COMMON PROBLEM AREAS IN CIVIL APPEALS: ADVENTURES IN KEEPING APPEALS ON TRACK AND DERAILING OTHERS

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State Bar of Texas
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Avoiding Malpractice Pitfalls Representing Multiple Clients, 2014 Advanced Personal Injury Law Course, Dallas, Texas (co-authored)

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I. Introduction

Adventure is just bad planning.
–Roald Amundsen, Norwegian Explorer (disappeared June 1928)

Let's say your case is in the trial court. You've got a pretty good point of law on the merits, and between the discovery sparring, the client shepherding, and the numerous battles with opposing counsel in and out of court, you've put your point in a motion to dispose of the case. And, music to your ears, the judge has finally agreed with you and ruled in your client's favor. You tell your client that she has won, and your client rejoices!

And then your case is no longer in the trial court. An appeal has been filed, and a new court awaits with new battles and new rules. The joy of victory starts to give way to a little bit of doubt. While you feel good about the merits of your case, you wonder if you jumped through the procedural hoops to hang on to your client's win on appeal.

For many lawyers, a good procedural fight is something worth showing up to work for. But for clients, few litigation outcomes can be more frustrating than an appellate loss on an avoidable procedural issue. On the same token, clients usually don't mind at all if a lawyer can pull out a victory by pointing out a procedural defect with their opponent's case.

In this paper, I'm going to discuss some common procedural issues that can make or break Texas state court appeals and consider how to address those problems on both sides. For each issue, I'll discuss the background law that gives rise to the problem and give some tips so hopefully you can avoid having your appeal derailed. I'll also give you some tips to keep in mind for spotting these traps for the times when they can help your client.

This paper starts by discussing summary judgment in Section II, then jury charges and verdicts in Section III, and issues with drafting orders and appealability in Section IV.

II. Summary Judgment

Summary judgment aims to weed out questions of law on the merits that should not go to a factfinder. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87 (Tex. 2018) (" . . . Rule 166a obligates Texas trial courts to distinguish between genuine fact issues, which must proceed toward trial, from non-genuine fact issues, which should not survive summary judgment."). The law imposes several mechanical requirements for a movant to obtain a summary judgment, and the appellate courts generally give no deference to the trial court's decision to grant summary judgment. *See id.* at 84.[1]

Perhaps it is no surprise then that appellate courts often reverse summary judgments based on procedural issues in the trial court. Let's consider two common issues that can give litigants

[1] I said "generally," not "always." Appellate courts will defer to trial courts for some summary judgment procedural rulings. *See, e.g.*, *Lujan*, 555 S.W.3d at 84–85 (explaining that exclusion of summary judgment evidence is subject to abuse of discretion review).

trouble: (1) preserving challenges to inadmissible evidence and (2) making sure that the grounds in the motion support the judgment entered and that those grounds are adequately challenged on appeal.

A. The Problem: Preserving challenges to inadmissible evidence.

Let's say you represent the movant on a no-evidence motion for summary judgment. The plaintiff non-movant timely responds, but he attaches an exhibit that contains plainly inadmissible hearsay. You file an objection with your reply, and after taking the matter by submission, the court signs an order granting your summary judgment. The court's order says nothing about the admissibility of the hearsay evidence.

When an appellate court reviews the trial court's summary judgment order, can the hearsay evidence be in the scope of review and thus raise a genuine issue of fact on appeal? Yes! "[E]ven if a party objects to an opponent's summary-judgment evidence, the evidence remains part of the summary-judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record." *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018) (per curiam) (cleaned up); *see also Alvarez v. Salazar-Davis*, No. 13-18-00366-CV, 2019 Tex. App. LEXIS 9309, at *17 n.7, 2019 WL 5445215 (Tex. App.—Corpus Christi Oct. 24, 2019, no pet.) (mem. op.). The Appellate Rules permit parties to preserve error by obtaining an implicit ruling. *See* Tex. R. App. P. 33.1(a)(2)(A) (requiring the record to show that the trial court "ruled on the request, objection or motion, either expressly or implicitly"). A mere order granting a motion for summary judgment, however, is often not sufficient to show an implicit ruling on the movant's evidentiary objections. *See Seim*, 551 S.W.3d at 166. An exception might exist if the summary judgment motion is necessarily predicated on the exclusion of certain evidence like, for example, needed expert testimony. *See id.* (declining to find an implicit ruling when, in that case, "sustaining the objections was not necessary for the trial court to grant summary judgment"). But generally, an order on the evidentiary objection is required. *See id.* In setting out this analysis in *Seim*, the Texas Supreme Court resolved a split in the courts of appeals as to whether and when an order granting summary judgment implicitly rules on evidentiary objections. *See id.* at 164–66.

In other words, even a prevailing movant must establish rulings on certain evidentiary objections to rely on those rulings as an appellee. As one court of appeals put it in an opinion cited positively by the supreme court in *Seim*, the movant satisfies this burden when "(1) the record affirmatively indicates that the trial court ruled on the objections to the summary judgment proof in granting summary judgment, or (2) the grounds for summary judgment and the objections to the summary judgment proof are of such a nature that the granting of summary judgment necessarily implies a ruling on the objections." *Trusty v. Strayhorn*, 87 S.W.3d 756, 760–61 (Tex. App.—Texarkana 2002, no pet.). The courts reason that this rule is justified because a similar rule applies at trial. *See id.* at 763. If the movant did not meet this burden on the record, the appellate court will review the otherwise inadmissible hearsay to determine whether it raises a genuine issue of material fact. *See id.* at 760–66; *see also* Tex. R. Evid. 802 ("Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.").

This can be bad news for the movant, but from the non-movant's perspective, this could be just what the non-movant needs to get a reversal and keep the case alive. The inclusion or exclusion

of evidence from the scope of review can be critical when the ultimate question is whether a fact issue exists. With that in mind, what can parties do to avoid this problem?

1. Tip #1: Know the difference between substantive and procedural objections.

First, we need to back up and note that not every evidentiary objection needs to be raised in the trial court. So, you or your opponent might not be out of luck simply for failing to object in the trial court.

Generally speaking, any appellate objection must have first been raised in the trial court. To preserve an objection for appeal, parties must usually (1) object to the trial court's ruling at a time when the trial court could correct the error, (2) state the specific grounds for the objection, and (3) obtain a ruling on the objection (or object to the failure to rule). *See* Tex. R. App. P. 33.1(a).[2]

But not all evidentiary objections are equal. Many evidentiary deficiencies are **formal** in nature and pertain merely to admissibility principles of what should and should not be before a factfinder. That is, formally defective evidence is evidence that is competent but inadmissible due to a rule of evidence. *See Scripps Tex. Newspapers, L.P. v. Belalcazar*, 99 S.W.3d 829, 834 (Tex. App.—Corpus Christi 2003, pet. denied). To preserve a complaint about a formal deficiency, the objecting party must timely object and obtain a ruling under Rule 33.1(a). *See id.*; *see also* Tex. R. Civ. P. 166a(f) ("Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."). Some deficiencies, however, affect whether the supposed evidence is any evidence at all—that is, whether the evidence is competent. *See Scripps Tex. Newspapers, L.P.*, 99 S.W.3d at 834. Since these **substantive** deficiencies affect the evidentiary sufficiency analysis, parties may raise substantive evidentiary objections for the first time on appeal. *See id.*; *see also Seim*, 551 S.W.3d at 166 ("When an affidavit presents purely substantive defects, those defects can be

[2] Rule 33.1(a) states the following general rule:

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

complained of for the first time on appeal and are not subject to the general rules of error preservation.").

The line between substantive and formal deficiencies can be blurry, and appellate courts sometimes disagree as to how to classify objections. *See, e.g.*, *Washington DC Party Shuttle, LLC v. iGuide Tours, LLC*, 406 S.W.3d 723, 735–36 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (discussing split concerning whether lack of personal knowledge is a formal or substantive defect). A common substantive objection is an objection that testimony is conclusory. *See Franks v. Roades*, 310 S.W.3d 615, 623 n.4 (Tex. App.—Corpus Christi 2010, no pet.) ("[The appellee] did not obtain a ruling on his objections to the affidavit; however, because a conclusory affidavit is a substantive defect as opposed to a defect of form, on appeal, we can determine whether the affidavit is conclusory."). Conclusory testimony is no evidence at all, and a reasonable fact finder cannot give it any credit. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). Other substantive objections include relying on verified pleadings instead of summary judgment proof,[3] complete failure to authenticate evidence,[4] and lack of relevance.[5]

Hearsay, however, is an example of a formal objection that must be made at the trial court level. *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 535 (Tex. App.—Corpus Christi 2015, no pet.) (mem. op.). As noted above, even inadmissible hearsay can raise a fact issue for purposes of summary judgment. Tex. R. Evid. 802; *see, e.g.*, *Kresge v. Mercado Latino, Inc.*, No. 13-01-078-CV, 2001 Tex. App. LEXIS 8548, at *16–18, 2001 WL 1636841 (Tex. App.—Corpus Christi Dec. 20, 2001, pet. denied) (not designated for publication). Other formal objections include attempted but improper authentication (as distinguished from complete failure to authenticate),[6] a lack of a jurat or failure to show that the supposed affidavit was sworn to,[7] competence,[8] and an objection that an interested witness's testimony is not clear, positive, direct, or free from contradiction.[9]

When analyzing an evidentiary objection raised for the first time on appeal then, the first question is whether that objection is formal or substantive. Substantive objections are a key tool in attacking your opponent's evidence, but if you did not preserve your formal objection to evidence in the trial court, you will be stuck with that evidence in the summary judgment record.

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[3] *Feldman v. Mfrs. Hanover Mortg. Corp.*, 704 S.W.2d 422, 425 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

[4] *Smith v. DeLooze*, No. 13-14-00092-CV, 2015 Tex. App. LEXIS 124, at *13, 2015 WL 124447 (Tex. App.—Corpus Christi Jan. 8, 2015, no pet.) (mem. op.).

[5] *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[6] *See Blanche v. First Nationwide Mortg. Corp.*, 74 S.W.3d 444, 451–52 (Tex. App.—Dallas 2002, no pet.).

[7] *Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

[8] *Americo Energy Res., L.L.C. v. Moore*, No. 13-08-00097-CV, 2008 Tex. App. LEXIS 7644, at *15–16, 2008 WL 3984169 (Tex. App.—Corpus Christi Aug. 29, 2008, no pet.) (mem. op.).

[9] *Id.*

Given that the line between formal and substantive can be blurry, the safest route is to object in writing in the trial court and obtain a written ruling to avoid preservation problems on appeal.

Proponents of evidence have to be vigilant on this issue in the trial court, too. If your evidence has a substantive deficiency, you are not safe merely because no one raised that deficiency in the trial court proceedings. You must keep this in mind when evaluating the strength of your position on appeal. For example, a conclusory objection can be devastating to the proponent's case. If an appellate court decides that an expert's testimony is not just unreliable (which is a formal defect) but conclusory and speculative (which is a substantive defect), you can end up with a no-evidence ruling without anyone ever objecting to the expert's testimony in the trial court. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) ("When a scientific opinion is admitted in evidence without objection, it may be considered probative evidence even if the basis for the opinion is unreliable. But if no basis for opinion is offered, or the basis offered provides no support, the opinion is merely a conclusory statement and cannot be considered probative evidence, regardless of whether there is no objection.").

2. Tip #2: Object in writing and obtain a ruling in writing before or when you get a ruling on the merits of the summary judgment motion.

While perhaps you can save your case by asserting a new objection for the first time on appeal, wouldn't you lose a little less sleep just by asserting your objection in the trial court? Maybe you should give the trial court an opportunity to rule on the objection, too.

If you have a formal objection and thus are in a position where you need to preserve your objection in the trial court, the safest way to do that is by filing a written objection before the summary judgment hearing and obtaining a written ruling on that objection at or before the time the court signs the order on the summary judgment motion.

Courts generally have held that the objections and the rulings on evidentiary issues in summary judgment must be in writing. *See Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018) (per curiam). That said, there are some courts that have found the point to be preserved through an oral ruling in the hearing. *See, Gomez v. Saratoga Homes*, 516 S.W.3d 226, 239 n.6 (Tex. App.—El Paso 2017, no pet.); *In re Estate of Brown*, 140 S.W.3d 436, 438 n.2 (Tex. App.—Beaumont 2004, no pet.). My advice: don't rely on oral rulings. Get it reduced to writing.

The Texas Supreme Court has recently endorsed the view that "it is incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver." *Seim*, 551 S.W.3d at 165–66 (quoting *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Nonetheless, an appellate court might find preservation even if the trial court signs the evidentiary ruling after issuing summary judgment if the record shows that the written evidentiary ruling merely memorializes a prior evidentiary ruling. *See, e.g.*, *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434, 447–48 (Tex. App.—Waco 2012, pet. denied). To avoid having to litigate this question, the objecting party should make efforts to get the evidentiary objection ruling signed before or simultaneously with the summary judgment order. If you have several summary judgment evidence or procedural objections, it would be wise to submit a "check-box" proposed

order asking the Court to sustain or overrule each objection as part of the order on the summary judgment motion. *See Seim*, 551 S.W.3d at 165 ("Practitioners should facilitate this procedure by incorporating all parties' objections to summary-judgment evidence in proposed orders granting or denying summary judgment." (cleaned up)).

As with any evidentiary objection, specificity is important. *See* Tex. R. Civ. P. 166a(f) (requiring formal defects to be "specifically pointed out" in objections). If you are objecting to only part of an exhibit that is partially admissible, for example, you must be clear about what part is objectionable. *See In re E.R.C.*, 496 S.W.3d 270, 282 (Tex. App.—Texarkana 2016, pet. denied). Unlike the de novo standard that applies to the summary judgment ruling itself, evidentiary rulings are reviewed on an abuse of discretion basis, and trial courts have discretion to overrule objections that are overly broad when part of the exhibit is admissible and part is not. *See id.*

Also, for you lawyers representing appellants out there, if the trial court issues an order sustaining an objection to your client's evidence, you must remember to challenge that evidentiary ruling if you want the appellate court to consider that evidence on appeal. If you fail to complain about the evidentiary ruling, the appellate court will disregard that evidence as properly excluded. *See, e.g.*, *Gomez v. Armstrong*, No. 13-03-658-CV, 2004 Tex. App. LEXIS 7989, at *12–13, 2004 WL 1932630 (Tex. App.—Corpus Christi Aug. 31, 2004, no pet.) (mem. op.) ("A party who does not object to the trial court's ruling excluding summary-judgment evidence or seek to amend any deficient affidavit waives the right to complain about the ruling on appeal. Similarly, a party who does not direct an issue on appeal challenging a trial court's ruling waives that issue.").

B. The Problem: Covering all your grounds.

Another common problem area in summary judgment appeals concerns what grounds can actually support the trial court's order. If a trial court cites no basis in its order granting a summary judgment, the appellant has the burden of challenging all possible bases for that order—that is, the appellant must challenge all grounds presented by the summary judgment motion to obtain a reversal on appeal. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015). On the other hand, if the trial court cites a basis for its ruling, the appellant only has the burden to challenge that basis to obtain a reversal, though the appellate court can reach other bases in its discretion if the parties brief those issues. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996).

So, here's an initial tip for summary judgment movants (and trial judges, too!). If you win your motion for summary judgment, you are probably better off on appeal with an order that does not cite any basis for its ruling.[10] Unless the trial court orders otherwise, you generally should submit a summary judgment order that cites no basis for the ruling so that your opponent has to challenge every possible basis. Orders that cite no basis can also be good for judicial efficiency as they can avoid seriatim appeals on each different legal ground. *See Diversicare Gen. Partner v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005) ("In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal *in the interest of judicial economy*." (emphasis added)).

[10] This is, of course, subject to the caveat that rulings on evidentiary objections should be in writing as discussed in the first problem above. *See supra* § II.A.

The language of the order can present other problems that can trip up litigants on appeal. First, for example, parties need to take care to be sure that the summary judgment motion actually supports the order in question. Second, parties also need to watch to see if the non-movant actually challenges all the possible bases that can support the summary judgment. Let's consider those two issues in turn.

1. Tip #1: Determine whether the motion, if granted, should result in a partial or final judgment.

A trial court cannot use summary judgment to dispose of any claims or defenses not properly presented in the summary judgment motion. *See G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011); *Jimenez v. City of Aransas Pass*, No. 13-17-00514-CV, 2018 Tex. App. LEXIS 10240, at *10, 2018 WL 6565090 (Tex. App.—Corpus Christi Dec. 13, 2018, no pet.) (mem. op.). This is true regardless of the merit of those claims or defenses.

This rule can cause trouble for litigants. When movants think about what order the trial court should sign if their motion is granted, movants must carefully consider whether the summary judgment should be partial or final—that is, whether their motion aims to dispose of all claims and all parties. If a trial court signs a judgment that disposes of all claims even though the summary judgment motion did not address all of the claims, the judgment will be reversed if the non-movant asserts that point on appeal. *See G&H Towing Co.*, 347 S.W.3d at 297.

To avoid problems, movants should compare their summary judgment motion to the pleadings in the case to determine whether the motion's grounds actually attack all claims in the opposition's pleadings. Attorneys representing non-movants, on the other hand, should take care on appeal to make sure that the judgment did not grant more relief than requested or otherwise erroneously dispose of unchallenged claims.

There are additional procedural problems that lawyers must keep in mind here, too. Remember that summary judgment grounds generally must be presented in summary judgment motions, not replies in support of those motions. *See Haye v. Elton Porter Marine Ins.*, No. 13-07-310-CV, 2009 Tex. App. LEXIS 1704, at *9–10, 2009 WL 542486 (Tex. App.—Corpus Christi Mar. 5, 2009, no pet.) (mem. op.). If you realize that you mistakenly failed to address one of the non-movant's claims after the non-movant files a response, you may need to delay the summary judgment hearing and amend your motion, or you can settle for advocating for a partial summary judgment motion for now. *See id.* Still, it is better to catch this issue in the trial court than have it pointed out to you on appeal.

2. Tip #2: Make sure the appellant non-movant addresses every ground presented in the summary judgment motion.

When the trial court cites no basis for its summary judgment order, the appellate court must affirm the summary judgment unless the appellant negates every possible basis for the judgment presented in the underlying motion. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015). This rule can be dangerous for appellants. If the appellant non-movant fails to challenge

one of the grounds, the court of appeals generally should affirm the judgment. *See John H. Carney & Assocs. v. Rosellini*, No. 13-13-00368-CV, 2015 Tex. App. LEXIS 522, at *10–15 (Tex. App.—Corpus Christi Jan. 22, 2015, no pet.) (mem. op.).

To avoid problems under this rule as an appellant, you should make sure that your appellate "to do" list includes taking time to compare your brief to a careful reading of the record. Don't assume that you remember everything from the trial court. It is worth the time to reread the summary judgment briefing. If you think a ground is not properly before the court because it was just a throwaway line or was not included in the summary judgment motion, consider saying that and then addressing it out of an abundance of caution. While you generally should avoid making arguments for your opponent, you have to balance that instinct against your responsibility as an appellant to challenge every ground presented.

Again, traps for appellants can present opportunities for appellees. If you represent the appellee, you should *also* check the record and reread your own summary judgment motion after you read your opponent's appellate brief. When you're done reading your opponent's brief, you might be chomping at the bit to fight back on the "big issue" in your case. But before you do that, make sure to reread the record. You might be surprised to find that your opponent wholly failed to brief an alternative basis for the summary judgment. Don't leave a potential easy win on the table!

One more thing. Let's say you represent the appellant, and you have that bad day where the appellee's brief or, worse, the appellate court's opinion alerts you to the fact that you failed to address an alternative ground for summary judgment. Can you do anything?

Maybe! You might be able to obtain leave to amend or supplement your brief to address the supposedly waived ground. The Appellate Rules permit courts of appeals to grant leave to amend or supplement briefs "whenever justice requires, on whatever reasonable terms the court may prescribe." Tex. R. App. P. 38.7. And the rules and Texas Supreme Court precedent encourage courts to resolve appeals based on the merits, not procedural technicalities. *See* Tex. R. App. P. 44.3; *Horton v. Stovall*, 591 S.W.3d 567, 569–70 (Tex. 2019) (per curiam). Some courts of appeals have even endorsed granting leave after issuing an opinion. *See, e.g.*, *Rogers v. City of Fort Worth*, 89 S.W.3d 265, 284 (Tex. App.—Fort Worth 2002, no pet.) (granting leave to file post-submission brief adding argument for the first time); *see also Linan v. Linan*, 632 S.W.2d 155, 156 (Tex. App.—Corpus Christi 1982, no writ) ("This Court is authorized to permit the filing of amended briefs, including additional points of error not originally presented, *even after the submission and the rendition of an opinion*." (emphasis added)). It may be worth a try. What you shouldn't do, however, is try to raise the new point for the first time in a reply brief without leave. *See State Office of Risk Mgmt. v. Pena*, 548 S.W.3d 84, 92 n.3 (Tex. App.—Corpus Christi 2018, no pet.) ("An issue raised for the first time in a reply brief is ordinarily waived and need not be considered by this Court.").

III. Charges and Verdicts

Onto another area of law. The Texas state jury charge presents some of the thorniest procedural issues known to appellate courts, and it should be no surprise that there are a lot of problem areas here. I'm going to discuss two of them.

The first has come up with some frequency at the Texas Supreme Court, and it involves the dreaded issue of when objections to the charge can be raised for the first time after the verdict. The second is more common but frequently neglected to the appellant's disappointment: how the charge controls evidentiary sufficiency challenges.

A. The Problem: Objecting to the charge for the first time post-verdict because the plaintiff tried the wrong theory or the findings were immaterial.

As you know, some peculiar and exacting rules govern charge error preservation. For some kinds of error, you have to object to the charge and get a ruling,[11] and for other kinds of error, you have to request a proposed charge in substantially correct wording and get a ruling.[12] For some particularly ambiguous errors, you might even have to do both to be safe because objecting or requesting alone might not be enough. Even if you properly classify your error, you still need to abide by rules for *how* to object or preserve by submission. Looming in the background of this typically strict area of law is the Texas Supreme Court's statement (which may or may not be applied to save your client) that all the appellant really has to do is make "the trial court aware of the complaint, timely and plainly, and obtain[] a ruling." *State Dep't of Hwys. & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). These difficulties are layered on top of often difficult questions of what the law says on the merits of an issue and what the jury should be told about that issue. And of course, all of this usually happens between the close of evidence and closing arguments with fatigued lawyers, tired judges, and impatient jurors waiting outside.

Like error preservation generally, as *Payne* indicates, the whole point is to give the trial court an opportunity to do the right thing and correct the problem before the case is submitted to the jury. If done right, theoretically, lawyers also should be given an opportunity to change the charge if they can be convinced that something is wrong.

Yet, there are times where parties can preserve charge related error despite doing nothing at the charge conference. Does that mean a party could, under the right circumstances, lie behind the log the entire trial and then raise an objection to the charge for the first time after an unfavorable jury verdict and defeat the opponent's entire cause of action as a matter of law?

The answer, it turns out, is yes, even though the result might be devastating to the claimant's case. The Texas Supreme Court has issued recent opinions reversing and rendering judgment in favor of the defendant in these circumstances. Two recent cases (*United Scaffolding* and *Red Deer*) serve as warning signs for claimants that would perhaps otherwise prevail in trial and provide valuable lessons for lawyers. Those cases are discussed in the next sections.

Broadly speaking, these cases involve situations where the plaintiff tried the case on the wrong legal theory (as in *United Scaffolding*) or obtained findings that are irrelevant to the correct legal theory (as in *Red Deer*).

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[11] *See* Tex. R. Civ. P. 272, 274.

[12] *See* Tex. R. Civ. P. 273, 276, 278.

1. Tip #1: Make sure the case was tried on the correct theory.

Let's start with the situation where the plaintiff tries the case on the wrong legal theory.

The procedural setting for this kind of problem is important. Charge error preservation analysis depends largely on (1) who has the burden of proof on the claim or defense at issue; (2) whether the error pertains to a question, a definition, or an instruction; and (3) whether the error in the charge concerns an omission or a defect. For this problem, we are talking about the plaintiff's liability question, so it is a situation where the plaintiff has the burden of proof on that question.

The plaintiff has the burden to secure proper findings to support recovery on the claims on which the plaintiff bears the burden of proof. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 481 (Tex. 2017). If the charge were to entirely omit a question on the plaintiff's ground for liability, the plaintiff would have the burden to timely request a question in substantially correct form to preserve error for appeal. *See id.*; *see also* Tex. R. Civ. P. 278. Otherwise, the plaintiff will waive the ground. *United Scaffolding, Inc.*, 537 S.W.3d at 481 ("[T]he burden to secure proper findings to support [a] theory of recovery is on the plaintiff, and a plaintiff who fails to satisfy that burden waives that claim."); *see also* Tex. R. Civ. P. 279 ("Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived.")).

From the defendant's perspective, however, the defendant has no burden to say anything at the charge conference to a charge that wholly omits a question on which the plaintiff would have the burden of proof. *See United Scaffolding, Inc.*, 537 S.W.3d at 481. Instead, the defendant only needs to object if the charge omits only part of the plaintiff's claim—that is, if the charge omits some but not all of the elements of the claim. *See id.* If the court submits the case to the jury on entirely the wrong theory, the defendant can thus wait until after losing the verdict to object that the plaintiff failed to obtain findings necessary to support a judgment. *See id.*

The Texas Supreme Court's recent opinion in *United Scaffolding* provides a stark example of how these rules can play out in court. In that case, the plaintiff sued the defendant for general negligence relating to a personal injury, and the case ultimately went to trial twice. *Id.* at 467–68. In the first trial, the trial court submitted the case to the jury with a general negligence question that had been proposed *by the defendant*. *Id.* at 468. The jury returned a verdict partly in favor of the plaintiff, but the plaintiff filed a motion for new trial claiming the verdict was against the great weight and preponderance of the evidence. *Id.* The trial court granted the motion for new trial, and after some mandamus wrangling, the parties tried the case for a second time. *Id.*

On the second go around, the trial court again submitted the same general negligence question as the first trial. *Id.* Since the defendant had proposed that question in the first trial, it was no surprise that the defendant did not object to that question at the charge conference. *See id.*

This time the jury returned a much larger verdict for the plaintiff. *Id.* After receiving the unfavorable verdict, the defendant objected *for the first time* in a motion for judgment notwithstanding the verdict that the plaintiff's cause of action in this case was actually one for

premises liability, not general negligence. *Id.* As a result, the defendant argued that the plaintiff had failed to obtain findings to support a premises liability judgment and that the plaintiff should thus take nothing. *Id.*

On appeal, the defendant argued that it did not need to present its objection in the charge conference because the charge wholly omitted the plaintiff's premises liability question. *Id.* at 481–82. In a split opinion, the Texas Supreme Court agreed and explained that a party in the defendant's position is not required to "forfeit a winning hand" by warning the plaintiff of his error. *Id.* In doing so, the supreme court also held that the submission of general negligence did not constitute a partial omission, even though general negligence and premises liability might appear to be similar. *See id.* at 471–72, 481–82 (noting that the claims "requir[e] plaintiffs to prove different, albeit similar, elements"). The supreme court also held that the defendant had not invited error by requesting the general negligence question in the first trial because the invited error doctrine would only extend to actions taken during the second trial. *Id.* at 481–82.

As a result, despite waiting through two trials and related mandamus proceedings before objecting, the defendant prevailed, and the supreme court rendered judgment that the plaintiff take nothing. *Id.* at 483.

So, what tips can we take from this opinion? Well, the main one (especially on the plaintiff's side) is that you had better be very sure what your cause of action actually is. You cannot depend on your opponent to point it out to you in the charge conference. As *United Scaffolding* demonstrates with devastating effect, the defendant may be free to wait until after the verdict to bring this problem to the court's attention.

Plaintiffs also may not be able to safely depend on a supposed overlap between the cause of action that was submitted and the correct cause of action. Consider how close premises liability appears to be to general negligence. *United Scaffolding* still held that a general negligence submission wholly omitted the premises liability claim. *Id.* at 481–82.

If you're not sure what your cause of action is as plaintiff's counsel, you may need to ask the court to submit both just to be safe.

There are lessons for defendants here, too. On one hand, yes, you can be safe waiting behind the log for a bad verdict to raise this objection. But that assumes that the court's charge wholly omits the correct cause of action. If the cause of action is only *partially* omitted, you will waive your objection and could potentially end up with findings deemed against you on any omitted elements. *See id.* at 481. So, while it is possible for you to wait until post-verdict, tread carefully.

Also, a key fact in *United Scaffolding* is that the defendant requested the general negligence charge only in the first trial and not the second trial. If the defendant had tried this objection after the verdict in the first trial, the outcome should be different because the defendant would have invited error as to that trial. *See id.* at 481–82.

Regardless, both sides need to be aware that the charge error issues may be far from over at the verdict stage. A defendant's careful attention to its post-verdict objections might pay off with an outcome-changing argument. Be careful.

2. Tip #2: Even if your case is tried on the correct theory, double-check the charge to be sure that the findings support a judgment on that theory.

Alright, but let's say that the plaintiff did try his case on the right theory. Recent case law shows that even under that circumstance the plaintiff still may not be in the clear.

Red Deer involved an oil and gas dispute that turned on whether the defendant could invoke a "shut-in royalty clause"[13] to protect its interest in an oil and gas lease. *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 395–96 (Tex. 2017). The key question under the lease was whether the well was incapable of producing gas in paying quantities on the last day gas was sold or used—that is, on June 4, 2012. *Id.* at 397–98. The court's charge, however, asked jurors whether the well was capable of producing in paying quantities on June 13, 2012, which was the day after the defendant shut the well. *Id.* at 393, 397–98. The charge did not ask about June 4th. *Id.*

The defendant did not object to the incorrect date during the charge conference. *Id.* at 401–02. Instead, the defendant waited until the jury answered "yes" to the charge to argue that the charge asked about an irrelevant date and thus could not support a judgment that the lease had been terminated. *Id.*

The Texas Supreme Court agreed that the defendant had preserved error because the jury's finding was immaterial. *Id.* at 402. A jury question is immaterial when its answer can be found elsewhere in the verdict or when its answer cannot alter the effect of the verdict. *Id.* A party can preserve an immateriality challenge by objecting for the first time in post-verdict proceedings. *Id.* The *Red Deer* defendant raised its immateriality objection in a motion for judgment in disregard of a jury finding, a motion for judgment notwithstanding the verdict, and in a motion for new trial. *Id.* Since the jury finding in *Red Deer* was immaterial as a matter of law, the court reversed and rendered a take-nothing judgment in favor of the defendant. *Id.* at 402–03.

Red Deer is similar to *United Scaffolding* in that both cases involved a defendant successfully torpedoing a verdict by pointing out a charge defect for the first time after the verdict was issued. But *Red Deer* presents something of a different problem. In *United Scaffolding*, the plaintiff's case failed because the plaintiff asked the jury about the wrong cause of action. In *Red Deer*, the plaintiff asked the jury about the correct cause of action but nonetheless erred by asking for a finding that turned out to be immaterial. Both the whole omission of the plaintiff's claim in *United Scaffolding* and the immaterial finding in *Red Deer* could be raised for the first time after the defendant received an unfavorable verdict.

[13] "[A] shut-in royalty clause provides for a substitute or contractual method of production, which will maintain the lease in force and effect when a gas well is drilled and for which no market exists. Invocation of the shut-in royalty clause is considered constructive production and will maintain the lease if its terms are satisfied." *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 395 (Tex. 2017).

The biggest takeaway from *Red Deer* is that parties on both sides of the aisle need to be very careful that the charge is asking for the right facts. If your case needs a finding as of a specific date, use that date. If it is not entirely clear what date you need, you may need to ask the jury multiple questions to protect you on appeal. If you need to ask about specific parties and entities, make sure you are clear and specific. Most importantly, if you are representing the party with the burden of proof on the issue, do not assume that you are using the right facts merely because the other side has not objected.

Perhaps just as important, if your client did not have the burden of proof and has suffered an unfavorable jury finding, do not forget to double-check that the charge actually asked the jury for a material finding. As *Red Deer* shows, it may not be too late to raise that kind of challenge post-verdict!

Consider also how tricky this issue can be from a preservation standpoint. In the charge conference, parties generally have the burden to object to defects in the charge. *See* Tex. R. Civ. P. 274 ("A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections."). But *Red Deer* shows that a question about an incorrect date may not be a mere defect for purposes of the preservation rules when the incorrect date would result in an immaterial finding. *See* 526 S.W.3d at 401 (rejecting argument that defendant was required to object under Rule 274). In a later opinion in fact, the supreme court explained that "a complaint that a jury's answer is immaterial is not a jury charge complaint." *Musallam v. Ali*, 560 S.W.3d 636, 640 (Tex. 2018).

Finally, while the supreme court reversed and rendered judgment for the defendant in *Red Deer*, that is not always the result on appeal for an immaterial jury finding. There was no fact issue in *Red Deer* as to what the correct date actually was, but if there had been one, the court likely would have reversed in remanded for a new trial. *See, e.g.*, *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 486–86 (Tex. 2017) (remanding when jury was improperly charged on cessation of production in paying quantities and where conflicting facts existed as to the proper period). So, if you are litigating an immateriality objection on appeal, do not forget to consider whether you have an alternative argument for a remand for a new trial rather than rendition.

B. The Problem: Evidentiary sufficiency challenges from a jury verdict where no one challenges the language of the charge.

Onto another rule that can derail your appeal if you aren't careful. In appeals from a jury verdict, parties often fight over what evidence does and does not support the verdict. But if you plan to run to an appellate court arguing that the plaintiffs presented insufficient evidence of their claims, you cannot forget that the evidence is measured against the charge as submitted, not some other law, if no one objects to that language. *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 407 (Tex. 2016).

In an appeal from a judgment on a jury verdict, evidentiary sufficiency challenges are measured against the language of the charge unless a party successfully proves charge error. *See*

id. This rule means that the appellate court will look to the language of the charge, not some law not identified in the charge. *See id.* This is true "[e]ven if another legal theory was argued to the jury and explained by the lawyers in argument" because "[s]tatements from lawyers as to the law do not take the place of instructions from the judge as to the law." *Id.*; *see also State Office of Risk Mgmt. v. Pena*, 548 S.W.3d 84, 90 n.2 (Tex. App.—Corpus Christi 2018, no pet.).

This rule has several implications for how you evaluate and advocate an appeal and what actions you should take in the trial court. Let's consider those points in turn.

1. Tip #1: On appeal, ask, "Legally sufficient evidence of what?"

We'll start by discussing the appeal since it highlights some of the potential problems here.

A critical part of your evaluation of your evidentiary sufficiency point on appeal has to be taking time to determine what you are measuring the evidence against. As the lawyer for the party challenging the jury's finding, you may not be able to simply frame your evidentiary sufficiency challenge against the substantive law as it exists. You must first evaluate whether the jury charge properly stated the law, and even then, you should reference the charge in your argument.

As the lawyer for the party defending the jury's finding, you also must stop and ask whether your opponent has considered the charge at issue. If your opponent is pushing for some facet of the law that was not presented in the charge to the jury, bring that to the appellate court's attention. Jury findings get affirmed every year because parties fail to measure the evidence against the charge as written. *See, e.g.*, *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 407 (Tex. 2016) (finding legally sufficient evidence supported jury finding on employment issue and disregarding alter ego theory the objecting party had failed to preserve).

Secondly, if you represent the appellant and you are dissatisfied with the charge as written, you need to make sure to assert a point for charge error if you can. This, of course, can put a lot of weight on whether your client preserved the charge error objection in the trial court. If your client did not preserve the charge error, you need to make that part of your analysis when you are evaluating the strength of your appeal. It is possible that your client could be right on the law on evidentiary sufficiency but still lose due to the language of a charge containing a waived error.

2. Tip #2: The charge is a critical piece of the evidentiary sufficiency analysis.

The evidentiary sufficiency problem brings into focus just how essential the charge is to an appeal from a jury verdict. In essence, to overcome the jury's findings on evidentiary sufficiency grounds, you need to show either (1) that the jury did not have sufficient evidence to support a "yes" answer to the charge as written or (2) the trial court gave the jury the wrong charge, and there was insufficient evidence to support a "yes" answer to an appropriately written charge. *See Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 407–08 (Tex. 2016); *W.L. Lindemann Operating Co. v. Strange*, 256 S.W.3d 766, 775 (Tex. App.—Fort Worth 2008, pet. denied). The failure to properly challenge the charge error in the trial court and in the appellate court can be the difference between success and failure for your client.

Consider, however, how this can affect your error preservation tactics in the trial court. The rules permit parties to preserve evidentiary sufficiency challenges by objecting for the first time through post-verdict mechanisms. While legal sufficiency challenges can be preserved by making pre-verdict motions and objections, they can also be preserved by objecting for the first time in several types of post-verdict and post-judgment motions. *See Gerdes v. Kennamer*, 155 S.W.3d 523, 531–32 (Tex. App.—Corpus Christi 2004, pet. denied). Factual sufficiency challenges must be made by a motion for new trial when challenging a jury verdict. Tex. R. Civ. P. 324(b).

Yet, your entire evidentiary sufficiency analysis depends on how the charge was written in the first place, which means that it also can depend on whether parties properly preserved error to the charge *during the charge conference*. At heart then, your client's appeal may well depend on making sure that you carefully analyze the charge and the proper mechanisms for preservation before and during the trial. While that can be a lot of pressure in the heat of trial and with the mish mash of drafts that fly back and forth during the charge conference, it is nonetheless what Texas procedural law requires. A failure to challenge an erroneous charge not only waives charge error but can seriously undermine your efforts to challenge the sufficiency of the evidence to support a jury finding.

IV. Drafting Orders and Questions of Appealability

For our final topic, I'll discuss two related issues that can produce a lot of problems and questions: how an order is written and when rulings are appealable.

The way orders are written may be one of the more overlooked and consequential aspects of appeals. When the trial judge rules in your client's favor, she typically asks you for a proposed order. In the rush of preparing for the hearing and putting out other fires, you realize you didn't file a proposed order before the hearing, but not wanting to lose momentum you say, "Right away, your Honor." Then you get back to your office, put together what looks right, look it over a few times, and send it to the judge (and maybe opposing counsel) for signature. After it's signed, you probably forget about it until you try to enforce it or during the appeal.

And it is on appeal that the specific language of the order comes into play as the appellate court tries to figure out what exactly the trial judge ruled. Questions can abound, for example:

- Did the judge indicate whether she considered an untimely amended pleading or evidence? *E.g., B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259–62 (Tex. 2020) (per curiam).
- Who actually received relief under the judge's order and what was that relief? *E.g., Disco Mach. of Liberal Co. v. Payton*, 900 S.W.2d 71, 73–74 (Tex. App.—Amarillo Feb. 15, 1995), *reinstated by* 900 S.W.2d 124 (Tex. App.—Amarillo May 31, 1995, writ denied).
- Did the judge include necessary findings? *E.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 10.005 ("A court shall describe *in an order* imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed." (emphasis added)).
- And, perhaps most vexing, did the trial judge really sign a final judgment or not? *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195–206 (Tex. 2001).

That last question about finality can be a doozy and a frustrating issue to explain to clients as the parties are forced to litigate whether the appellate courts, the trial court, or anyone has any jurisdiction of the case. We'll discuss that problem first. A second problem, related to jurisdiction and finality, has to do with when court rulings are appealable and is discussed below.

A. The Problem: Oh, I didn't mean FINAL final . . . .

Here's an issue that appellate lawyers love (at least in the abstract), but just about everyone else despises: whether a trial judge has signed a final and appealable judgment.

An unexpected, premature final judgment can be devastating news to the unsuspecting litigant. It can also be a happy surprise for the prevailing party.

Explaining the problem here requires some discussion of final judgment law. When the trial court signs a final judgment, the clock begins to tick on the trial court's plenary power and on the parties' ability to file an appeal. *See* Tex. R. Civ. P. 329b(d); Tex. R. App. P. 26.1. If no timely post-judgment motions are filed that would extend the trial court's plenary power, the trial court's plenary power expires 30 days after the judgment is signed, and any notice of appeal is also due on that same date. *See* Tex. R. Civ. P. 329b(d); Tex. R. App. P. 26.1. An extension of time can be sought for a notice of appeal up to 15 days later. *See* Tex. R. App. P. 26.3. Parties also have 6 months from the date the final judgment was signed to file a restricted appeal, but the appellant can only prevail in that appeal if (1) the appellant did not participate in the hearing that resulted in the final judgment; (2) the appellant did not file a timely post-judgment motion, a request for findings of fact and conclusions of law, or a notice of appeal; and (3) the appellant can show an error on the face of the record. *See* Tex. R. App. P. 26.1(c), 30; *Ex parte E.H.*, 602 S.W.3d 486, 495 (Tex. 2020).

In the last couple of decades, the Texas Supreme Court has changed final judgment law significantly to create a bright-line test to determine whether a judgment or order is final when there has not yet been a conventional trial on the merits. When there has not been a conventional trial on the merits, "an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001).[14]

The latter category of final judgments—the ones based on clear and unequivocal finality language—can bring cases to premature and surprising ends. Under that category, an order can be a final judgment even if no party had filed any motion that could have disposed of all claims and all parties and even if the trial court did not actually intend to enter a final judgment. *See Lehmann*, 39 S.W.3d at 205–06. If the order's language clearly and unequivocally states that it is a final judgment, then it is a final judgment. *See id.* If the trial court erred by signing a final judgment, that error must be timely challenged in the trial court or an appellate court. *Id.* ("[I]f the language

[14] After a conventional trial on the merits, the rule shifts, and courts will generally presume that judgments are final unless the record indicates otherwise. *See Vaughn v. Drennon*, 324 S.W.3d 560, 562–63 (Tex. 2010) (per curiam).

of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed.").

The *Lehmann* opinion did not just set out a general rule for finality. It specifically said that certain magic language would satisfy the "clear and unequivocal language" test: "This judgment finally disposes of all parties and all claims and is appealable." *Id.* at 206.

The supreme court has since made clear that a judgment's inclusion of *Lehmann*-like finality language will make the order final even if the trial court attempts, without plenary power, to clarify that the order should not have been final, and even if the order came at an early stage of the litigation and left a lot of relief not granted. *See In re Elizondo*, 544 S.W.3d 824, 825–29 (Tex. 2018) (per curiam) (orig. proceeding) (rejecting trial court's attempt to remove *Lehmann*-like language by purporting to amend order after plenary power expired in case involving order that meant only to remove a lien, not resolve the entire dispute,); *In re Daredia*, 317 S.W.3d 247, 248–50 (Tex. 2010) (orig. proceeding) (per curiam) (finding default judgment order to be final due to *Lehmann*-like language even though the order mistakenly disposed of claims against another defendant who had answered the lawsuit); *see also Palma v. Young*, 601 S.W.3d 799, 800–02 (Tex. 2020) (per curiam) (analyzing and confirming the *Lehmann* standard).

So, if you have a case where the *Lehmann* finality language finds its way into what should otherwise be an interlocutory order, you need to act as if the clock is running on your case.

1. Tip #1: Magic language will almost certainly end your case no matter what kind of order it appears in.

As discussed above, the Texas Supreme Court has consistently applied the *Lehmann* magic language in a fairly airtight, bright-line fashion.

There may be exceptions. For one, it is likely possible that a judgment could include the *Lehmann* finality language and nonetheless fail to be clear and unequivocal. For example, if the order said it was not final and nonetheless included the finality language, that probably is not enough to pass the "clear and unequivocal" standard.

Secondly, some commentators have asked whether a judgment can be final if it is too vague to be enforceable. To be final, a judgment must not only dispose of all issues and all parties in the lawsuit, but it "must [also] be sufficiently definite and certain." *Hinde v. Hinde*, 701 S.W.2d 637, 639 (Tex. 1985) (per curiam). The supreme court has not yet said how this finality rule interacts with the one in *Lehmann*.

Regardless, lawyers need to approach this area of law with caution. That means reading orders when they come in with an eye for this problem and, if the order is unfavorable to your client, challenging the order if it is close. In close calls, it is not unheard of to file a notice of appeal out of an abundance of caution and notifying the court of appeals at the outset that there is a question about finality and appealability.

The supreme court has now made clear that it does not matter to the *Lehmann* test that the trial court later stated without plenary power that it did not intend to sign a final judgment. *See In re Elizondo*, 544 S.W.3d 824, 829 (Tex. 2018) (orig. proceeding) (per curiam). The trial court cannot change the finality of the judgment after the plenary power period has run or through a nunc pro tunc judgment. *See id.*

The bottom-line rule is that if you have *Lehmann*-like magic language in an order signed by the judge, your case is almost certainly on the clock, or at the very least, you need to treat it that way.

2. Tip #2: Litigating what the court meant by an order can be frustrating.

The other big picture consideration here is how upsetting this issue can be for clients. The worst-case scenario is that your clients lose their entire case by an erroneous, premature final order that slipped by without a timely appeal. But even if you end up winning the finality fight or if the finality issue is only questionable, finality litigation can be annoying to clients who might see it as an unnecessary delay based on arcane rules. After convincing an appellate court that no final judgment was entered, you still need to litigate the case to final judgment and perhaps appeal it again. Most of these fights can be avoided by taking more time in the trial court before the case ends up on appeal.

B. The Problem: When, if ever, does an appellate court have jurisdiction to review this ruling?

Finally, let's talk about what might be the most common appellate question:[15] when is this ruling appealable?

The issue is obviously important for several reasons. Does your case have to languish until final judgment under what you believe to be an erroneous ruling? Or can you challenge it now? Conversely, is it worth it to contest an issue that appears to be a close call if your opponent can gum up the trial court proceedings with an immediate appeal? And if you're heading into a contested hearing with appellate-worthy stakes, how fast do you have to start getting your appellate briefing in order?

No one wants to be blindsided by the other side's surprise interlocutory appeal or mandamus petition. If you know an appeal or mandamus is coming, you can better prepare for it whether you win or lose in the trial court.

[15] Other contenders: "will we win?," "how much longer will this take?," and "aren't briefs supposed to be, well, brief?"

1. Tip #1: Know where to look to determine whether you need to wait for final judgment for appellate review.

If you've just come out of the trial court frustrated that the trial judge ruled against your client on an important issue, you might wonder whether you can immediately challenge the judge's ruling and get appellate relief.

For starters, keep in mind there are basically three types of appellate actions: appeals from final judgments, interlocutory appeals expressly permitted by statute, and mandamus review.[16] Until not long ago, the Texas Supreme Court described this framework as generally only permitting appeals to be taken from final judgments unless a statutory exception applied. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) ("[T]he general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment."). With the Legislature authorizing more interlocutory appeals and the judiciary recognizing more mandamusable rulings, the supreme court has noted that the appellate courts are seeing more and more appellate cases from interlocutory rulings. As the court said last year, "[l]imiting appeals to final judgments can no longer be said to be the general rule." *Dall. Symphony Ass'n v. Reyes*, 571 S.W.3d 753, 759 (Tex. 2019).

If you are analyzing an interlocutory order—that is, an order that is not a final judgment under the tests discussed above—you need to conduct a two-step inquiry to determine whether your client has a right to seek immediate appellate relief.

First, you need to check whether a statute authorizes an immediate interlocutory appeal from the order in question. There are several statutes in this area, but the most common one is Section 51.014 of the Texas Civil Practice & Remedies Code. It lists a number of orders as being appealable.

You should pay special attention whether your statute permits immediate appeals from both grants and denials of the relief in question because sometimes the statute only permits one or the other. Similarly, you should also take care to pay attention to whether the statute in question includes an automatic stay of trial court proceedings under the circumstances of your case, and if so, whether that is a stay of all proceedings or just trial.

If you don't have a statute the provides for an interlocutory appellate remedy, you then have to determine whether your case qualifies for mandamus review. To obtain a writ of mandamus, the party bringing the mandamus petition (the relator) must show (1) a clear abuse of discretion and (2) an inadequate remedy by appeal. *See In re Ford Motor Co.*, 211 S.W.3d 295, 297–98 (Tex. 2006) (orig. proceeding) (per curiam). The key issue for whether an order is mandamusable is the second prong: inadequate remedy by appeal. Case law has effectively decided that some rulings are categorically entitled to mandamus review as a general matter—that is, that some types of rulings almost never have an adequate remedy by appeal. A classic example involves discovery rulings that require parties to produce information beyond the permissible

[16] A fourth mechanism exists for "permissive appeals," but I'll leave that issue for another paper. There are also other fairly uncommon types of original proceedings that I won't discuss here.

bounds of discovery. *See In re Weekley Homes, L.P.*, 295 S.W.3d 309, 322 (Tex. 2009) (orig. proceeding). That bell cannot be unrung by a later appeal. *See In re Jorden*, 249 S.W.3d 416, 419–20 (Tex. 2008) (orig. proceeding) (explaining that an improperly ordered deposition "cannot be 'untaken'"). If your ruling does not fit the mold of a recognized category of mandamusable orders, you will need to construct an argument based on cases analyzing the inadequate remedy prong. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–41 (Tex. 2004) (orig. proceeding) (discussing the balancing test involved with this standard).

If no statute provides for immediate interlocutory review and if you have an adequate remedy by appeal, then you will have to wait until final judgment to challenge the trial court's decision in an appellate court.

2. Tip #2: Be aware of your deadlines and try to anticipate appealable issues ahead of time.

In some senses, the timing of *when* you can appeal does not affect your trial court preparation. Whether you can appeal immediately or have to wait for a final judgment, you still need to try to persuade the trial court to rule in your favor and preserve whatever arguments and objections you plan to present to the appellate court if an appeal follows.

That being said, if you know an appeal is likely to come immediately, you may need to devote more attention to focusing on making sure you've thought through all of the issues both on the merits and in terms of making your record. You may not get another chance to add things to the record later on this issue once it is on appeal. For example, in the interlocutory appeal context, there is no option in the rules to automatically extend your notice of appeal deadline merely by filing a motion to reconsider. *See* Tex. R. App. P. 26.1. This is contrary to the final-judgment appellate rules, which automatically extend the appellate deadline on the filing of a motion for new trial (and other types of post-judgment filings). *See id.*

Logistically speaking, you also need to think about what timeline you will be operating on. If you believe you are heading into a hearing that could produce an immediately appealable or mandamusable ruling, you should do what you can to smoothly transition the case from the trial court to the appellate court.

The relator bringing a mandamus petition has the burden of preparing and filing the record and filing a petition for writ of mandamus at the same time. *See* Tex. R. App. P. 52.7. This is an important difference from an interlocutory appeal where, generally, the appellant merely files a notice of appeal and record designations and then waits for the court's staff to assemble and file the appellate record. *See* Tex. R. App. P. 35.3. *But see* Tex. R. App. P. 28.1(e) (allowing parties to file sworn clerk's record in interlocutory appeal). If you are anticipating filing a petition for writ of mandamus, you might decide to start putting together your mandamus petition and the record ahead of the hearing, particularly if you know you may have a short turnaround after the hearing to stop the judge's ruling from potentially harming your client. At the very least, you will want to make sure you have the time and staffing needed to get that project on file in time.

Another key logistical difference between appeals (whether interlocutory or regular) and mandamus actions is that mandamus petitions can arise from oral rulings from the trial judge. *See See In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding); *see also* Tex. R. App. P. 52.3(k)(1)(A) (requiring appendix to contain "a certified or sworn copy of any order complained of, or *any other document showing the matter complained of*" (emphasis added)). The appellate rules for appeals, on the other hand, require a written ruling signed by the court. *See* Tex. R. App. P. 26.1 (setting the deadline to file a notice of appeal based on when the judgment or order "is signed"). Thus, in an appeal, you may be waiting for a lag period between the oral ruling and the appealable order, but there is no such lag for mandamus. And waiting too long in mandamus can give rise to your petition being denied for laches. *See In re Laibe Corp.*, 307 S.W.3d 314, 318 (Tex. 2010) (orig. proceeding) (per curiam).

The underlying point, though, is that investing the time into knowing that you have a likely appealable order coming will help you prepare better. If you are bringing that appellate action, you can move quicker, be ready, and avoid potential waiver of your client's rights. If you are not bringing the appellate action, you can put your client in the best position to defend the trial court's ruling. You can also decide ahead of time whether an appeal is even worth it to your client on this issue, rather than having to make that decision in the limited time after the ruling is issued. Not all appealable or mandamusable rulings can be anticipated, but if you can see them coming, your client will be better for it.

V. Conclusion

This paper only covers some common traps that can derail your client's appeal. There are many more, but hopefully, this paper will help get you thinking about how to avoid having an appeal decided on something other than the merits—that is, if you want that. Good luck out there.