at www.tex-app.org. Go to the "CLE Articles" page on the site, and search by author name or go to the Post-Trial category. You may find a copy of this paper on my website at www.stevehayeslaw.com (Go to the "Resume" page, scroll down to "Legal Publications and Speeches", and click on the title to this paper.).

As of the writing of this paper, the Supreme Court Advisory Committee has actively worked on and discussed potential changes to the Rules governing most of the error preservation tools discussed in this paper, or at least those Rules governing Findings of Fact and Conclusions of Law, and motions regarding judgments (TEX. R. CIV. PRO. 296-308). At present, the Committee has drafted and discussed revisions to those rules but, as the Committee Chair has said, the drafts and revisions have not reached the stage where they are "chum in the water yet." http://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2009/transcripts/sc02202009.pdf, p. 245. Just remain aware these discussions are proceeding.

2. Preservation of Legal and Factual Sufficiency Objections–When and How.

Before launching into the rest of the paper, I thought it might provide some help to present in tabular form the tools available to preserve error concerning legal and factual sufficiency post-trial. That table appears at the end of this paper. But now, on to error preservation in general.

3. The Evidence "Ends."

The evidence "ends" at several points during a trial, at least in the since that it might allow you to take a step which would arguably allow you to preserve error. Depending on the type of trial, you may need to preserve certain error through certain means at various times. In semi-chronological order, here are tools you would want to consider using at each "end" of the evidence.

A. Your Opponent Rests, and You Would Like for the Rodeo to End.

In other words, you would like for the Judge to end it now but, if you're unsuccessful, you still have some more evidence to put on.

I. Jury Trial

a. The Motion for Directed Verdict/Instructed Verdict–When There Is No Point in Hearing Any More Evidence.

TEX. R. CIV. P. 268 states that "a motion for directed verdict shall state the specific grounds therefor." I spelled the last word in the sentence exactly like it reads in the Rules. I also quoted the Rule verbatim, in all its glory. Seemingly not much there.

But the tool, in the appropriate situation, possesses immense power. Used unwisely, it may only alert your opponent to a deficiency she or he can fix. Ordinarily, a directed verdict should not be granted against a party before the party has had a full opportunity to present its case and has rested. *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 82 (Tex. 2003), *citing Wedgeworth v. Kirskey*, 985 S.W.2d 115, 116 (Tex. App. – San Antonio 1998, pet. den.), *Nassar v. Hughes*, 882 S.W.2d 36, 38 (Tex. App. – Houston [1st Dist] 1994, writ denied) and *Buckner v. Buckner*, 815 S.W.2d 877, 878 (Tex. App. – Tyler 1991, no writ). However, a trial court does not err in directing a verdict, even before the plaintiffs' first witness finishes testifying, if the plaintiffs "affirmatively limited their claim to damages they could not recover as a matter of law." *McCall*, 104 S.W.3d at 82, *citing Buckner*, 815 S.W.2d at 878.

But be aware that moving for directed verdict on the

lack of pleadings potentially gives your opponent the opportunity to fix its deficiency. "Unless the petition affirmatively demonstrates that no cause of action exists or that plaintiff's recovery is barred, we require the trial court to give the plaintiff an opportunity to amend before granting a motion to dismiss or a motion for summary judgment." *McCall*, 104 S.W.3d at 82, *citing Peek v. Equipment Serv. Co.*, 779 S.W.2d 802, 805 (Tex. 1989).

A trial court properly grants a motion for directed verdict in the following circumstances: (1) a defect in the opponent's pleadings makes the pleadings insufficient to support a judgment, (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law, or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact. *Apache Corp. v. Dynegy Midstream Servs.*, 214 S.W.3d 554, 559 (Tex. App. – Houston [14th Dist.] 2006), *aff'd in part, rev'd in part on other grounds, remanded by* 294 S.W.3d 164; *citing Sherman v. Elkowitz*, 130 S.W.3d 316, 319 (Tex. App. – Houston [14th Dist.] 2004, no pet.). The test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Dynegy*, 214 S.W.3d at 558, *citing City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Under the properly applied scope of review, appellate courts must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not disregard such evidence. *Dynegy*, 214 S.W.3d at 558-9, *citing City of Keller*, 168 S.W.3d at 807.

Texas law is well settled that a defendant who moves for a directed verdict after the plaintiff rests, but thereafter elects not to stand on its motion for instructed verdict, and proceeds with her own case, waives her motion for directed verdict unless the motion is reurged at the close of her case. *Ratsavong v. Menevilay*, 176 S.W.3d 661, 667 (Tex. App. – El Paso 2005, pet. den., cert. den. 127 S. Ct. 253, 166 L. Ed. 2d 149, 2006 U.S. LEXIS 7207, 75 U.S.L.W. 3170 (U.S. 2006)), *citing Horton v. Horton*, 965 S.W.2d 78, 86 (Tex. App.– Fort Worth 1998, no pet.) (citing *Jacobini v. Hall*, 719 S.W.2d 396, 398 (Tex. App.– Fort Worth 1986, writ ref'd n.r.e.); *Wenk v. City Nat'l Bank*, 613 S.W.2d 345, 348 (Tex. Civ. App.– Tyler 1981, no [**12] writ)); *1986 Dodge v. State*, 129 S.W.3d 180, 183 (Tex. App. – Texarkana 2004, no pet.) (citing *Cliffs Drilling Co. v. Burrows*, 930 S.W.2d 709, 712 (Tex. App. – Houston [1st Dist.] 1996, no writ); *McMeens v. Pease*, 878 S.W.2d 185, 190 (Tex. App. – Corpus Christi 1994, writ denied)).

Keep in mind that the unsuccessful Motion for Directed Verdict, just like the unsuccessful Motion for Judgment NOV or Motion to Disregard Jury Findings, will not preserve a factual sufficiency complaint; only a Motion for New Trial will preserve a factual sufficiency complaint. TEX. R. CIV. P. 324(b)(2), (3). The Motion for Directed Verdict, if appropriately reasserted as mentioned above, will preserve an argument that the evidence is legally insufficient to support a jury verdict. TEX. R. CIV. P. 301, 324; *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992) *citing Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985). But so will an appropriately and timely asserted Motion for Judgment NOV, an objection to submitting an issue to a jury, a Motion to Disregard Jury Findings, and a Motion for New Trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). *See* . TEX. R. CIV. P. 301, 324. Several courts of appeals has held that an appropriately worded motion to modify, correct, or reform judgment will preserve a no-evidence complaint.. *Suntrust Bank v. Monroe*, No. 02-16-00388-CV, 2018 WL 651198, 2018 Tex. App. LEXIS 942, at *20 (App.—Fort Worth Feb. 1, 2018, no pet.); *Truong-Tu v. Nguyen*, No. 14-02-00461-CV, 2004 WL 162941, 2004 Tex. App. LEXIS 798, at *5 (App.—Houston [14th Dist.] Jan. 29, 2004, pet. denied); *Galveston v. Rice*, NO. 01-88-00594-CV, 1989 WL 28349, 1989 Tex. App. LEXIS 709, at *4 (App.—Houston [1st Dist.] Mar. 30, 1989, no pet.). So if your only reason for making a Motion for Directed Verdict is to preserve a legal sufficiency argument, you want to carefully consider whether you want to file a Motion for Directed Verdict asserting a lack of evidence, especially if you think that will prompt your opponent to move to reopen the evidence.

1. Motion to Reopen

Having filed your Motion, be ready to defend against the Motion to Reopen. And if you find yourself the target of a Motion for Directed Verdict, keep that Motion to Reopen in mind as a tool to avoid Directed Verdict.

A trial court may permit a party to offer other additional evidence in the face of a motion for judgment when it "clearly appears to be necessary to the due administration of justice." TEX. R. CIV. P. 270. In determining whether to grant a motion to reopen, the trial court should consider whether (1) the moving party showed due diligence in obtaining the evidence; (2) the proffered evidence is decisive; (3) reception of such evidence will not cause undue delay; and (4) granting the motion will cause an injustice. *Mora v. Hemco Indus.* 2005 WL 568067, 2005 Tex. App. LEXIS 1908, *16-7

(Tex. App. – Houston [1st Dist.] March 10, 2005).

The trial judge should liberally exercise its discretion to permit both sides to fully develop their cases. *Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 517 (Tex. App. – Fort Worth 1988, writ denied), *citing Turner v. Lone Star Industries, Inc.*, 733 S.W.2d 242, 245 (Tex.App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.). Absent an abuse of discretion, the court of appeals will not disturb the trial court's denial of a motion to reopen. *Mora*, 2005 Tex. App. LEXIS 1908, *7. A trial court abuses its discretion in denying a motion to reopen testimony if the denial seems to "blindside" the movant, especially when the motion was directed to an issue which had been raised for some time in the plaintiff's petition. *Pratt v. Trinity Projects, Inc.*, 26 S.W.3d 767, 768-9 (Tex. App.– Beaumont 2000, pet. den.). A trial court does not abuse its discretion in refusing to reopen evidence after evidence has closed if: 1) the evidence to be introduced was not decisive; and 2) if the party seeking to reopen does not show it was diligent in presenting its evidence. *Lopez v. Lopez*, 55 S.W.3d 194, 201 (Tex. App. – Corpus Christi 2001, no pet.).

Some authority suggests a need to object to the offer of testimony after the granting of the Motion to Reopen to preserve error on appeal. *MCI Telecommunications Corp. v. Tarrant County Appraisal Dist.*, 723 S.W.2d 350, 353 (Tex. App.–Fort Worth 1987, no writ). Conversely, if Court grants the motion to reopen, but limits the reopening, a failure to object to the Court's limitation in doing the same may waive any right to complain on appeal about the limited reopening. *Dallas County Hospital Dist. v. Perrin*, 694 S.W.2d 257, 260 (Tex. Civ. App.–Dallas 1985, writ ref'd., n.r.e.). As in any situation where the trial court excludes evidence, the complaining party must make an offer of proof of the excluded evidence so that the appellate court can discern whether the exclusion was harmful error. *Sink v. Sink*, 05-10-00144-CV, 2012 WL 840340 (Tex. App.–Dallas Mar. 14, 2012, n.p.h.) (citing Tex. R. Evid 103(a) that "Error may not be predicated upon a ruling which ... excludes evidence unless a substantial right of the party is affected, and ... the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.").

II. Trial to the Court

a. In a Nonjury Case, the Pertinent Rule (TEX. R. APP. P. 33.1(d)) Expressly Allows You to First Raise Legal and Factual Insufficiency On Appeal.

In their paper, McClure and Nickelson point out that, pursuant to an amendment effective January 1, 2003, TEX.R.APP.P. 33.1(d) now expressly states that in a nonjury case, a complaint regarding legal or factual insufficiency of the evidence may be made for the first time on appeal. This amendment expressly reinstates the former TEX.R.APP.P. 52(d). TEX.R.APP.P. 33.1, Notes and Comments. McClure and Nickelson also give an interesting history of the "now you see it, now you don't" nature of this directive in the Rules. They trace its presence from the former TEX.R.APP.P. 52(d) in a 1990 amendment, to its elimination by virtue of changes to the Rules in 1997 which added TEX.R.APP.P. 33.1 and declared TEX.R.APP.P. 52(d) as unnecessary by virtue of TEX.R.CIV.P. 324(a) and (b). They note that eventually the El Paso Court recommended, in *Wyler Industrial Works, Inc. v. Garcia*, 999 S.W.2d 494, 506 n. 8 (Tex. App.– El Paso 1999, no pet.), that the Supreme Court make it expressly clear that the insufficiency points can be made for the first time on appeal in a non jury trial. *See* McClure and Nickelson, page 27-8.

The Supreme Court has now expressly dealt with TEX. R. APP. P. 33.1(d), holding that it means what it says. *Office of the Attorney General v. Burton*, 369 S.W.3d 173, 175 (Tex. 2012) (held, a complaint that no evidence supported a trial court's finding of a child support arrearage of zero can be raised for the first time on appeal, even in the context of an abuse of discretion standard of review). It seems pretty clear that you can feel comfortable that, in a non-jury trial, you can raise your legal and factual sufficiency points for the first time on appeal.

So in drafting your various post-evidence, post-trial motions for the trial court, you engage in a balancing act: you have to bring the trial court's attention to your sufficiency point at some point in time, but not so prematurely that your opponent can cure the same, *if* the trial court will allow them to reopen the evidence to do so.

Which brings us to ask–what motion do you file in a nonjury trial when your opponent rests?

b. Motion for Judgment

You will not find this motion *expressly* mentioned in the rules–common law whelped and continues to nurture this creature. TEX. R. CIV. P. 305 implies the possibility of such a motion, without ever mentioning the word "motion", when it recognizes that "any party may prepare and submit a proposed judgment to the court for signature", while requiring that party to "serve the proposed judgment on all other parties to the suit." As Sanders points out, when your opponent rests in a nonjury trial, you do not file a motion for directed verdict; you file a motion for judgment. Sanders, II.D,

citing *Grounds v. Tolar I.S.D.*, 856 S.W.2d 417, 422 (Tex. 1993)(Gonzalez, J., concurring) and *Quantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988).

If you file a motion for judgment before everyone rests, make sure the trial court understands that if it grants your motion, a court of appeals will not review its grant in the same manner as the granting of a motion for directed verdict. Instead, the court of appeals will "allow the trial judge, sitting as trier of fact and law, to rule on both the factual and legal issues at the close of the plaintiff's case and to make factual findings at that time if requested by a party." *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988). For some time prior to *Quantel*, the appellate courts treated the granting of a motion for judgment at the close of the plaintiff's case in a bench trial as equivalent to the granting of a motion for directed verdict in a jury trial. *See Lorino v. Crawford Packing Co.*, 169 S.W.2d 235 (Tex. Civ. App. – Galveston), aff'd, 142 Tex. 51, 175 S.W.2d 410 (1943), and cases cited in *Qantel*, 761 S.W.2d at 303-4. This meant that, on appeal from the granting of a motion for judgment at the end of the plaintiff's case, the appellate court had to consider the evidence in the light most favorable to the plaintiff; it also had to reverse the judgment if any evidence of probative force raised a fact issue on any material question presented. *See* cases cited in *Quantel*, 761 S.W.2d at 303-4. In the face of mounting criticism of these rules by the courts of appeals, *Quantel* changed all that. *Quantel* noted that a resting plaintiff "indicates that he does not desire to put on further evidence, except by rebuttal testimony, and that he has fully developed his case." *Quantel*, 761 S.W.2d at 304. *Quantel* recognized that "no useful result obtains by having the court hear the defendant's evidence when the judge, as trier of fact, is unpersuaded by the plaintiff's case." So *Quantel* adopted the rule mentioned above. *Quantel* rejected the court of appeals' reversal of the trial court's judgment because some evidence existed on a question of material fact; *Quantel* held that the trial court is presumed to have ruled on the sufficiency of the evidence. *Quantel*, 761 S.W.2d at 304.

A combination of factors should cause you to carefully evaluate whether you really want to file a motion for judgment at the close of your opponent's evidence. First of all, TEX. R. CIV. P. 270 authorizes the trial court to permit a party to offer other additional evidence in the face of an objection at any time, including in the face of a motion for judgment, when it "clearly appears to be necessary to the due administration of justice." Additionally, in a trial to the court, TEX. R. APP. P. 33.1(d) relieves you from raising sufficiency points before appeal; then there is the license given a trial court to "rule on both the factual and legal issues at the close of the plaintiff's case." *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988). So you need to give serious consideration to whether you want to file a motion for judgment at the end of your opponent's evidence. You have to temper this consideration with any ability your opponent might have to reopen the evidence– you do not want to play "Gotcha", only to realize you have alerted your opponent to a problem the trial court will now allow them to fix.

1. Motion to Reopen

We have already addressed the motion to reopen earlier, in conjunction with the use of the motion for directed verdict, and will not repeat that discussion here.

B. Everybody Rests

I. Jury Trial

a. Before the Verdict

1. The Motion for Directed Verdict/Instructed Verdict.

We have covered this topic earlier, and will not repeat that discussion again. *See* Section 3.A.i.a., *supra*. This heading merely serves as a reminder in your checklist–because, after all, a complaint that the trial court erred in denying a previously unsuccessful motion for directed verdict is waived unless the motion is reurged at the appropriate time. *Ratsavong v. Menevilay*, 176 S.W.3d 661, 667 (Tex. App. – El Paso 2005, pet. den., cert. den. 127 S. Ct. 253, 166 L. Ed. 2d 149, 2006 U.S. LEXIS 7207, 75 U.S.L.W. 3170 (U.S. 2006)).

2. Objecting to the Submission of a Question/Instruction to the Jury

As mentioned above, an appropriately timed and worded objection to the submission of a question or instruction to the jury will preserve an argument that the evidence is legally insufficient to support a jury verdict *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). *See* . TEX. R. CIV. P. 301, 324. Because other speakers and papers deal more directly with this topic, we will not address it in greater detail here.

Rule 272 allows objections to be made "before the charge is made to the jury." But if the trial court says

something like "tomorrow when we come in, I'm not going to mess with this [charge] any further," you may be shut out of making further objections to the charge before the case goes to the jury the next morning. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 842 (Tex. 2014).

b. While the Jury, and the Verdict, Remain in Limbo

Realizing the following tool exists, you should "war game" the potential verdict to try to decide what kind of combination of answers might give you either incomplete, non-responsive, or conflicting answers to the jury questions. In fact, you should probably think about that in the charge conference, and forewarn the trial court about that possibility, like the lawyers did in *Estate of Puckett v. Arvizu*, 364 S.W.3d 309, 313 (Tex. App.–Beaumont 2010) *rev'd and rendered*, 364 S.W.3d 273 (2012). Because if you intend to pull the trigger on this one, you have to do so, as they say in my childhood hometown, quick like a bunny before the jury gets discharged.

1. Correction of Verdict–TEX. R. CIV. P. 295 (*Before* the Court Excuses the Jury) "INCA" and "I PAIR".

A. Best Practice: Your trial notebook should contain a pro forma motion to correct the verdict.

In a minute, we will talk about whether you must raise a request to correct the verdict before the trial court discharges the jury, at least for the three forms of defective verdicts which Rule 295 lists specifically. But it cannot be denied that the safest practice would be to assert an objection to a defective verdict before the trial court discharges the verdict, to avoid the potential error preservation fight which could and probably will ensue if you fail to do so. So you should draft and insert in your trial notebook a pro forma motion correct the verdict.

TEX. R. CIV. P. 295 allows the trial court to direct the reformation of the "purported verdict" if it is "defective". The only "defective" verdicts listed by TEX. R. CIV. P. 295 are those which are:

- "I"– *incomplete*;
- "N"– *not responsive* to the questions in the court's charge; or
- "CA"– verdicts with *conflicting answers.*

If one of these defects exists, then "in open court" the trial court will:

- "I"– *instruct* the jury in writing "of the nature of the incompleteness, unresponsiveness, or conflict";
- "P"– *provide* the jury
- "AI"– such *additional instructions* as may be proper; and
- "R"– *retire* the jury for further deliberations.

The Supreme Court gave some guidance about when jury answers fatally conflict in *Arvizu v. Estate of Puckett*, 364 S.W.3d 273, 276 (2012), which it reaffirmed in *USAA Lloyd's Co. v. Menchaca*, 545 S.W.3d 479, 503, 510, n. 30 (2018) (from *Arvizu*: "To determine whether a conflict is fatal, ' the court must consider each of the answers claimed to be in conflict, disregarding the alleged conflicting answer but taking into consideration all of the rest of the verdict, and if, so considered, one of the answers would require a judgment in favor of the plaintiff and the other would require a judgment in favor of the defendant, then the answers are fatally in conflict.'").

B. Best Practice Number 2: If you even think the jury verdict is defective, ask the judge for additional time to study it and make your objection before the trial court dismisses the jury.

Read the multipage analysis in *Menchaca* that seven Justices on the Texas Supreme Court used to determine whether jury answers conflicted, and whether that conflict was fatal. *Menchaca*, at 503-510. If you can do that analysis in your head in the one or two minutes between when the jury returns its verdict and the trial court usually dismisses them, then you are wasting your time reading an article this mundane written by someone who cannot hold a candle to your mental horsepower. Seriously.

Whether you want to play a game of chicken with the other side(s) based on how good you feel about what the jury will do, and how strongly you feel about whether you have a pre-jury dismissal deadline to make this complaint, is up to you. But it would be a good idea to think about whether to convince the judge to give everyone some extra time to evaluate whether the jury has returned a defective verdict before dismissing the jury.

C. The Supreme Court cannot agree on whether the deadline for objecting to a defective verdict is before dismissal of the jury.

As recently as three years ago, this paper said that if you intend to appeal on the defectiveness of the verdict based on any of the three specific "INCA" grounds, you had to ask the trial court to direct the reformation of the verdict before the jury is excused; otherwise, you waive that argument. *Roling v. Alamo Group (USA), Inc.*, 840 S.W.2d 107, 110 (Tex. App.– Eastland 1992, no writ) (argument that answers conflicted *held* waived); *Continental Casualty Co. v. Street*, 379 S.W.2d 648, 650-1 (Tex. 1964) (argument that answers were

incomplete *held* waived). As of the Supreme Court's 2018 decision in *Menchaca*, whether that deadline remains is at best unclear–but you cannot say that a majority of the Court has undone the pre-existing rule.

Three Justices in *Menchaca* held that "we have long held that a judgment will not be reversed 'unless the party who would benefit from answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury redeliberate on the issues or that the trial court grant a mistrial.," and applied that same rule to conflicting answers. *Menchaca*, at 519. Having said that, this Three Justice opinion held that, because "of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case," a "remand is necessary here in the interest of justice," even though error was not preserved and the fatal conflict in the jury answers was not fundamental error which avoided the need to preserve error. *Menchaca*, at 521.

But four Justices said that, while "[g]enerally, a party should object to conflicting answers before the trial court dismisses the jury, " the "absence of such an objection, however, should not prohibit us from reaching the issue of irreconcilable conflicts in jury findings." *Menchaca*, 526 (Green, J., dissenting, joined by Chief Justice Hecht, Justices Guzman and Brown). In so stating, the dissent noted that Rule 295 only says that if a purported verdict "is defective, the court *may* direct it to be reformed," and then gave three instances (the INCA grounds) where, "if the trial court chooses to do so, additional jury instructions must be given in writing." *Id.*, at 527 (emphasis in dissent). The Dissent said that holding that "the Rule 295 verdict-reformation process is the *only* remedy for conflicting jury answers . . . misconstrues Rule 295, misapplies our precedent, and ignores trial realities, as this case demonstrates." *Id.*, at 527. In discussing various cases in which post-judgment motions challenged allegedly conflicting jury answers, the Four Justice Dissent said that they "do not believe our preservation requirements prevent us from rulng in USAA's favor or even from considering the issue of conflicting jury issues in this case." *Id.*, at 530.

I suspect there will be many more thorough discussions of *Menchaca* in the months to come, but for a more thorough discussion of *Menchaca*'s error preservation aspects, you can see what I posted on my error preservation blog. *See* "Recent Texas Supreme Court Error Preservation Decisions, 4/20/18," https://wordpress.com/post/shayessite.wordpress.com/2096. An appendix to this paper gives a tabular representation of how the various Justices voted on the error preservation issues.

c. After the Verdict

You have several potential error preservation tools–or requirements–at your disposal, some of which require you to be quicker on your feet–or, better yet, more foresighted– than others.

1. Requests for Findings of Fact and Conclusions of Law (*ONLY* if, and as to, fact issues to be decided by trial court; filed within twenty days after a judgment is *signed*. TEX. R. CIV. P. 296).

If the jury decides all the fact issues in your trial, this tool is not available to you–or at least is not meaningfully available to you. But if the trial court decides certain fact issues–for example, attorneys' fees–you may be entitled to findings or conclusions, or they may be a tool which the court of appeals will consider on appeal as to those fact issues decided by the trial court. *See* McClure and Nickelson, pages 35-41; *see also* Keltner and Perkins, page 4; *Heafner & Assocs. v. Koecher*, 851 S.W.2d 309, 313 (Tex. App. – Houston [1st Dist.] 1992, writ den.).

We will not further address findings of fact and conclusions of law here. *See* Section 3.B.ii.b of this paper, *infra*, for a discussion of this tool.

2. Acting on the Verdict: Motions to Disregard Jury Findings, for JNOV, or for Judgment on the Verdict (TEX. R. CIV. P. 301). These typically do not extend the appellate timetables nor the trial court's plenary power.

Once the jury has returned its verdict, and left the courthouse, you face the prospect of asking the trial court to do something about that verdict.

a. Some recent examples from the Supreme Court about complaints concerning the verdict which can be raised post-verdict.

Before launching into the pertinent motions, it bears mentioning that in 2017 and 2018 the Supreme Court issued several decisions where it reminded us that a "purely legal issue," or a complaint about an immaterial finding can first be raised in this post-verdict time frame, as opposed to being waived if not asserted as to the charge before the jury retired to deliberate. For example, the Supreme Court held that:

- a complaint about the immateriality of a jury finding can first be raised:
  - in a motion for jnov. *BP Am. Prod. Co. v. Red Deer Res., LLC* 526 S.W.3d 389, 402 (Tex.

2017); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 482 (Tex. 2017); or
- in a motion to disregard or for new trial. *Red Deer*, 526 S.W.3d at 402; and

- a purely legal issue can first be raised in a motion for judgment. *Menchaca*, at 487, n. 8.

So. what makes a jury finding immaterial? Well, a damage question is immaterial if it asks the jury to find damages related to a shut-in clause, but it asks about damages on a date different than set out in the shut-in clause. *Red Deer*, 526 S.W.3d at 402. Or if it asks the jury to find whether there was negligence in a case pled as a premises liability claim. *United Scaffolding*, 537 S.W.3d at 482

Then there are those purely legal issues, like the cap on exemplary damages or the lack of joint and several liability for exemplary damages, both of which can be preserved post-verdict. In that regard:

- a motion for new trial will timely preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in "the absence of a plea and proof of cap-busting conduct." *Zorrilla*, 469 S.W.3d at 157.
- responding to an amended motion for entry of judgment, and specifically adopting the response of other defendants that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties, will preserve that complaint by the adopting defendant. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).
- a motion for judgment will preserve a complaint "contractual damages are independent from statutory damages and must be based on a finding that [the defendant] breached the policy [of insurance]." *Menchaca*, at 487, n. 8.

b. And now, for the rule and the specific motions.

TEX. R. CIV. P. 301 provides that the judgment:

1) shall conform to the pleadings, the nature of the case proved and the verdict, if any; provided that
2) upon motion and reasonable notice the court may render judgment non obstante veridicto if a directed verdict would have been proper; and furthermore provided
3) the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence.

We will take these in turn.

1. Motion for Judgment on the Verdict

Assume you like the verdict. Where there is no irreconcilable conflict in the jury's findings, and no basis to ignore part or all of the verdict, it is the ministerial duty of the Judge to enter a judgment on the verdict, the matter involves no judicial or discretionary powers, and the trial court abuses its discretion in not entering the judgment. *Traywick v. Goodrich*, 364 S.W.2d 190, 191 (Tex. 1963), *citing Gulf C. & S.F. Ry. Co. v. Canty*, 115 Tex. 537, 285 S.W. 296. It is furthermore the duty of the trial court to reconcile conflicting jury findings if at all possible. *Huber v. Ryan*, 627 S.W.2d 145, 145-6 (Tex. 1981), *citing Signal Oil & Gas v. Universal Oil Prod.*, 572 S.W.2d 320, 326 (Tex. 1978); *Traywick*, 364 S.W.2d at 190.

In filing your motion for judgment on the verdict, keep the following several things in mind that Storey, et al, mention on pages1-2 of their paper:

1) doing so does *not* extend the appellate timetables nor extend the court's plenary powers. *Brazos Electric Power Cooperative, Inc. v. Callejo*, 734 S.W.2d 126, 128-9 (Tex. App. – Dallas 1987, no writ);
2) doing so does preserve error when the trial court enters a judgment different from that sought by a party. *Emerson v. Tunnel*, 793 S.W.2d 947, 947 (Tex. 1990); *Medi Clinic v. Allen*, 2003 WL 1752167, 2003 Tex. App. LEXIS 2899, *4-5 (Tex. App. – Dallas April 3, 2003, no pet.); ***BUT***
3) if you move for judgment on the verdict, you will have waived the right to challenge the sufficiency of the evidence to support the findings of the jury. This is true even if you file a brief with your motion in which you "reserved the right to 'challenge any adverse judgment based upon the verdict.'" The Supreme Court of Texas has specifically disapproved of this "hide the ball in the brief" practice. *Litton Industrial Products, Inc., v. Gammage*, 668 S.W.2d 319, 320-1 (Tex. 1984).

But the Supreme Court has recognized the need for allowing a party to move for judgment based on a verdict, and yet still be able to challenge portions of the jury verdict. In *First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989), the Supreme Court specifically approved the following language in a motion for judgment based on the verdict as preserving a party's right to complain on appeal that a portion of the jury findings conflicted with each other, and was against the great weight and preponderance of the evidence:

> 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 the 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 result.

Fojtik, 775 S.W.2d at 633. The Court specifically distinguished this language, and approach, from the maneuver of the party in *Gammage*. Two other instances where no waiver follows the filing of a motion for judgment on the verdict are: (1) in the event jury findings are susceptible to more than one interpretation (*Miner-Dederick Const. Corp. v. Mid-Cty. Rental*, 603 S.W.2d 193, 198 (Tex. 1980); *Sun Power, Inc. v. Adams*, 751 S.W.2d 689, 696-7 (Tex. App. – Fort Worth 1988, no writ)); and (2) in the event that complaints about the verdict are not inconsistent with the motion for judgment (*Gammage*, 668 S.W.2d at 322; *Green v. Texas Workers' Compensation Ins. Facility*, 993 S.W.2d 839, 842-3 (Tex. App. – Austin 1999, pet. den.);). These latter rules seem to emanate from the recognition that a motion for judgment on portions of the verdict may not, in and of itself, conflict with challenging other portions of the jury verdict. *Green*, 993 S.W.2d at 842-3. *See* Storey, et al, at page 2.

2. Motion for Judgment Notwithstanding the Verdict (TEX. R. CIV. P. 301)

As mentioned above, TEX. R. CIV. P. 301 provides that upon motion and reasonable notice the court may render judgment non obstante veridicto if a directed verdict would have been proper. This motion, and the granting of the same, relates to the entire jury verdict, as opposed to the motion to disregard jury findings, which relates to less than the entire verdict. The standard for granting the Motion for JNOV seems clear enough–but the time for filing the same or, perhaps more appropriately worded, how far down the appellate road you can file a motion and still call it a Motion JNOV, become a little mushy. ***START HERE***

1) The Standard for Granting

The trial court may grant a Motion for Judgment Notwithstanding the Verdict when no evidence supports the verdict. TEX. R. CIV. P. 301. The court may not grant a JNOV if the only complaint is that the evidence is factually, as opposed to legally, insufficient. *Great Western Drilling, Ltd., v. Alexander*, 305 S.W.3d 688, 693 (Tex. App.–Eastland 2009, no pet.) *citing Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 594 (Tex. 1986). Courts of appeals review a trial court's granting of a judgment notwithstanding the verdict under a legal sufficiency standard, viewing the evidence and inferences in the light most favorable to the jury's finding. *Edascio, L.L.C. v. NextiraOne L.L.C.*, 264 S.W3d 786, 795 (Tex. App.– Houston [1st] May 22, 2008), *citing City of Keller v. Wilson*, 168 S.W.3d 802, 807, 823 (Tex. 2005) (stating that "the test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review"). One assumes that this review is a review of "the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Escoto v. Estate of Ambriz*, 200 S.W.3d 716, 722 (Tex. App. – Corpus Christi 2006) *reversed and rendered on other grounds by* 288 S.W.3d 401; *citing City of Keller*, 168 S.W.3d at 807. Courts of appeals will sustain the granting of a judgment notwithstanding the verdict based on "no evidence" when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the trial court is barred by the rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is not more than a scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Edascio*, 264 S.W.3d at 795, *citing City of Keller*, 168 S.W.3d at 810.

When a trial court specifies the ground upon which it grants a judgment notwithstanding the verdict, an appellant need only challenge the ground relied upon by the trial court. *Edascio*, 264 S.W.3d at 795, *citing Voskamp v. Arnoldy*, 749 S.W.2d 113, 118 (Tex. App.– Houston [1st Dist.] 1987, writ denied) and *Swink v. Alesi*, 999 S.W.2d 107, 111-12 (Tex. App.--Houston [14th Dist.] 1999, no pet.). However, the appellee may assert on appeal the grounds that it alleged in its motion for judgment notwithstanding the verdict, but not relied upon by the trial court, to attempt to vitiate the jury's verdict. *Edascio*, 264 S.W.3d at 795, *citing Voskamp*, 749 S.W.2d at 118 and TEX. R. APP. P. 38.2(b) (providing that when trial court renders judgment notwithstanding the verdict "the appellee must bring forward by cross-point any issue or point that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict.") and TEX. R. CIV. P. 324(c) (stating that when judgment notwithstanding verdict is rendered, appellee "may bring forward by cross-point contained in his brief filed in the Court of Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury's findings have insufficient support in the evidence or are against the overwhelming

preponderance of the evidence as a matter of fact. . . .").

2) The Requisites of the Motion

The Motion has to be in writing and reasonable notice given to your opponents. If no motion is filed, the trial court errs in granting a judgment notwithstanding the verdict. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213 (Tex. App. Houston 14th Dist. 1984).

3) The Timing of Filing the Motion–the Motion JNOV May Be Filed After Judgment–But Whether It Can Be Filed More Than Thirty Days After Judgment Might be a Matter for Concern.

Some confusion exists in this area. But it appears that the majority of courts agree that a Motion JNOV may be filed after judgment, and perhaps as long as a trial court retains plenary power. At least one court has held that filing that motion more than thirty days post judgment makes it a nullity. As set out below, given the confusion that exists in this area, file your Motion for JNOV within thirty days of the signing of the judgment.

In *Kirschberg v. Lowe*, 974 S.W.2d 844, 846 (Tex. App. – San Antonio 1998, no pet.), the San Antonio Court discussed the issue of when the Motion for JNOV had to be filed, and whether its filing extended the appellate deadlines:

> Rule 301 provides for a motion for judgment non obstante veredicto but neither that rule nor any other "'provide[s] a time limit [for its] filing.'" *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex. Civ. App.--Corpus Christi 1966, writ ref'd) (quoting *Hann v. Life & Cas. Ins. Co. of Tenn.*, 312 S.W.2d 261, 263 (Tex. Civ. App.--San Antonio 1958, no writ)). Therefore, in Texas state courts, motions for judgment n.o.v. can properly be filed before or after judgment. *Id.*; *see also Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); *Needville Indep. Sch. Dist. v. S.P.J.S.T. Rest Home*, 566 S.W.2d 40, 42 (Tex. Civ. App.--Beaumont 1978, no writ). Historically, however, while a motion for judgment n.o.v. could be filed before or after judgment and still preserve error, it did not extend the appellate timetable. *Walker*, 409 S.W.2d at 944-45; see TEX. R. CIV. P. 329b(5) (Vernon 1977). An extended timetable could be obtained only by a timely-filed motion for new trial. *Id.*

Kirschberg, 974 S.W.2d at 846. *Kirschberg* then goes on to point out what happened in the wake of the 1981 amendments to the Rules of Civil Procedure:

> In the aftermath of [*Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176, 176-77 (Tex. 1995) (per curiam)] the filing of any post judgment motion or other instrument that (1) is filed within the time for filing a motion for a new trial and (2) "assail[s] the trial court's judgment" extends the appellate timetable. *Gomez*, 896 S.W.2d at 176. We therefore hold that Kirschberg's motion for judgment non obstante veredicto, which was filed within thirty days of the date the judgment was signed and which assails the trial court's judgment in favor of Rey, extended the appellate timetable.

Kirschberg, 974 S.W.2d at 847-8.

The *Kirschberg* Court then noted that the Dallas Court of Appeals had held that, because a Motion for JNOV is to be treated as a motion to modify for purposes of extending the appellate timetable, it must be similarly treated for purposes of the thirty-day filing deadline for filing a motion to modify. *Kirschberg*, 974 S.W.2d at 848, *citing Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.– Dallas 1992) (holding that an amended Motion for JNOV filed more than thirty days post judgment was a nullity, and preserved no error), vacated, 843 S.W.2d 486 (Tex. 1993). The *Kirschberg* Court specifically rejected this result and holding, even thought the issue was not before it. *Kirschberg*, 974 S.W.2d at 848.

While no other court has adopted the holding of *Thomas*, i.e., that a Motion for JNOV must be filed within thirty days of the signing of the judgment, the following quote from *Thomas*, including the portions of TEX. R. CIV. P. 329b quoted by *Thomas*, have to give us some sense of concern, at least until the Supreme Court or the Dallas Court rejects the reasoning and result in *Thomas*:

> The applicable procedural rule states:
>
> The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:
>
> (a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.
>
> (b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.
>
> . . .
>
> (g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial.
>
> . . .

Thomas, 825 S.W.2d at 141, *citing* TEX. R. CIV. P. 329b(a), (b), & (g) (emphasis added). If a Motion for JNOV is a "motion to modify, correct, or reform" a judgment, then an argument exists that TEX. R. CIV. P. 329b establishes a thirty day post-judgment window to file the Motion for JNOV. It might be best, even though the majority of courts have been more lenient than *Thomas*, to file your Motion for JNOV less than thirty days after the signing of the judgment.

4) The Filing of a Motion for JNOV Extends Appellate Deadlines, if it "assails the . . . judgment."

Storey, et al, discuss this issue in their paper at page 4. In a case involving a Bill of Review, the Supreme Court held 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." *Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176, 177 (Tex. 1995) (per curiam). In her paper, Sanders mentions that another Supreme Court opinion reaches the same conclusion, in the context of a post judgment motion to incorporate sanctions into a new final judgment. *Lane Bank Equipment Co. v. Smith Southern Equipment, Inc.*, 10 S.W.3d 308, 314 (Tex. 2000). *Kirschberg*, 974 S.W.2d at 847-8, extended this holding to Motions for JNOV.

The Supreme Court has since spoken to this issue, in the context of a motion which was designated a Motion for JNOV. *Ryland Enter. v. Weatherspoon*, 355 S.W.3d 664 (Tex. 2011). In *Ryland*, the Supreme Court noted that the Motion for JNOV was filed prior to the signing of the judgment. *Ryland*, 355 S.W.3d at 666. The Court interpreted *Gomez* to mean that "a JNOV motion can constitute a "motion to modify the judgment" under Rule 26.1(a)(2) if it assails the later-entered judgment." *Id.* The Court then noted that the movant's JNOV motion was "filed . . . on legal insufficiency grounds [and] . . .also requested a new trial in the alternative." *Ryland*, 355 S.W.3d at 664. The Court held that "[t]he underlying nature of Ryland's JNOV motion was: (1) to assail the judgment likely to follow from the jury's verdict; and (2) to request a new trial. Either purpose warrants the application of the" rules which "triggered Rule 26.1(a)'s extension of the appellate timetable." *Ryland*, 355 S.W.3d at 666.

The Court premised its ruling in *Ryland* on the recognition that "[t]his Court has consistently treated minor procedural mishaps with leniency, preserving the right to appeal." *Id.*, citing *Gomez*. But the Court gave no indication that, had the motion for JNOV not asserted a legal sufficiency challenge, or not asked for a new trial, it would have held the motion extended the appellate deadlines. So the lesson here is to make sure that you consciously assail the trial court's judgment, and request a new trial. Otherwise, you run the risk of not extending the appellate deadlines. *See* Storey, et al, at page 4, and Sanders, page 2, for the same reasons set out above. *See also Herrera v. Anzaldua,* 13-11-00531-CV, 2011 WL 3846734, 2011 Tex. App. LEXIS 7043 (Tex. App. Corpus Christi Aug. 30, 2011, pet. denied) ("A motion for judgment notwithstanding the verdict is a post-judgment motion that extends the appellate deadlines if timely filed.").

5) Remember–If You Call Your Motion a Motion for New Trial, Instead of a Motion JNOV, the Court of Appeals Might Just Agree With You.

Funny how that happens. But it does. *Beal v. Great American Indem. Co.*, 322 S.W.2d 399, 402 (Tex. Civ. App. – Texarkana 1959, no writ). Even if you try to convince the court of appeals your motion was really a Motion for JNOV in disguise, which would entitle you to a judgment you supposedly asked for below. *Beal*, 322 S.W.2d at 402. And if the appeals court decides that what you filed was in fact a motion for new trial, because that's what you called it and that's what it was, then the appeals court will not give you the judgment you contend you were entitled to below– it will send you back down for a new trial because, well, that's what a motion for new trial asks for. *Beal*, 322 S.W.2d at 402.

Should you inherit a case with only a document styled a Motion for New Trial preserving your legal sufficiency complaints, look to *Daniels v. Empty Eye, Inc.,* 368 S.W.3d 743 (Tex. App.–Houston [14th Dist.] 2012, pet. denied). The majority and dissent in *Empty Eye* disagree about when a document styled a Motion for New Trial will enable an appellate court to render judgment, but both opinions supply helpful arguments to avoid the "you only asked for new trial" snare.

The dissent in *Empty Eye* summarizes the opinion's majority position to be that a rendition may result if a motion (even one titled a Motion for New Trial) raises a legal sufficiency point and contains a general prayer. *Id*. at 759-760. The dissent concludes that the majority position has support in a distinguished law review article but not in supreme court's precedent. The dissent, however, would construe a Motion for New Trail as a JNOV if the motion raises a legal sufficiency point and requests the rendition of judgment. *Id*. at 53-54. Both opinions highlight a useful sanctuary for the appellate lawyer with the argument that it is the substance and not the label of a motion that controls.

3. Motion to Disregard Jury Findings (TEX. R. CIV. P. 301)

As mentioned earlier, TEX. R. CIV. P. 301 allows the trial court to disregard any jury finding on a question that has no evidentiary support. Taking advantage of this tool requires:

1) A motion (even if said motion is called a "motion for judgment" instead of a "motion to disregard jury findings") which satisfies three elements: 1) it must designate the finding and/or findings which the court is called upon to disregard; 2) it must specify the reason why the finding or findings should be disregarded; and 3) it must contain a request that judgment be entered upon the remaining findings after the specific findings have been set aside or disregarded. *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.,* 542 S.W.2d 882, 892 (Tex. Civ. App. – Corpus Christi 1976, writ ref'd n.r.e.), *citing Hines v. Parks*, 128 Tex. 289, 96 S.W.2d 970 (Tex.Comm'n App. – 1936, opinion adopted) and *Employers Mutual Casualty Company v. Poorman*, 428 S.W.2d 698 (Tex.Civ.App. – San Antonio 1968, writ ref'd n.r.e.).

2) Notice to all parties. TEX. R. CIV. P. 301.

3) Filing of the Motion within the appropriate deadline–whenever that is. *See* discussion regarding filing deadlines for Motion for JNOV, *supra*. Follow the same rule of thumb–try to file it within thirty days of when the judge signs the judgment. *Eddings v. Black*, 602 S.W.2d 353, 356-7 (Tex. Civ. App. – El Paso 1980, writ ref'd. n.r.e. per curiam 615 S.W.2d 168 (Tex. 1981)).

The trial court may disregard a jury's finding on an immaterial issue and render judgment based upon the remaining findings; such a judgment is not considered as one rendered non obstante verdicto. *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 216-7 (Tex. App. – Houston [1st Dist.] 2001, pet. den.), *citing Kuehnhoefer v. Welch*, 893 S.W.2d 689, 692 (Tex. App.– Texarkana 1995, writ denied), *Dewberry v. McBride*, 634 S.W.2d 53 (Tex. App.– Beaumont 1982, no writ) and *J.R. Neatherlin Corp. v. Baughman*, 580 S.W.2d 129, 130 (Tex. Civ. App.– Houston [14th Dist.] 1979, writ ref'd n.r.e.).

A jury's answers to questions may only be disregarded if they have no support in the evidence or if they are immaterial. *Southeastern Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999), *citing Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994) and *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966). In this regard:

1) The no evidence review contemplates an analysis under *City of Keller* and its progeny. *Basic Capital Mgmt. v. Dynex Commer., Inc.*, 254 S.W.3d 508, 512, (Tex. App. – Dallas 2008), *reversed and remanded on other grounds* 348 S.W.3d 894 (2011).

2) A question is immaterial when it should not have been submitted, it calls for a finding beyond the province of the jury, such as a question of law, or when it was properly submitted but has been rendered immaterial by other findings. *Tichacek*, 997 S.W.2d at 172, *citing Spencer*, 876 S.W.2d at 157. As Storey, et al, point out on page 6 of their paper, immaterial findings also include findings that are evidentiary only. *Clark v. McFerrin*, 760 S.W.2d 822, 826 (Tex. App. Corpus Christi 1988, writ denied).

Whether the filing of a motion to disregard jury findings extends the appellate deadlines is probably subject to the same analysis as relates to Motions for JNOV, discussed above. If you do not assume that filing a motion to disregard extends those deadlines, you will not be disappointed or surprised. However, to have an argument that the motion extends the appellate timetable ensure that the motion explicitly assails the judgment that you anticipate the trial court will enter.

d. After Judgment

1. A Word of Warning About the Finality of Judgments: Sometimes The Clock Starts Ticking Before You Think It Does/Want It To.

You can extend the plenary power of the court, and the appellate deadlines, only if you do so within the allotted time frame following the signing of a *final* judgment. This means that you need to make sure you do not overlook the fact that a *final* judgment has been signed, or you will run out of time to either extend the plenary power of the trial court, or to extend the time to perfect your appeal, or to perfect your appeal.

A case in point. Let's assume that A sues B and C on a $769,789.91 credit card debt. B answers; C does not. A then files a motion asking the trial court "to award . . . the relief requested . . . by signing and entering the attached DEFAULT JUDGMENT." The attached judgment, drafted by A's counsel, recited C's default and awarded damages and attorney fees against C. The last two sentences of the judgment stated: "All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL." The trial court signed the judgment, and no one appealed. More than fifteen months later, A moved for judgment nunc pro tunc to correct what it called a "typographical error," saying that its attorney should have used the word "Interlocutory" in both the motion and judgment, so that the case could proceed against the answering defendant, B. The trial court granted the motion for judgment nunc pro tunc, the court of appeals denied mandamus relief to B–and the Supreme Court held that the earlier judgment was final,

resulted in a take nothing judgment against answering defendant B, and the time had elapsed to either extend the trial court's plenary power under TEX. R. CIV. PRO. 329b or appeal the same:

> We agree with the court of appeals that the language of the judgment in this case clearly and unequivocally indicates that it is intended to be final. The use of the word "final" in the last sentence is slightly less clear than "appealable", the example offered in *Lehmann*. A judgment might possibly be said to be "final" as to only some claims or parties, while it would not be "appealable" unless it disposed of all. But the language of this judgment is clear enough. The court of appeals' holding that the failure to mention [the answering defendant] creates an ambiguity that makes the judgment interlocutory is contradicted by *Lehmann*.

In re Daredia, 317 S.W.3d 247, 248-249 (Tex. 2010). How do you spell "Oh, Shoot."

Also, remember that *Daredia* involved a disposition after a trial other than a trial on the merits, No presumption of finality applies to interlocutory dispositions such as from Motions to Dismiss or Motions for Summary Judgment. A presumption of finality does apply when a judgment is entered after a trial on the merits. *Vaughn v. Drennon*, 324 S.W.3d 560, 561 (Tex. 2010), citing *NE. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 897–98 (Tex.1966) for this proposition: "Under the Aldridge presumption, any judgment following a conventional trial on the merits creates a presumption that the judgment is final for purposes of appeal. . . .A judgment following a conventional trial on the merits need not dispose of every party and claim for the Aldridge presumption of finality to apply.") With a judgment entered after a trial on the merits, assume that the clock is ticking for you to file post-judgment motions and perfect an appeal.

Let the foregoing serve as a lesson: find a case on point that what you think you have done is what you have done, and carefully evaluate what the Judgement says before you submit it to the court.

2. Motion for New Trial (TEX. R. CIV. P. 320, et al)

The first caveat to keep in mind about a motion for new trial, and about motions to modify, correct and reform judgments, is that TEX. R. CIV. P. 329b and its commentary takes up four full pages in West's Texas Rules of Court handbook, and the blurbs of cases citing TEX. R. CIV. P. 320 and TEX. R. CIV. P. 329b take up nearly 200 pages in Vernon's Rules Annotated. So whatever your situation involving motions for new trial or to modify, correct or reform judgments, carefully research the law to make sure you have leading authority that tells you exactly when plenary power time frames expire and appellate timetables start to run and then expire. This paper cannot cover all that material, and no one can remember it all.

The second caveat to keep in mind about a motion for new trial is that it asks for–a new trial. At least in the context of presenting a no evidence argument, if this is the only motion you file, and a new trial is the only relief you ask for, that is the only relief you will be entitled to if you win on appeal. *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995); *Horrocks v. Texas Dept. of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993). "Despite the fact that there is no evidence to support the verdict, we can only remand for new trial because Eastex did not request rendition of judgment in the trial court." *Werner*, 909 S.W.2d at 870, citing *Horrocks*, 852 S.W.2d at 499. The *Horrocks* Court based its decision on then existing TEX. R. APP. P. 81(c), which required that "the [appellate] court shall proceed to render such judgment or decree as the court below should have rendered. . . ." *Horrocks*, 852 S.W.2d at 499. TEX. R. APP. P. 81(c) has since been merged with other rules into TEX. R. APP. P. 43.3, without any apparent change in substance, and no indication in the comment that would indicate an inclination to change this result. While a new trial may be the only relief you would have been entitled to, or that you would have wanted; but on a no evidence complaint, you would sure hate to have the court appeals agree–and then send you back for a new trial. So consider whether, in addition to or in conjunction with the motion for new trial, you want to file a motion which asks for other relief–e.g., a motion for judgment or a motion to modify, correct, or reform the judgment.

Every motion for new trial must be in writing and signed by the party or his attorney (though a trial court may grant a new trial on its own motion–though its power to do so expires on the expiration of its plenary power. *Gulf Ins. Co. v. Adame*, 575 S.W.2d 87, 88 (Tex. Civ. App. – Amarillo 1978, no writ). TEX. R. CIV. P. 320. The new trial can be as to only a part of the matters in controversy, except that the trial court cannot order a separate trial on unliquidated damages alone if liability issues are contested. TEX. R. CIV. P. 320. Each point relied on by a motion for new trial shall briefly refer to that part of the ruling, the charge given or refused, the admission or rejection of evidence or other complained of proceedings "in such a way that the objection can be clearly identified and understood by the court." TEX. R. CIV. P. 321. Grounds of objection couched in general terms shall not be considered by the court. TEX. R. CIV. P. 322.

FUNCTIONS OF A MOTION FOR NEW TRIAL:

For our purposes in this paper, a Motion for New

Trial performs two salient functions:

A) it preserves error. TEX. R. CIV. P. 324. There are some types of error that only a motion for new trial can preserve (TEX. R. CIV. P. 324(b), discussed below). Except for those specifically-listed types of error, however, a point in a motion for new trial is not a prerequisite on appeal in either a jury or nonjury case. TEX. R. CIV. P. 324(a).

B) it extends the timetable for filing the notice of appeal. *See* TEX. R. APP. P. 26.1(a)(1).

Let's address these functions in turn.

A) A Motion for New Trial Preserves Error. TEX. R. CIV. P. 324.

You can raise points on appeal which you do not mention in a Motion for New Trial *unless* TEX. R. CIV. P. 324(b) requires you mention the points in the Motion. TEX. R. CIV. P. 324(a). TEX. R. CIV. P. 324(b) specifically mentions the following points which you must raise in your Motion for New Trial to complain about them on appeal:

I) A complaint on which evidence must be heard such as jury misconduct, or newly discovered evidence, or failure to set aside a judgment by default. (TEX. R. CIV. P. 324(b)(1)). Taken in turn, here are some things to keep in mind on each of these:

a) jury misconduct– *see also* TEX. R. CIV. P. 327 and TRE 606(b).

I) your motion can include misconduct of the jury, misconduct of any officer in charge of them, communication made to the jury, or that a juror gave an erroneous or incorrect answer on voir dire examination. TEX. R. CIV. P. 327(a);

ii) you must support your motion by affidavit. TEX. R. CIV. P. 327(a);

In order to obtain a hearing without a juror's affidavit, the party must disclose a reasonable explanation and excuse as to why affidavits cannot be secured and must also state sufficient particularized allegations of material jury misconduct. *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 636 (Tex. App. – Houston [1st] 1993, writ den.), *citing Roy Jones Lumber Co. v. Murphy*, 139 Tex. 478, 163 S.W.2d 644 (Tex. 1942).

iii) the court must hear evidence in open court. TEX. R. CIV. P. 327(a);

The rule is well settled, however, that the opportunity for a hearing on a motion for new trial is not mandatory and the trial court does not abuse it's discretion in failing to conduct a hearing on a defective motion for new trial alleging jury misconduct when the allegations of the motion, even if proven, would be insufficient to show jury misconduct. *Scott v. Scott*, 774 S.W.2d 307, 307-8 (Tex. App. – Austin 1989, no writ); *Clancy v. Zale Corp.*, 705 S.W.2d 820, 829 (Tex. App. – Dallas 1986, writ ref'd n.r.e.); *Jordan v. Ortho Pharmaceuticals, Inc.*, 696 S.W.2d 228, 239 (Tex. App. -- San Antonio 1985, writ ref'd n.r.e.); *Caterpillar Tractor Co. v. Boyett*, 674 S.W.2d 782, 793 (Tex. App. – Corpus Christi 1984, no writ).

iv) the trial court may grant a new trial *if*:

a) the misconduct is proved, or the communication occurred, or the erroneous or incorrect answer was given *and*

b) it reasonably appears *from the evidence both on the hearing of the motion* ***and*** *the trial of the case* ***and*** *the record as a whole* that **injury probably resulted** to the complaining party. TEX. R. CIV. P. 327(a).

v) a juror may *not* testify, by affidavit or evidence, as to any matter or statement:

a) occurring during the course of the jury's deliberations (TEX. R. CIV. P. 327(b); TRE 606(b)); or

b) to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith. (TEX. R. CIV. P. 327(b); TRE 606(b))

As used here, "deliberations" means formal jury deliberations -- when the jury weighs the evidence to arrive at a verdict; this probably equates with the stage of trial after the court has charged the jury but before it has returned a verdict. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 371 (Tex. 2000) (conversations during a trial break are not excluded from a hearing).

vi) a juror *may* testify whether any outside influence was improperly brought to bear upon any juror, or to rebut a claim that the juror was not qualified to serve. (TEX. R. CIV. P. 327(b); TRE 606(b)).

As used here, an "outside influence" means a force external to the jury and its deliberations. Outside influence does not include information acquired by a juror and communicated to the others between the time the trial court instructs the jury and the time it renders a verdict, even where the information is not in evidence, and is unknown to jurors before trial. Outside influence, in the form of information not in evidence, must come from a non-juror. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 660 (Tex. App. – Dallas 2002, pet. den.) *citing Wooten v. S. Pac. Transp. Co.*, 928 S.W.2d 76, 78-79 (Tex. App.– Houston [14th Dist.] 1995, no writ); *Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 271-72 (Tex. App.– El Paso 1994, writ denied). *Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 316 (Tex. App.– Houston [14th Dist.] [**65] 1988, writ denied), reversed on other grounds, *Golden Eagle Archery*, 24 S.W.3d at 371.

Clancy v. Zale Corp., 705 S.W.2d 820, 829 (Tex. App. – Dallas 1986, writ ref'd. n.r.e.), which rejected an argument that an outside influence was present, did offer some examples of "outside influences", to wit: *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983) (tampering with evidence by an attorney); *United States v. Williams*, 613 F.2d 573, 575-76 (5th Cir.), cert. denied, 449 U.S. 849, 66 L. Ed. 2d 60, 101 S. Ct. 137 (1980) (conversation between the judge and a juror); and H.R. Rep. No. 650, 93rd Cong., 2d Sess., reprinted in 10 J. Moore & H. Bendix, Moore's Federal Practice, 606.01[2] (2d ed. 1985) (a threat to a juror). Furthermore, the Supreme Court of Texas has held that a plaintiff contacting a juror at the juror's place of business to persuade the juror to "do all you can to help me" amounted to an outside influence. *Texas Employers' Ins. Ass'n. v. McCaslin*, 159 Tex. 273, 317 S.W.2d 916, 921 (1958). *See* Storey, et al, at page 10.

vii) In 2009, the Supreme Court addressed the scope of formal discovery to which jurors might be subjected in *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009). This was not in the context of a motion for new trial, however; it was in the context of a plaintiff trying to enforce a settlement agreement from which a defendant had withdrawn. The parties had entered into the settlement agreement during jury deliberations, after the presiding juror sent a note to the judge asking the maximum amount that could be awarded. *Castillo*, 279 S.W.3d at 659. After the judge released the jurors from service, four of the jurors told Ford's lawyers that the jury had already answered one liability question in Ford's favor and were leaning that way on another question. *Castillo*, 279 S.W.3d at 659. The trial court denied Ford's request to delay the settlement, and in response to the plaintiff's motion to enforce the settlement, Ford announced it would proceed with the same but needed a little more time to do so, which the trial court granted. Ford then filed a motion for reconsideration, for new trial, for mistrial and to set aside the Rule 11 settlement, saying that the "settlement agreement should be set aside under the theory of mutual mistake because both parties acted under the mistaken belief that the presiding juror sent the note on behalf of the jury and that the jury had reached the issue of damages." The trial court denied Ford's motion, and subsequently granted the plaintiff summary judgment on a claim for breach of the settlement agreement, but not before Ford asked the court for a chance to conduct discovery on its claim of "the motivation of the presiding juror's actions and any outside influences that possibly swayed her." *Castillo*, 279 S.W.3d at 659, 660, 661. The court of appeals affirmed the trial court. The Supreme Court said it agreed with Ford's contention that "the trial

court erred in denying it the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures." *Castillo*, 279 S.W.3d at 661. The Supreme Court decided the trial court abused its discretion in depriving Ford of all discovery on the breach of contract claim, it also noted that "[W]e believe the better policy, in general, is to conform discovery involving [**24] jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve. . . .it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained." *Castillo*, 279 S.W.3d at 666. The Court did not reach the issue of whether the trial court erred in excluding the juror affidavits offered by Ford in support of its motions. *Id.*, at 367.

FYI: As of the writing of this paper, the conduct of the presiding juror in *Castillo* has prompted a request from the Supreme Court that the Supreme Court Advisory Committee study the whole issue of questions from jurors, and how the same should be communicated to the court and parties, with the potential for revisions to instructions given to jurors pursuant to TEX. R. CIV. PRO. 226a.

vii) as to a juror giving an erroneous or incorrect answer on voir dire examination, a juror can commit misconduct if he or she lies in response to a specific question. *Wooten v. Southern Pac. Transp. Co.*, 928 S.W.2d 76, 79 (Tex. App. Houston 14th Dist. 1995, no writ). A venire person's failure to disclose information about which she had no knowledge or had forgotten at the time of voir dire does not constitute concealment. *Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34, (Tex. App. – Houston [14th Dist.] 1999, pet. den.), *citing* Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 851 (Tex. App.– Houston [1st Dist.] 1987, writ ref'd n.r.e.). Proof of these failures or concealments must come from a source other than jury deliberations. *Kiefer*, 10 S.W.3d at , *citing Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 272 (Tex. App.– El Paso 1994, writ denied); *Soliz v. Saenz*, 779 S.W.2d 929, 933 (Tex. App.– Corpus Christi 1989, writ denied).

As Storey, et al, point out on pages 10-11 of their paper, keep in mind that, as to an order denying a motion for new trial alleging jury misconduct, when said order is based on an evidentiary hearing, in the absence of findings of fact and conclusions of law (which the trial court therefore impliedly has the authority to make) the appellate court will assume the trial court made such findings as necessary to support its order. *Pharo v. Chambers County*, 922 S.W.2d 945, 949, 950 (Tex.1996). The trial court's determination as to whether jury misconduct occurred "is ordinarily binding on the reviewing courts and will be reversed only where a clear abuse of discretion is shown." *Pharo*, 922 S.W.2d at 948, citing *State v. Wair*, 163 Tex. 69, 351 S.W.2d 878, 878 (Tex. 1961).

b) newly discovered evidence–TEX. R. CIV. P. 324(b)(1).

A party who seeks a new trial on the ground of newly discovered evidence must satisfy the court that (1) the evidence has come to his knowledge since the trial, (2) it was not owing to want of due diligence that the evidence did not come to his attention sooner, (3) the evidence is not cumulative, and (4) the evidence is so material that it would probably produce a different result if a new trial were granted. *Chapman v. Abbot*, 251 S.W.3d 612, 620 (Tex. App. – Houston 1st Dist. 2007, no pet.), *citing Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), overruled on other grounds, and *Summers v. WellTech, Inc.*, 935 S.W.2d 228, 233 (Tex. App.– Houston [1st Dist.] 1996, no

writ). Appellate courts review the trial court's denial of a motion for new trial for an abuse of discretion. *Chapman*, 251 S.W.3d at 620, citing *Jackson*, 660 S.W.2d at 809.

TEX. R. CIV. P. 324(b)(1) does not say anything about an affidavit. Though the origin of their holdings is unclear, some cases have said that a motion for new trial based on newly discovered evidence must be supported by the affidavit of the movant. *Associates Inv. Co. v. Lenz*, 288 S.W.2d 857, 859-60 (Tex. Civ. App. – Austin 1956, no writ); *In re Thoma*, 873 S.W.2d 477, 512 (Tex. Rev. Trib. 1994); *Brown v. Hopkins*, 921 S.W.2d 306, 211 (Tex. App. – Corpus Christi 1996, no writ); *Hibler v. Puckett*, 2005 WL 1405748, 2005 Tex. App. LEXIS 4496, *14-5 (Tex. App. – Eastland June 9, 2005, no pet.); *In the Interest of A.A.E.*, 2005 WL 1364084, 2005 Tex. App. LEXIS 4419, *19-20 (Tex. App. – Corpus Christ June 9, 2005); *Zuniga v. Zuniga*, 13 S.W.3d 798, 801 (Tex. App. – San Antonio 1999, no writ), overruled on other grounds, *In the Interest of Z. L. T.*, 124 S.W.3d 163, 166 (Tex. 2003). But given the inclination of courts to sustain the trial court's rulings on motions for new trial, the safe practice probably lies in supporting your motion for new trial with an affidavit.

c) failure to set aside a judgment by default–TEX. R. CIV. P. 324(b)(1).

Books, or at least very large pamphlets, have been written about motions for new trial in this setting. Story, et al, have a relatively extensive discussion about this setting aside a default judgment in their paper at pages 11-14, and Robert Alan York, The Honorable Wanda Fowler, Nina Reilly and Lauren Beck Harris provide extensive coverage of the same in their paper *Default Judgments*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2006). For our purposes here, just keep in mind the test for granting a new trial in a default judgment situation, and some of the mechanisms for pursuing the motion. A default judgment should be set aside and a new trial ordered in any case in which: [1] the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; [2] provided the motion for a new trial 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. *State Emples. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994), *citing Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939), *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 381 (Tex. 1994), and *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 390 (Tex. 1993). The prerequisites for setting aside a no-answer default judgment have been applied to post-answer default judgments, and the Supreme Court recently applied the foregoing rules to post-answer defaults. *Dolgencorp v. Lerma*, 288 S.W.3d 922, 925-926 (Tex. 2009), noting the Court had previously so ruled in *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966); *Evans*, 889 S.W.2d at 268, *citing Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987) and *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex. 1986). A motion for new trial is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Evans*, 889 S.W.2d at 268, *citing Cliff*, 724 S.W.2d at 778-79. However, a trial court abuses its discretion by not granting a new trial when all three elements of the Craddock test are met. *Evans*, 889 S.W.2d at 268, *citing Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992). Obviously, if the defendant proves a lack of service or notice, proof of the second and third *Craddock* elements is not required. *Pessel v. Jenkins,* 125 S.W.3d 807, 810 (Tex. App.– Texarkana 2004, no pet.) ("[A] party who has been denied due process through lack of notice of a trial setting satisfies the first *Craddock* factor and does not have to meet the remaining requirements to be entitled to a new trial.).

II) A complaint of factual insufficiency of the evidence to support a jury finding. (TEX. R. CIV. P. 324(b)(2)) and a complaint that a jury finding is against the overwhelming weight of the evidence. (TEX. R. CIV. P. 324(b)(3).

When considering a factual sufficiency challenge to a jury's verdict, courts of appeals must consider and weigh all of the evidence, not just that evidence which supports the verdict. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998), *citing Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) and *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986). A court of appeals can set aside the verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust. *Ellis*, 971

S.W.2d at 406-7, *citing Ortiz*, 917 S.W.2d at 772 and *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The court of appeals is not a fact finder. Accordingly, the court of appeals may not pass upon the witnesses' credibility or substitute its judgment for that of the jury, even if the evidence would clearly support a different result. *Ellis*, 971 S.W.2d at 406-7, *citing Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986).

Bear in mind, as Storey, et al, mention on page 14 of their paper and McClure and Nickelson mention on page 26 of their paper, that you should really analyze carefully whether you want to raise a no-evidence challenge solely in a motion for new trial. If the appellate court sustains that challenge, it cannot render judgment for you–it can only remand for a new trial. *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995); *Horrocks v. Texas Dept. of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993).

III) A complaint of inadequacy or excessiveness of the damages found by the jury. (TEX. R. CIV. P. 324(b)(4)).

The standard of review for an excessive damages complaint is factual sufficiency of the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998), *citing Rose v. Doctors Hosp.*, 801 S.W.2d 841, 847-48 (Tex. 1990) and *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). The court of appeals should employ the same test for determining excessive damages as for any factual sufficiency question. *Ellis*, 971 S.W.2d at 406-7, *citing Pope*, 711 S.W.2d at 624.

IV) Incurable jury argument if not otherwise ruled on by the trial court. (TEX. R. CIV. P. 324(b)(5)).

As the Texas Supreme Court said in *Living Ctrs. of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008):

> ...in rare instances the probable harm or prejudice cannot be cured. In such instances the argument is incurable and complaint about the argument may be made even though objection was not timely made. See TEX. R. CIV. P. 324(b)(5); *Haywood*, 266 S.W.2d at 858. To prevail on a claim that improper argument was incurable, the complaining party generally must show that the argument by its nature, degree, and extent constituted such error that an instruction from the court or retraction of the argument could not remove its effects. *See Haywood*, 266 S.W.2d at 858. The test is the amount of harm from the argument: whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict. *Id.* But jury argument that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its capacity to damage the judicial system. Such argument is not subject to the general harmless error analysis.
>
> In *Reese*, this Court discussed different types of jury argument that constitute incurable error. For example, appeals to racial prejudice adversely affect the fairness and equality of justice rendered by courts because they improperly induce consideration of a party's race to be used as a factor in the jury's decision. *See Reese*, 584 S.W.2d at 840 (citing *Haywood*, 266 S.W.2d at 858); *see also Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619, 620 (Tex. 1889). Unsupported, extreme, and personal attacks on opposing parties and witnesses can similarly compromise the basic premise that a trial provides impartial, equal justice. *See Reese*, 584 S.W.2d at 840 (citing *Howsley & Jacobs v. Kendall*, 376 S.W.2d 562 (Tex. 1964) and *Sw. Greyhound Lines, Inc. v. Dickson*, 149 Tex. 599, 236 S.W.2d 115 (Tex. 1951)). Further, accusing the opposing party of manipulating a witness, without evidence of witness tampering, can be incurable, harmful argument. *See Howsley & Jacobs*, 376 S.W.2d at 565-66.

Other examples of incurable jury arguments can be found at p. 15 of Oldham, which is an updating of Storey's paper.

Thus, an unobjected to comparison in jury argument of defense counsel's trial conduct and defendant's business to Germany's World War II T-4 Project, which used the elderly and impaired for experiments, was held properly preserved by making it a point in a motion for new trial. *Penalver*, 256 S.W.3d at 680; conversely, the Supreme Court has held that one counsel's plea to send a message to the doctors was not of this same class of impropriety. Positive treatment is indicated. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009)The party which complains about the incurable jury argument has the burden of showing that its nature, degree, and extent

amounted to reversible harmful error. Oldham, at p. 15, updating Storey, and citing *Reliance Steel v. Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008), and giving a more full explanation of the manner of analyzing whether reversible error has occurred.

B) A Timely Filed Motion for New Trial Extends the Trial Court's Plenary Power, and the Timetable for Filing the Notice of Appeal. *See* TEX. R. CIV. P. 329b(e), TEX. R. APP. P. 26.1(a)(1).

The timely filing of the motion for new trial gives the trial court (without regard to whether an appeal has been perfected) plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions are first overruled, either by written and signed order or by operation of law. TEX. R. CIV. P. 329b(e). But in light of the *Brookshire* decision, discussed below, underline and emphasize the word "***timely***", because of the importance of making sure that you carefully consider and research exactly how each of your filings, and the ensuing actions or inactions by the trial court, affect the power of the trial court, and your appellate deadlines.

And what does the timely filing of a motion for new trial do to the appellate timelines? The filing of the motion extends the date for filing the notice of appeal until 90 days after the judgment is signed. TEX. R. APP. P. 26.1(a)(1). This extension assumes that the motion was filed by a party–a non-party filing the same does not satisfy the requirements of TEX. R. CIV. P. 320 (*State v. $ 15,975.85 in U.S. Currency*, 221 S.W.3d 713, 715 (Tex. App. – Houston 1st Dist. 2006, no pet.)). And this extension does not apply to accelerated appeals. *In the Interest of K.A.F.*, 160 S.W.3d 923, 926 (Tex. 2005).

Furthermore, a motion for new trial, if granted, does not operate to extend the appellate deadlines for a subsequent judgment–the granting of the motion moots it, in terms of any effect it might have on a subsequent judgment. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005). If such a motion is denied, however, it will extend the appellate timetable, so long as the motion makes a complaint applicable to the new judgment. *Id.* The Supreme Court has subsequently held, however, that when a "second judgment did not correct all of the errors or omissions asserted in [the] previous motion to modify, the [previous] motion [to modify] operated to extend the appellate timetable applicable to the second judgment." *Brighton v. Koss*, 415 S.W.3d 864, 867 (Tex. 2013). Be sure to wade into this area with the realization that you need to carefully research your specific situation to see where you stand.

And all of this might militate in favor of waiting until you actually have a judgment in place to file your motion for new trial.

OTHER ASPECTS OF THE MOTION FOR NEW TRIAL:

Having discussed the foregoing two functions of a Motion for New Trial, let's discuss two other aspects of these Motions: whether a new trial granted solely "in the interests of justice" remains largely unassailable, and the fact that you do not have to assert any specific ground to file a motion for new trial.

C) A New Trial may be granted for "good cause," but the order granting the same must articulate "reasonably specific" reasons for granting the new trial, and the reasons must be supported by the record.

TEX. R. CIV. P. 320 specifically says that new trials may be granted and judgments set aside for "good cause." It is now absolutely clear that "appellate courts must be able to conduct merits-based review of new trial orders," and that if "a trial court's articulated reasons are not supported by the underlying record, the new trial order cannot stand." *In re Toyota Motor, U.S.A., Inc.*, 407 S.W.3d 746, 758 (Tex. 2013). This means that an order granting a new trial "must be 'understandable,' 'reasonably specific,' *see Columbia*, 290 S.W.3d at 213, 'cogent,' 'legally appropriate,' 'specific enough to indicate that the trial court did not simply parrot a pro forma template,' and issued 'only after careful thought and for valid reasons,' . . . .An order that does not satisfy these requirements may be corrected by mandamus." *Id.*, 407 S.W.3d at 757.

What specific direction do we have from the Supreme Court in this area, which changed dramatically with the Court's 2009 decision in *In re Columbia Med. Ctr. Of Las Colinas*, 290 S.W.3d 204, 215 (Tex. 2009)? We know the following:

- first of all, "'in the interests of justice or fairness' or similar language 'is never an independently sufficient reason for granting new trial.'" *In re Toyota*, 407 S.W.3d at 757.
- joining all the reasons the trial court is granting the new trial with the phrase "and/or" renders the new trial order unsustainable if *any* of the reasons listed is found to be deficient. *Id.* So do not use, and do not allow the trial court to use, the phrase "any/or" in linking the reasons for granting a new trial.
- in the context of granting a new trial for jury misconduct, it will not be a reason for granting a new trial:
  - because a juror failed to disclose it had been a

defendant in a lawsuit, when a review of the record showed that the party seeking a new trial did not question nor strike four other jurors who disclosed they had been defendants in other lawsuits. *In re Whataburger Rests. LP*, 429 S.W.3d 597, 598 (Tex. 2014) (held, "the record contains no competent evidence that Chavez's nondisclosure resulted in probable injury, and the only competent evidence supports that it did not."); and

- that a juror communicated with the party "solely about the upcoming church retreat, and these were communications that began before the trial," because the "evidence here is not legally sufficient to support a finding that the communications between the juror and the person associated with a party probably caused injury.

D) Time for Filing a Motion for New Trial

As with findings of fact and conclusions of law, a motion for new trial is not ineffective just because it is prematurely filed; every such motion "shall be deemed to have been filed on the date of but subsequent to the time of the signing of the judgment the motion assails." TEX. R. CIV. P. 306c. Seems pretty clear, but as you will see later in this discussion, there are times when a prematurely filed motion for new trial, when thrown in the mix with more than one subsequently signed judgment and/or other unusual post-trial activity, can create uncertainties about the expiration of the plenary power of the court and the running of appellate deadlines.

A motion for new trial has to be filed prior to or within thirty days after the signing of the judgment or other order complained of (as Storey, et al, point out on page 16 of their paper, this time limit cannot be extended by agreement, citing *Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex. App. – Houston [14th Dist.] 1984, no writ). Within that same thirty day period, amended motions may be filed without leave of court assuming the trial court has not overruled any preceding motion for new trial. All motions for new trial, original or amended, are overruled by operation of law if not determined within 75 days of the signing of the judgment. Without regard to whether an appeal has been perfected, the trial court has plenary power to grant a new trial: (a) within thirty days after signing the judgment; and (b) if a motion for new trial is timely filed by any party, until thirty days after all such timely filed motions are overruled, either by written and signed order or by operation of law, whichever comes first. 329b(a)-(e). After the time has expired during which the trial court had plenary power, a judgment cannot be set aside by the trial court except by bill of review (or to correct a clerical order or to declare the judgment void because it was signed after the expiration of the trial court's plenary power). TEX. R. CIV. P. 329b(f).

Well, that clears that up. Until you realize how dangerous this whole area is, as emphasized by a recent decision of the Texas Supreme Court, which decided on a 5-4 vote that a *second* motion for new trial, filed *after* the trial court overruled your first motion for new trial, *does not* act to extend the trial court's plenary power:

> Subsection (b) of Rule 329b provides that an amended motion may be filed without leave of court when: (1) no preceding motion for new trial has been overruled *and* (2) it is filed within thirty days of judgment. Tex.R. Civ. P. 329b(b). "And"is conjunctive: an amended new-trial motion is timely filed only *before* the court overrules a prior [Motion for New Trial].

In re Brookshire Grocery Co., 250 S.W.3d 66, 69 (Tex. 2008). Because the second Motion for New Trial was a nullity, the clock on the trial court's plenary power started running when it signed the order overruling the first New Trial motion:

> In this case, because the only 329b motion Brookshire filed was a motion for new trial, the trial court's plenary power expired January 10, 2005, thirty days after it overruled the first motion. Brookshire's second motion for new trial was filed within that thirty-day period, and the trial court could have thus considered the grounds raised in it and granted a new trial on that basis or on its own motion; however, the court could only act while it had plenary power. See *Moritz*, 121 S.W.3d at 720. The February 1, 2005 order granting a new trial was signed after the court's plenary power period expired, and, therefore, that order was void.

In re Brookshire Grocery Co., 250 S.W.3d at 72; see also *Linan v. Padron*, 2010 WL 3180278, 2010 Tex. App. LEXIS 6594, *3-4 (Tex. App.–Corpus Christi-Edinburg August 12, 2010, no pet.). That does not mean that other motions, filed after the denial of a motion for new trial, would not extend the trial court's plenary powers:

> Thus, a party whose motion for new trial is overruled within thirty days of judgment may still file a motion to modify, correct, or reform the judgment – provided it is filed within thirty days of judgment – and thereby extend the trial court's plenary power. *See* TEX. R. CIV. P. 329b(g)

(deadlines for filing and ruling on a motion to modify, correct, or reform the judgment are the same as those prescribed for a motion for new trial); *see also L.M. Healthcare, Inc. v. Childs*, 929 S. W.2d 442, 444 (Tex. 1996) (holding that "a timely filed motion to modify judgment extends the trial court's plenary power, separate and apart from a motion for new trial"). It is this scenario--and not one involving successive rulings on multiple motions for new trial--that is referenced in TEX. R. CIV. P. 329b(e), which provides that plenary power expires thirty days after "all such timely--filed motions are overruled." TEX. R. CIV. P. 329b(e) (emphasis added); see also id. 329b(g) (providing that "[t]he overruling of [a motion to modify, correct, or reform the judgment] shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform").

In re Brookshire Grocery Co., 250 S.W.3d at 72.

And also keep in mind that an untimely amended motion for new trial can be a nullity. If the trial court denies a new trial, the belated motion is a nullity and supplies no basis for consideration upon appeal of grounds which were required to be set forth in a timely motion. *Mindis Metals, Inc. v. Oilfield Motor & Control, Inc.*, 132 S.W.3d 477, 486 (Tex. App. – Houston [14th Dist.] 2004, pet. denied), *citing Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003) (citing *Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983) and *Kalteyer v. Sneed*, 837 S.W.2d 848 (Tex. App.– Austin 1992, no writ)). However, the trial court may in its discretion consider grounds raised in an untimely motion and grant a new trial under its inherent authority before it loses plenary power. *Mindis Metals*, 132 S.W.3d at 486.

And keep in mind the need for a *signed, written order* under Rule 329(c) to effectuate the granting of a new trial. A granting of a motion for new trial reflected by a notation on the docket sheet stating "New trial granted," and accompanied by a signed and agreed to "Pre-Trial Scheduling Order" that set various pre-trial deadlines and contained a trial date, does not constitute a signed, written order granting a new trial, nor satisfy the need for a "bright-line rule" concerning new trials. *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009) (orig. proceeding), affirming holding in *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993) (per curiam).

E) Does A Motion for New Trial Now Need a Sound or Reasonable Basis?

I have repeated the mantra that the "filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary" so many times I cannot remember when I started. And, as Storey, et al, note on page 9 of their paper, and Sanders notes on page 4 of her paper, the Supreme Court has so held in *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993)–a case not mentioned by any of *In re Baylor Medical Center*, *In re Columbia Medical Center*, or *In re DuPont*, *supra*. We do know from *In re DuPont* that a trial court is not limited in granting a new trial to just the grounds set out in the motion for new trial. *In re DuPont*, 289 S.W.3d at 862. So it appears that filing a no specific grounds motion for new trial will continue to extend the appellate timeline, at least until the Supreme Court has that question in front of it and decides differently. But if you really want the motion granted, and granted on sufficiently specific grounds to withstand a mandamus proceeding, you might want to actually set out a basis other than just "the interests of justice."

3. Motion to Modify, Correct or Reform Judgment (TEX. R. CIV. P. 329b(g)

TEX. R. CIV. P. 329b also governs motions to modify, correct or reform judgments. Motions to modify, correct or reform must be in writing and signed by the party or his attorney, just like motions for new trial (TEX. R. CIV. P. 329b(g), compared to TEX. R. CIV. P. 320). TEX. R. CIV. P. 329b(d)(e)).

Although they need not be limited to these topics, Motions to Modify, Correct, or Reform often deal with housekeeping issues relating to a judgment, such as the award of attorney's fees, or to correct an award of pre-judgment interest or the assessment of costs. A Motion to Modify, Correct, Amend, Reform, etc. may be required to deal with issues of greater moment. *See e.g. Solomon v. Steitler,* 312 S.W.3d 46, 60 (Tex. App.–Texarkana 2010, no pet.) (argument that judgment improperly included permanent injunction waived because appellant did not bring issue to trial court's attention by a Motion to Correct or Amend Judgment or similar means).

Even though it is not one of the types of motions traditionally listed as preserving a no evidence point, a document titled a motion to modify may also serve that function. *See* Sec. 3.B.I.C.2.B, *supra*, and *Daniels v. Empty Eye, Inc.,* 368 S.W.3d 743, 749 (Tex. App.–Houston [14th Dist.] May 8, 2012, pet. denied). (Applying rule that substance of motion prevails over title and holding "[Appellant] asked the trial court to order a new trial, or alternatively, to render a take-nothing judgment on all of the plaintiffs' claims. We therefore construe the motion

not only as a motion for new trial, but also as a *motion for modification of the judgment* or for judgment notwithstanding the verdict."(emphases added))

The same filing and determination deadlines apply to a motion to modify as apply to motions for new trials–i.e., filed within 30 days of the signing of the judgment, and determined as a matter of law within 75 days of the signing of judgment. TEX. R. CIV. P. 329b(g). The filing of a motion to modify, correct, or reform a judgment "shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial." TEX. R. CIV. P. 329b(g). Interestingly, in light of the foregoing Rule, TEX. R. APP. P. 26.1 says that the notice of appeal must be filed within 90 days of the signing of the judgment if a party timely files "a motion to modify", but it says nothing about a motion which only says it is to correct or reform the judgment. The extension to file the notice of appeal probably extends to all such motions, in light of the language in TEX. R. CIV. P. 329b(g), but why take a chance–call your motion a motion to modify, correct or reform judgment. Finally, if a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed (except for clerical errors corrected after the expiration of plenary power, no complaint can be heard on appeal that could have been presented in an appeal from the original judgment). TEX. R. CIV. P. 329b(h). For example, a trial judge who modifies a judgment and then withdraws the modification has modified the judgment twice, and the appellate timetable runs from the withdrawal of the modification. *Arkoma Basin Exploration Co. v. FMF Assocs.*, 249 S.W.2d 380, 391 (Tex. 2008), as explained by *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 231(Tex. 2009)(orig. proceeding). But remember that although any change made to a judgment –no matter how minor– will restart the clock, a motion to modify that seeks only a clerical correction will not extend the appellate timetable or extend the trial court's plenary power. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.,* 10 S.W.3d 308, 313 (Tex. 2000) ("[A]ny change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h) . . but only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g) "). As to the types of changes which restart the running of the appellate timetable, *see* Oldham at p. 21, updating Storey. You should review the discussions in Section 3.B.d.i, which touch on the nuances of appellate and plenary power deadlines on motions for new trials, to remind yourself of the traps that exist.

Finally, remember–whatever your situation involving motions for new trial or to modify, correct or reform judgments, carefully research the law to make sure you have leading authority that tells you exactly when plenary power time frames expire and appellate timetables start to run and then expire. As mentioned earlier, TEX. R. CIV. P. 329b and its commentary takes up four full pages in West's Texas Rules of Court handbook, and the blurbs of cases citing TEX. R. CIV. P. s 320 and 329b take up nearly 200 pages in Vernon's Rules Annotated. Make sure you have cases in hand for everything you do or plan to do, and cases in hand for the net effect of your actions.

4. Formal Bills of Exception–TEX. R. APP. PRO. 33.2.

TEX. R. APP. PRO. 33.2 provides a mechanism to "complain on appeal about a matter that would not otherwise appear in the record." It comes into play in those situations where, for example, either intentionally or through oversight, a record is not made concerning a ruling. Rule 33.2 requires that "the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make *the trial court* aware of the complaint." *Emphasis supplied*. Rule 33.2 sets out its procedural and evidentiary requirements, emphasizing that the complaining party "must first present a formal bill of exception *to the trial court*." Rule 33.2(c)(1). If the parties cannot agree on the contents of the bill of exception, Rule 33.2 covers a series of potential scenarios as to the form of the bill of review that the trial judge puts in the record, and how the complaining party can get the bill of exception it prefers into the record, an eventuality that may require the affidavits of "at least three people who observed the matter to which the bill of exception is addressed." Rule 33.2(c)(3). Thus, even though Rule 33.2 allows a party to file a formal bill of exception no later than 30 days after filing the party's notice of appeal, the complaining party should start getting its ducks in a row immediately upon becoming aware that a matter might not be in the record–which is sometimes difficult to know, especially since the reporter's record will often not be available to review until after the deadline for filing a formal bill of exception, and the deadline (15 days later) for filing a request to extend that deadline, have passed. Rule 33.2(e)(1) and (3)

II. Trial to the Court

You have some of the same tools available to you here that you have available in a jury trial–motion for judgment and motion for new trial, to name a couple–and a few more. Let's address them in the chronological order you might most commonly see.

a. Motion for Judgment (Before Judgment)

We have already discussed this motion arising from the common law. *See* Section 3.A.ii.b., *supra*. You obviously file it before judgment.

b. Requests for Findings of Fact and Conclusions of Law (filed within twenty days after a judgment is *signed*. TEX. R. CIV. P. 296).

In their paper, McClure and Nickelson point out that, in a trial to the court in which no findings or conclusions are requested or made, the court of appeals will attempt to find any theory in the pleadings which will support the judgment. The law clearly not only allows the appellate courts that leeway in the absence of findings and conclusions–it requires that appellate courts give effect to the intended findings of the trial court and affirm the judgment if it can be upheld on any legal theory that finds support in the evidence. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 631 (Tex. 1992).

McClure and Nickelson also point out that, in their opinion:

> Make no mistake about it– more appeals from nonjury trials are lost here than anywhere else. Are you listening?

McClure and Nickelson, page 35.

So what kind of case requires the trial court to make findings and conclusions? A TEX. R. CIV. P. 296 Request for Findings of Fact and Conclusions of Law applies to **"a case tried in the *district* or *county* court *without* a jury"** (TEX. R. CIV. P. 296, emphasis supplied). The trial court conducting an evidentiary hearing apparently serves the necessary element that a case was "tried". *See Haddix v. Am. Zurich Ins. Co.*, 253 S.W.3d 339, 345 (Tex. App. – Amarillo 2008, no pet.), and cases cited therein. And the trial has to be to the court, not to the jury. But when you have a case with both jury findings and trial court findings, whoever appeals the issues decided by the court should consider requesting findings and conclusions on those issues–and this situation arises a lot in family law cases. *See* McClure and Nickelson, pages 35-41; *see also* Keltner and Perkins, page 4; *Heafner & Assocs. v. Koecher*, 851 S.W.2d 309, 313 (Tex. App. – Houston [1st Dist.] 1992, writ den.).

With those general rules in mind, the Texas Supreme Court has held that findings and conclusions have no purpose, should not be requested, made nor considered on appeal, and do not extend the appellate deadlines, in any of following situations: a summary judgment; a judgment after a directed verdict or notwithstanding the verdict; a default judgment awarding liquidated damages; dismissals for want of prosecution or want of jurisdiction, assuming no evidentiary hearing occurred; a dismissal based on the pleadings or special exceptions; or any judgment rendered without an evidentiary hearing. *IKB Ind. Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1977). ***This analysis is particularly important in trying to figure out if the filing of a request for findings and conclusions extends the appellate deadlines. If findings and conclusions do not meet the "are required by the Rules of Civil Procedure or...could properly be considered by the appellate court" test, the filing of a request for the same does not extend the appellate deadlines. TEX. R. APP. P. 26.1(a)(4).*** For example, a court of appeals has held that, where findings and conclusions can have no purpose and cannot be properly considered by the appellate court, such as when a judgment is rendered as a matter of law, the filing of a request for findings and conclusions does not extend the time for perfecting an appeal. *Flathers v. Tex. Dep't. of Pub. Safety*, 279 S.W.3d 789, 791 (Tex. App. – Amarillo 2007, no pet.)(findings and conclusions not required nor properly considered on appeal to district court of driver's license suspension when no evidence taken at hearing), *citing IKB Industries*, 938 S.W.2d at 443 and *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994).

But the Texas Supreme Court has held that a timely filed request for findings and conclusions extend the appellate deadlines when a party is entitled to findings and conclusions under TEX. R. CIV. P. 296, or when "they are not required by TEX. R. CIV. P. 296 but are not without purpose– that is, they could properly be considered by the appellate court." *IKB*, 938 S.W.2d at 443. Specifically, the Court identified the following situations as meeting this criteria:

> a judgment after a conventional trial before the court, default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and *any judgment based in any part on an evidentiary hearing*.

IKB, 938 S.W.2d at 443, *emphasis supplied*. And to emphasize– *always* think about the possibility of requesting findings and conclusions *if* you have a judgment or order based *in any part* on and *evidentiary hearing*. If you face other than the foregoing specific situations, and wonder whether requesting findings and

conclusions will serve to extend your appellate deadlines, you should find a case on point confirming that issue one way or the other. As a starting point in that regard, see other instances when findings and conclusions "could properly be considered by the appellate court" and hence extend the appellate deadlines. *See* Keltner and Perkins, page 3; McClure and Nickelson, page 44.

And that brings us to the timing of **filing stuff** regarding Findings and Conclusions. Unless a shorter time is required by statute (e.g., TEX. FAM. CODE ANN. §154.130), the **Request must be filed "within twenty days after judgment is signed.**" TEX. R. CIV. P. 296. Then what? Well, the "*court shall file* its *findings of fact and conclusions of law* **within twenty days after a timely request is filed**" and "shall cause its findings and conclusions to be mailed to each party." TEX. R. CIV. P. 297. If the court fails to do so, then "the *party making the request* shall, **within thirty days after *filing the original request***" file a notice of past due findings of fact and conclusions of law. TEX. R. CIV. P. 297, emphasis supplied. Filing the past due notice extends the deadline for the court to file findings of facts and conclusions of law "to **forty days from *the date the original request was filed.*"** TEX. R. CIV. P. 297, emphasis supplied. But if the Court actually files Findings and Conclusions, either party may request "specified" additional or amended findings or conclusions, provided "the request for these findings *shall be made* **within ten days *after the filing*** of the original findings or conclusions by the court." TEX. R. CIV. P. 298, emphasis supplied. A word to the wise–failing to timely file the request for additional or amended findings or conclusions will waive the right to complain that the trial court failed to make the same and that the findings were not full and complete (*McDuffie v. Blassingame*, 883 S.W.2d 329, 337 (Tex. App.–Amarillo 1994, writ den.), and a Motion for New Trial will not be construed as a request for additional findings. Keltner and Perkins, page 6, *citing Operation Rescue-Nat'l. v. Planned Parenthood*, 937 S.W.2d 60, 82 (Tex. App. – Houston [14th Dist.] 1996), *aff'd. as modified*, 975 S.W.2d 546 (Tex. 1998).

To view my attempt at diagraming this filing regimen, *see* the Schematic at Appendix One to this paper.

Having said all this, and despite the time limits placed on the trial court in the Texas Rules of Civil Procedure to sign Findings and Conclusion, nothing expressly prevents a trial court from filing original Findings and Conclusions late. *Quanaim v. Frasco Rest. & Catering*, 2005 WL 856911, 2005 Tex. App. LEXIS 2927, *19-20 (Tex. App. – Houston [1st Dist.] April 14, 2005), citing *Robles v. Robles*, 965 S.W.2d 605, 611 (Tex. App.– Houston [1st Dist.] 1998, pet. denied); *Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Auth.*, 876 S.W.2d 940, 959-60 (Tex. App.– Beaumont 1994, writ denied); *Morrison v. Morrison*, 713 S.W.2d 377, 380-81 (Tex. App.– Dallas 1986, writ dism'd). A trial court's late filing of Findings of Fact and Conclusions of Law is not reversible error unless the complaining party shows that the error caused harm–e.g., an inability to adequately present his appeal . *Quanaim*, at *19-20, citing *Robles*, 965 S.W.2d at 611; *Lower Valley Neches Auth.*, 876 S.W.2d at 960. And to preserve this right to complain of harm, at least two courts have held that you might have to file a motion to strike the late filed findings and conclusions. *Narisi v. Legend Diversified Investments*, 715 S.W.2d 49, 50 (Tex. App. – Dallas 1986, write ref'd. n.r.e.) and *Summit Bank v. The Creative Cook*, 730 S.W.2d 343, 345 (Tex. App. – San Antonio 1987, no writ) (citing *City of Roma v. Gonzalez*, 397 S.W.2d 943 (Tex. Civ. App. – San Antonio 1965, writ ref'd n.r.e.)), cited by McClure and Nickelson, page 45.

So **what does the losing party (i.e, you) gain** by filing a Request for Findings and Conclusions?

1) An **extension of the appellate timetable**, if you file correctly.
   a) Deadline for Filing: Requests for Findings and Conclusions must be filed within *twenty days* after a *judgment* is *signed*. *See* discussion of TEX. R. CIV. P. 296, *supra*. The rules make it pretty clear that filing early will not render your Request ineffective, and that the prematurely filed Requests will "be deemed to have been filed *on the date of* but subsequent to the time of the signing of the judgment." TEX. R. CIV. P. 306c, *emphasis supplied*.
   b) Timely and Appropriate Filing Extends Appellate Deadlines: the *timely* filing of an *appropriate* Request for Findings and Conclusions:

      extends the time for filing the Notice of Appeal until 90 days after the judgment is signed, *assuming* the findings and conclusions "either are required by the Rules of Civil Procedure or...could properly be considered by the appellate court." TEX. R. APP. P. 26.1(a)(4); and

      extends the time for filing the record until the 120th day after the judgment was signed (same assumption applies). TEX. R. APP. P. 35.1(a).

      Keep in mind the rigorous analysis necessary to determine whether findings and conclusions are required or properly considered, discussed above. Unless you have case law confirming

that findings and conclusions extend the appellate deadlines in your situation, it would be safest to assume they do not.

But remain aware that even a timely filed Request for Findings and Conclusions *will not* extend the appellate deadlines in an accelerated appeal (which includes an interlocutory appeal, quo warranto appeals, appeals required by statute to be accelerated or expedited, and appeals required by law to be perfected or filed within less than 30 days after the date of the appealed from order of judgment), or in a restricted appeal. TEX. R. APP. P. 26.1(b), (c); TEX. R. APP. P. 28.1(a)(b).

c) <u>But Even Timely and Appropriate Filing *Does Not* Extend Trial Court's Plenary Power Over Its Judgment</u>. TEX. R. CIV. P. 329b does not mention a Request for Findings or Conclusions extending any deadlines for filing Motions for New Trial, to Modify, Correct or Reform Judgments, or to Vacate. As pointed out by Sanders, two courts of appeals have held that a request for findings and conclusions does not extend the trial court's plenary powers. Sanders, page 8, citing *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App. – Houston [14th Dist.] 2003, orig. proceeding) and *Pursley v. Usery*, 982 S.W.2d 596, 599 (Tex. App. – San Antonio 1998, pet. den.).

2) The Other Things You Gain: A Potential Narrowing of the Issues on Appeal, and the Avoiding of Adverse Presumptions.

And this is where the party drafting the Findings and Conclusions–many times, the winning party–has to carefully complete their task. Even though the trial court has the duty to prepare findings and conclusions if properly requested to do so (TEX. R. CIV. P. 296), many times the trial court will request the winning party to draft the same. A very experienced trial judge once explained the rationale to me as follows: "It's your neck, let me hand you the razor." And the import of that advice comes home to roost when we consider the following directives:

A) As pointed out above, if no findings or conclusions are either requested or made, the court of appeals will attempt to find any theory in the pleadings which will support the judgment, and in fact the appellate court must affirm the judgment if it can be upheld on any legal theory that finds support in the evidence. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 631 (Tex. 1992).

B) Additionally, in the absence of a request for or the filing of findings, the appellate courts will "infer 'all facts necessary to support the judgment and supported by the evidence . . . .'". *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007), citing *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

C) The purpose of a request under the rules is to "narrow the bases of the judgment to only a portion of [the multiple] claims and defenses, thereby reducing the number of contentions that the appellant must raise on appeal." *Liberty Mutual Fire Insurance Co. v. Laca*, 243 S.W.3d 791, 794 (Tex. App. – El Paso, no pet.), citing *Larry F. Smith, Inc. v. Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.– Dallas 2003, pet. denied).

D) If findings are made, the "judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact." TEX. R. CIV. P. 299.

E) "but when one or more elements [of a ground of recovery or defense] have been found by the trial court, omitted unrequested elements, when supported by the evidence, will be supplied by presumption in support of the judgment." TEX. R. CIV. P. 299. This latter rule does not hold true if an element was submitted as a proposed finding or conclusion, and the trial judge deleted it. *Davey v. Shaw*, 225 S.W.3d 843, 857 (Tex. App. –Dallas 2007, no pet.), citing *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 253 (Tex. App.– Houston [14th Dist.] 1999, pet denied). This rule really emphasizes the need to file a request for additional findings and conclusions if an element you submitted to the court failed to make it into the findings and conclusions signed by the court.

F) "The trial court's duty to make such findings, in response to a timely request, is mandatory. *See* Tex. R. Civ. P. 297; *see also Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). A trial court's failure to respond to a timely request is presumed to be harmful error, unless the appellate record affirmatively shows that the complaining party has suffered no harm. Id." *Laca*, 243 S.W.3d at 794.

G) That harm is presumed, unless the record shows no injury. To determine harm, one must determine whether the appellant will be forced to guess the reason or reasons behind

the trial court's judgment. *Weber Co.*, 110 S.W.3d at 614. For example, in a case involving only a single ground of recovery or defense, harm probably does not occur. *Larry F. Smith*, 110 S.W.3d at 614. But if more than one ground of recovery or defense exists, the appellant is probably forced to guess. *Larry F. Smith*, 110 S.W.3d at 614.

3) How Do You Go About Drafting the Requests and Conclusions, If Asked to Do So, or Monitoring What the Trial Court Signs?

So while we have a presumption in favor of affirming the judgment, we have enough shifting trumps that the winning party must take its task of drafting proposed findings and conclusions seriously, and draft the same carefully. Keltner and Perkins suggested taking the live pleadings, and the Judgment signed by the trial court, and making a list of the elements of each ground of recovery ***and*** defense ***and*** other controlling issue on which you need a finding or conclusion; with those checklists in hand, you can request all the necessary findings and conclusions. Keltner and Perkins, page 12. These should include:

> Findings on ultimate or controlling issues, though findings are not required on evidentiary issues. *In the Interest of M.M.M.*, 229 S.W.3d 821, 824 (Tex. App.– Fort Worth 2007, no pet.), citing *In re Marriage of Edwards*, 79 S.W.3d 88, 99, 103 (Tex. App.– Texarkana 2002, no pet.)

It has been held that an ultimate fact issue is one that is essential to the cause of action and seeks a fact that would have a direct effect on the judgment. *Edwards*, 79 S.W.3d at 103, citing *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. App.– Houston [1st Dist.] 1985, writ ref'd n.r.e.). In contrast, an evidentiary issue is one the trial court may consider in deciding the controlling issue, but is not a controlling issue itself. *Edwards*, 79 S.W.3d at 103, citing *Winograd*, 695 S.W.2d at 639. If you are the drafter, err on the side of over inclusiveness.

Having said that, give careful consideration to the 2005 holding of the San Antonio Court in *Tagle v. Galvan*, 155 S.W.3d 510, 516 (Tex. App.–San Antonio 2005, no writ). In that case, the San Antonio Court said that the "question presented in this case is how does the holding in *Harris County* apply in the context of a bench trial? If a defendant believes a specific element of damages presented for the trial court's consideration is not supported by sufficient evidence, how does the defendant preserve error with regard to the court's consideration of that element?" *Id.* The Court answered that question by holding that "a properly prepared request for findings or additional findings specifically drawing a trial court's attention to the *Harris County/Casteel* problem will likely be sufficient to preserve error." *Id.* Unfortunately, the defendants in *Tagle* "only requested additional findings that: (1) appellee sustained lost wages in the amount of $ 14,297.00; and (2) appellee incurred reasonable and necessary past medical expenses in the amount of $ 56,232.96." *Id.* The *Tagle* Court thus concluded that the "requested additional findings did not specifically draw the trial court's attention to any complaint that one of the elements of damages included in its broad-form finding was unsupported by the evidence." *Id.* Accordingly, the *Tagle* Court held that the defendants had waived any complaint regarding the sufficiency of the evidence to support separate damage findings and were limited to a *Thomas* challenge to the sufficiency of the evidence supporting the damage award as a whole. *Id.* So keep in mind that, if you are attacking a specific element of a claim or damages as unsupported by the evidence, you should say so in your requested findings or additional findings. For a much more in depth discussion of this point, get hold of the PowerPoint presentation made by David Keltner at the STATE BAR OF TEXAS 24TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE (2010), concerning *Findings of Fact and Conclusions of Law: Do They Really Matter?*

4) What traps do you have to watch for?

Make Sure Your Requests Are Appropriately Titled, and Filed With the Clerk. TEX. R. CIV. P. 296 specifically says that requests for findings and conclusions "shall be entitled 'Request for Findings of Fact and Conclusions of Law'," "shall be filed," and that the party making the Request "shall serve it on all the other parties in accordance with TEX. R. CIV. P. 21a." The clerk brings them to the judge's attention "immediately." The same strictures apply to a "Notice of Past Due Filings of Fact and Conclusions of Law." TEX. R. CIV. P. 297.

Make Sure the Findings and Conclusions Are in Writing and in The Record, But Do Not Put The Findings in the Judgment. The Findings of Fact (and does this include the Conclusions of Law as well?) "shall not be recited in a judgment." TEX. R. CIV. P. 299a. If Findings are erroneously made in a judgment, and also in another document pursuant to TEX. R. CIV. P. 297 and 298, "the latter findings will control for appellate purposes." TEX. R. CIV. P. 299a.. Rules 297 and 298 imply that findings and conclusions have to be in writing by requiring the trial court to file the same and cause them to be mailed to the parties, and Rule 296 specifically says that parties may request the court "to state in writing" its findings and conclusions. Courts have concluded that "oral comments from the bench . . .do not constitute findings of fact and conclusions of

law." *Sharp v. Hobart Corp.*, 957 S.W.2d 650, 652 (Tex. App.–Austin 1997, no pet. h.), cited by *In re Guardianship of Fortenberry*, 261 S.W.3d 904, 909-10 (Tex. App.–Dallas 2008, no pet.).

Having said this, and while you should avoid putting your findings in the judgment, there is a split of authority among the courts of appeals as to whether findings in the judgment are effective or not. Keltner and Sanders point out in their paper *Findings of Fact & Conclusions of Law: Do They Really Matter?*, STATE BAR OF TEXAS 24th ADVANCED CIVIL APPELLATE PRACTICE COURSE (2010), the Amarillo, Beaumont, El Paso, and 14th District Courts have held that findings in a judgment can have probative value (as long as they do not conflict with other findings), while the Dallas, Fort Worth, Texarkana, and 1st District Courts have held that they will not consider findings recited only in the judgment. With this split, why not just follow the rule and not have to worry about it?

Remember That You Waive Error Concerning the Trial Court's Failure to File Findings and Conclusions by:

(1) A Late Filed Request for Findings and Conclusions;

(2) a Failure to File or a Late Filed Notice of Past Due Findings and Conclusions; *AND*

(3) a *Prematurely* Filed Notice of Past Due Findings and Conclusions. *See*: (1) as to late filed or absent Notice of Past Due Findings and Conclusions, *Betts v. Reed*, 165 S.W.3d 862, 867 (Tex. App.– Texarkana 2005, no pet.), citing *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.– Houston [14th Dist.] 2000, no pet.); and *Ohio Cas. Group v. Risinger*, 960 S.W.2d 708, 712 (Tex. App.--Tyler 1997, writ denied); and (2) as to *prematurely* filed Notice, *In the Interest of B.N.B.*, 2005 WL 236665, 2005 Tex. App. LEXIS 780, *4-5 (Tex. App.– San Antonio February 2, 2005), citing *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301-02 (Tex. App.– San Antonio 1999, pet. denied). But as to late filed second requests, at least one court has held that, because under the prior versions of 296 and 297 "it is apparent that the timetables set out by Rules 296 and 297 are flexible if there is no gross violation of the filing dates and no party is prejudiced by the late filing", a failure to strictly follow the rules in making the requests will not render the requests or findings unusable on appeal. *Wagner v. GMAC Mortg. Corp.*, 775 S.W.2d 71, 71-2 (Tex. App. – Houston [1st Dist.] 1989).

5) What Do You Do If the Trial Court Improperly Fails to Make Required Findings and Conclusions?

Raise this as an issue in your appellate brief. *Seaman v. Seaman,* 425 S.W.2d 339, 341 (Tex 1968). In that issue, show that you have suffered harm because you have to guess the reasons behind the trial court's judgment and, if the failure to file findings and conclusions can be corrected by the trial court, ask for an abatement of the appeal and an order of the appellate court to direct the trial court to correct its omission. TEX. R. APP. P. 44.4(a), (b); *Weber Co.*, 110 S.W.3d at 614; *Larry F. Smith*, 110 S.W.3d at 614. Furthermore, file a separate motion to abate, asking for that same abatement and correction relief, and list the need for abatement in any Docketing Statement required by the court of appeals (*See*, e.g., Docketing Statement (Civil Case), Section VII, "Extraordinary Relief", Fort Worth Court of Appeals).

6) What if your trial judge is no longer on the bench when findings are due?

From time to time, a trial judge hears a case and then through death, or the expiration of her or his term, fails to make findings. Dealing with this situation involves the interplay between Rules 296-299 and Tex. Civ. Prac. & Rem. Code §30.002. If a judge dies, his or her successor can file findings and conclusions. §33.002(a). If the trial judge's term ends, the successor judge "lack[s] authority to file the findings and thus the findings [made by the successor] were of 'no effect." *AD Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 136-37 (Tex. 2017). This means that any findings made by the successor judge are of no effect–but in order to preserve error about the lack of findings, the party which requested findings must file a notice of past due findings, which "is sufficient to preserve error for unfiled findings," assuming a timely initial request for findings and conclusions was made. *Villarai*, 519 S.W.3d at 136-137. At that juncture, the successor judge should ask the judge who tried the case to file findings and conclusions; if that judge "fails or refuses to file findings as and when requested," the appropriate remedy is "a new trial." *AD Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 142-43 (Tex. 2017).

c. Motion for New Trial

As with jury trials, a point in a motion for new trial in a trial to the court is not a prerequisite to a complaint on appeal, except for the grounds specifically enumerated in TEX. R. CIV. P. 324(b). *See* TEX. R. CIV. P. 324(a). And the fact of the matter is that all of the grounds enumerated in TEX. R. CIV. P. 324(b) relate to juries and jury trials, save for two: **newly discovered evidence** or **failure to set aside a judgment** by default. TEX. R. CIV. P. 324(b)(1). We have already discussed these two issues in Section 3.B.i.d.1.A, and will not discuss them again. We will also not discuss the rules and cases which seem to clearly indicate that you do not need to file a motion for new trial to preserve error

concerning legal and factual sufficiency. *See* Section 3.A.ii.a, *supra*.

As with jury trials, the motion for new trial can extend the plenary power of the trial court, as well as appellate deadlines. *See*, Section 3.B.i.d.1.B, *supra*. And in any situation where you have concerns that your requested findings of fact and conclusions of law are not required or properly the subject of consideration by the courts of appeals (*See* Section 3.B.ii.b*, supra*), timely filing a motion for new trial could help give you comfort that you have extended the time frame in which to file a notice of appeal, at least for non-accelerated, non-restricted appeals. *See* TEX. R. APP. P. 26.1(a).

d. Motion to Modify, Correct or Reform Judgment

Once again, we will not repeat the discussion found on this topic in the jury trial section of the paper–the motion to modify, correct or reform can extend appellate deadlines. *See* Section 3.B.i.d.2., *supra*. So, as with motions for new trial, in any situation where you have concerns that your requested findings of fact and conclusions of law are not required or are not properly the subject of consideration by the courts of appeals (*See* Section 3.B.ii.b*, supra*), timely filing a motion to modify, correct or reform could help give you comfort that you have extended the time frame in which to file a notice of appeal, at least for non-accelerated, non-restricted appeals. *See* TEX. R. APP. P. 26.1(a). And as with the discussion on motions for new trials, the motion to modify, correct or reform judgment can extend the plenary power of the trial court, as well as appellate deadlines. *See*, Section 3.B.i.d.2, *supra*. And keep in mind the very profound procedural advantage a motion to modify, etc., can have on appeal over a motion for new trial, in the context of arguing with the trial court that no evidence supports its judgment-- as Storey, et al, mention on page 14 of their paper and McClure and Nickelson mention on page 26 of their paper, if you raise a no-evidence challenge solely in a motion for new trial. If the appellate court sustains your no-evidence challenge on appeal, it cannot render judgment for you–it can only remand for a new trial. *Werner v. Colwell*, 909 S.W.2d 866, 870 (Tex. 1995); *Horrocks v. Texas Dept. of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993). Several court of appeals has applied the *Werner*/*Horrocks* rule in the context of a trial to the court. *Broomfield v. Parker*, 2007 Tex. App. 1712, 2007 Tex. App. LEXIS 1712, *7 (Tex. App. Tyler Mar. 7, 2007); *Huntley v. Enon Ltd. P'ship*, 197 S.W.3d 844, 853 (Tex. App.–Fort Worth 2006, no pet.); *Brown v. Traylor*, 210 S.W.3d 648, 659 (Tex. App.– Houston [1st Dist.] 2006, no pet.). At least one concurring opinion in a Court of Criminal Appeals opinion indicated that perhaps in some instances the *Werner*/*Horrocks* rule might not apply in a trial to the court. *Collier v. State*, 999 S.W.2d 779, 784 (Tex. Crim. App. 1999, Keasler, J., concurring). But better safe than sorry–file your motion to modify, etc., and ask for relief in addition to just a new trial.

e. Formal Bills of Exception–TEX. R. APP. PRO. 33.2.

See the discussion for formal bills of exception, to complain about matters that would not otherwise appear in the record, in Section B.I.d.4, *supra*.

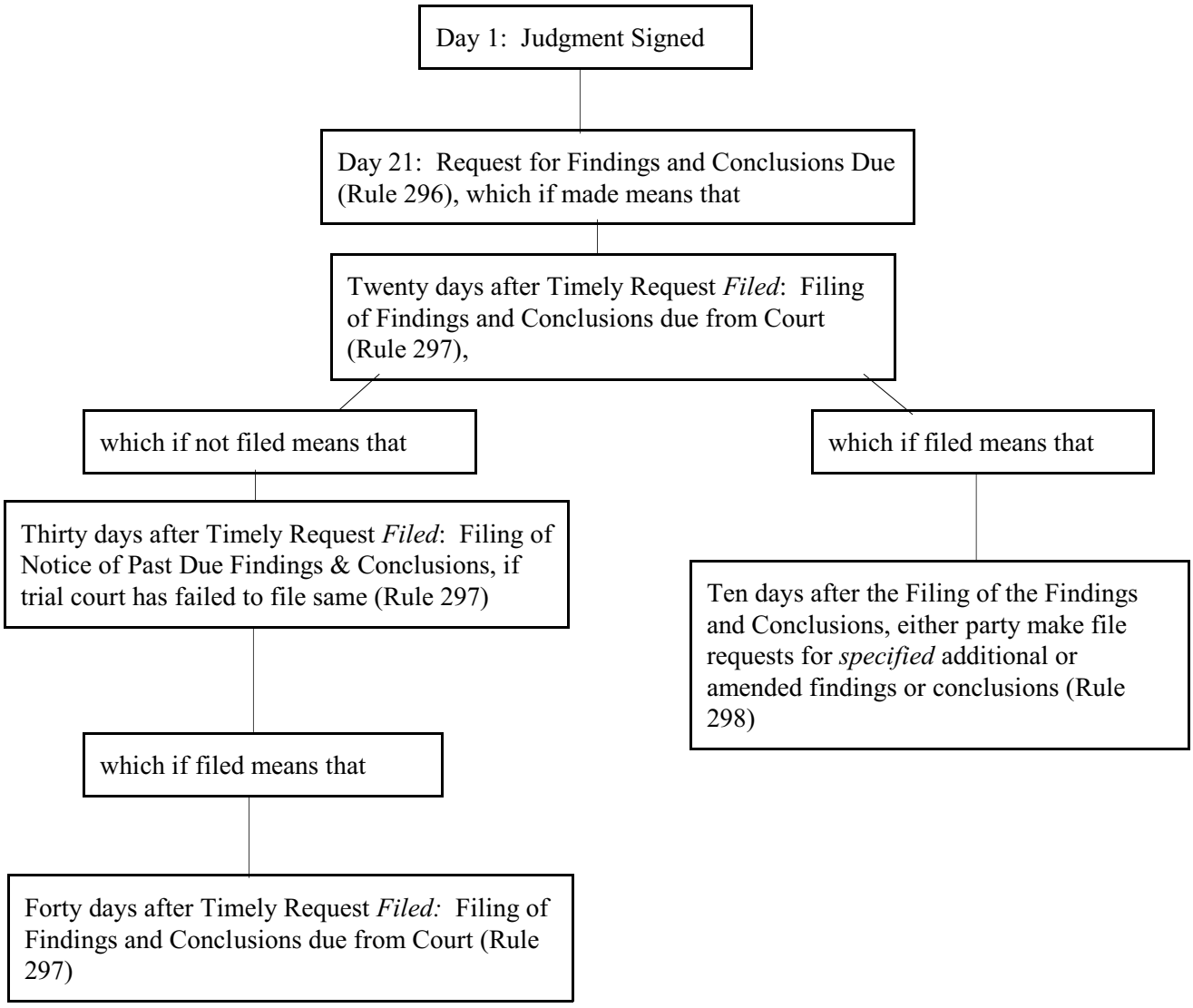
4. For Federal Post-Trial Preservation: Two articles for your consideration.

Consider these two papers for error preservation issues in Federal Court: Nissa M. Sanders, *Preservation - Post-Trial*, STATE BAR OF TEX. PROF. DEV. PROGRAM, APPELLATE BOOT CAMP (2004), and Russell S. Post, *Federal Post-Trial Practice for the State Court Practitioner–The Legal sufficiency Labyrinth*, 67 THE ADVOCATE, STATE BAR LITIGATION SECTION REPORT 62 (Summer 2014). In her paper, Nissa deals in detail with the preservation of error post-trial in federal court. *See* Sanders, pages 7-16. Absent some glitch, you can find that article in the CLE Articles section of the website of the Appellate Section of the State Bar of Texas (www.tex-app.org). Russell's paper, while more focused, is more current, and should be available on the Litigation Section's website (www.litigationsection.com). You or your lawyers may have to join these Sections to access the papers, but Section membership in both instances is really inexpensive, and the benefits outweigh the cost.

5. Conclusion

That's about it. Preserving error post-trial is a tedious process. You typically do best at it when you have the opportunity, and take advantage of the opportunity, to prepare for the task by giving thought to the error you will need to preserve and planning which tools will assist you. Finally, you should check, and then recheck, what unfolding events have done to extend the temporal limits of the plenary power of the trial court, and to establish the deadlines for perfecting your client's appeal.

Appendix One: Schematic For Filing Deadlines for Requests For Findings of Fact and Conclusions of Law



Appendix Two: Sufficiency Preservation Table–State Court

Tool	**Jury Trial**						**Nonjury Trial**					
	Legal Insufficiency			**Factual Insufficiency**			**Legal Insufficiency**			**Factual Insufficiency**		
Motion Name	**Must Use This**	**Must Use One of These**	**Can Use**	**Must Use This**	**Must Use One of These**	**Can Use**	**Must Use This**	**Must Use One of These**	**Can Use**	**Must Use This**	**Must Use One of These**	**Can Use**
For Judgment	NA	NA	No	NA	NA	No	No	Yes	Yes	No	No	Yes
Directed Verdict	No	Yes	Yes	No	Yes	Yes	NA	NA	No	NA	NA	No
JNOV	No	Yes	Yes	No	Yes	Yes	NA	NA	No	NA	NA	No
New Trial	No	Yes	Yes	***YES***	Yes	Yes	No	Yes	Yes	No	No	Yes
To Disregard	No	Yes	Yes	No	Yes	Yes	NA	NA	No	NA	NA	No

In *Aero Energy* the Texas Supreme Court said: "No evidence points must be preserved through one of the following procedural steps in the trial court: (1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; ***(3) an objection to the submission of the issue to the jury***; (4) a motion to disregard the jury's answer to a vital fact issue; (5) a motion for new trial." *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985) (***emphasis supplied, because not a specifically mentioned in prior table***); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992). *See* . TEX. R. CIV. P. 301, 324. Some courts of appeals have also confirmed that an appropriately worded motion to modify, correct, or reform judgment will also preserve a no-evidence point following a jury trial. *Suntrust Bank v. Monroe*, No. 02-16-00388-CV, 2018 WL 651198, 2018 Tex. App. LEXIS 942, at *20 (App.—Fort Worth Feb. 1, 2018, no pet.); *Truong-Tu v. Nguyen*, No. 14-02-00461-CV, 2004 WL 162941, 2004 Tex. App. LEXIS 798, at *5 (App.—Houston [14th Dist.] Jan. 29, 2004, pet. denied); *Galveston v. Rice*, NO. 01-88-00594-CV, 1989 WL 28349, 1989 Tex. App. LEXIS 709, at *4 (App.—Houston [1st Dist.] Mar. 30, 1989, no pet.).

Only a Motion for New Trial will preserve a factual sufficiency complaint. TEX. R. CIV. P. 324(b)(2), (3).

Appendix Three: Voting of Texas Supreme Court Justices on Error Preservation Issues in *Lloyd's v. Menchaca*

Issue	**7 Justices***	**Boyd, Hecht, Lehrmann, Devine**	**Boyd, Lehrmann, Devine**	**Hecht**	**Green, Hecht, Guzman, Brown**	**Green, Guzman, Brown**
Trial ct. erred in disregarding jury answer favoring D.	Yes					
Jury Answers conflict	Yes					
Conflict is fatal		Yes				
Conflict is Fundamental Error			No	?	?	
Have to object to preserve			Yes	No, for the reasons Green gives	Not in these circum-stances	
Have to object before jury dismissed			Yes		No. Post trial motions here were not necessary, but were good enough here in any event.	
Remand and retrial			Yes, in interest of justice	Yes, only way to correct trial court error		No need-render judgment that P take nothing.

* Justice Johnson did not participate, and Justice Blacklock concurred in the judgment requiring a remand, only.