

**PRESERVING REVERSIBLE ERROR IN TEXAS:
THE ART OF CULTIVATING CLAIRVOYANCE**

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By Roger D. Townsend

I. THE HORNS OF YOUR DILEMMA

To preserve an appellate complaint, you must object, move, or request. But jurors don't like objections, because it looks like you are trying to hide something from them, and it's usually something that hurts your case. To preserve a complaint for appeal, moreover, you must obtain a ruling from the judge. Thus, judges usually don't like objections, either, because ruling is how they can err. The dilemma: Do you want to win at trial, or do you want to win on appeal?

A. Quantum events

Trials are full of surprises: a witness who never shows up; a juror who goes insane sitting in the box; a witness who blurts out the word *insurance*; a key exhibit that gets lost in all the papers on the table; a judge who leaves the bench before the trial is over; your client merges with another company during the trial, and new counsel shows up and wants to start examining witnesses; the insurer waits until the middle of the trial to deny coverage; and on and on. Thus, you must know how to preserve a complaint on the spur of the moment for random situations that you cannot even imagine.

B. Standards—not rules—of appellate review, and the quicksand of discretion

What is error in the eyes of an appellate court? Is the evidence legally insufficient? Is it a scintilla or less, or more? How can you tell? Is the finding so against the overwhelming weight of the evidence that it is manifestly unjust, or is the finding only against some of the evidence and not necessarily unjust? Did the trial court abuse its wide discretion? Is the ruling something the appellate court would not independently have made, but within the range afforded the trial judge? You have to understand these concepts to know when error is occurring.

C. Injustice is in the eye of the beholder

Even if you correctly preserved a complaint, and even if you meet the test in hindsight for error, did the error cause an improper judgment? What is improper in the eyes of the appellate court? Should your client get another bite at the apple, or is it likely to lose 9 times out of 10 no matter how fair the trial? Since trials are not law school exams, you get no points for spotting error. Only reversible error counts in the long-run.

D. Hide and seek

Is the properly preserved, reversible error obscured by many other unfounded complaints? Did the trial court really have a clear opportunity to avoid or correct the error?

II. **RIDING THE BULL BY PRESERVING ONLY REVERSIBLE ERROR.**

The solution is to preserve only reversible error. To preserve reversible error, you must understand the standard of review; the concepts of harmless and reversible error; and how to preserve a complaint.

A. **What is error?**

You must evaluate whether a particular ruling really is error. This requires you to know the applicable standard of appellate review while you are in the heat of trial. For a comprehensive list, see W. Wendell Hall, "Standards of Review in Texas," 34 St. Mary's L.J. 1 (2002).

B. **What is reversible error?**

You must evaluate the record, usually while it is evolving, whether a particular ruling is likely to affect the fact-finder. The test is one of probable harm from the record as a whole. But in applying this test, you must also keep in mind which party seems to wear the black hat and which party seems to wear the white hat. For a good discussion, see State Bar of Tex., *Texas Appellate Practice Manual*, ch. 8 (2d ed. 1993).

C. **How do you preserve a complaint for appeal?**

This is the easy part. Rule 33.1(a) of the Texas Rules of Appellate Procedure requires the record to show (1) a timely and specific objection, request, or motion; and (2) a ruling on the timely objection, request, or motion. I would add that your record needs to also demonstrate harm, but that can be shown from the record as a whole.

To some extent, context can aid the specificity, and the ruling can sometimes be implicit. The rule states:

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 Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure;
- (2) the trial court:
 - (A) ruled on the request, objection, or motion either expressly or implicitly; or

- (B) refused to rule on the request, objection, or motion and the complaining party objected to the refusal.

Tex. R. App. P. 33.1(a). The appellate record consists of the clerk's record and the reporter's record. Tex. R. App. P. 34. The former contains written pleadings, motions, orders, and the like. Tex. R. App. P. 34.5. The latter is the court reporter's transcription of oral proceedings and written exhibits. Tex. R. App. P. 34.6(a).

If something occurs that is not on the record, you must resort to a bill of exceptions. *See* Tex. R. App. P. 33.2.

III. SOME SPECIFIC WRINKLES

For a comprehensive listing of how to preserve complaints, see R. Hogan and J. B. Hogan, "Preservation of Error—Pretrial and Trial (State and Federal), in State Bar of Texas, *Appellate Boot Camp* (2003).

A. Pleadings

1. *Special appearance*

You challenge the trial court's exercise of personal jurisdiction by filing a sworn special appearance. Tex. R. Civ. P. 120a. It *must* be filed before anything else, and any subsequent paper should be made subject to the special appearance.

2. *Venue*

You object to improper venue by filing a written motion to transfer venue before filing any other document. Tex. R. Civ. P. 86. Again, any other document subsequently filed should expressly be made subject to the motion, and you should obtain a ruling on the motion to transfer venue before getting a ruling on anything else. The burden is on the movant to obtain a hearing on the motion. *See* Tex. R. Civ. P. 87.

3. *Petition and answer*

In the absence of special exceptions, pleadings are liberally construed. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000). But independent grounds of recovery must be specifically pleaded. *See* Tex. R. Civ. P. 47; Tex. R. Civ. P. 301. Texas Rule of Civil Procedure 93 lists those pleas that must be verified. If the defendant raises the statute of limitations, then the plaintiff must plead the discovery rule. *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988).

Rule 94 requires that any matter constituting an avoidance or affirmative defense must be specifically pleaded, and it lists some (but not all) of them. For instance, immunity must be pleaded. *Davis v. City of San Antonio*, 752 S.W.2d 518, 519-20 (Tex. 1988). Unless jurisdictional, preemption must be specifically pleaded. *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546

(Tex. 1991). Contractual issues such as lack of conspicuousness, failure to meet the express negligence test, failure of essential purpose, and unconscionability must be specifically pleaded. *See, e.g., Forest Lane Porsche Audi Assocs. v. G&K Servs., Inc.*, 717 S.W.2d 470, 474 (Tex. App.—Fort Worth 1986, no writ); *Delta Eng'g Corp. v. Warren Petroleum, Inc.*, 668 S.W.2d 770, 773 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

Absent a pre-trial order to the contrary, pleadings can be freely amended until seven days before trial. Tex. R. Civ. P. 163, 166. Even afterwards, the trial court must allow an amendment “unless: (1) the opposing party presents evidence of surprise or prejudice . . . ; (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face” *Chapin & Chapin, Inc. v. Tex. Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992).

B. Right to jury trial

To ensure a jury for your trial, you must not only make a written request, but also pay the fee “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” Tex. R. Civ. P. 216(1).

C. Disqualification and recusal of judges

A constitutionally disqualified judge makes the judgment void and subject to challenge at any time, even by a collateral attack. *See Buckholts Indep. Sch. Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982).

By contrast a verified recusal motion must be filed “[a]t least ten days before the date set for trial or other hearing.” Tex. R. Civ. P. 18a(a). The only exception is when the movant did not receive at least 10 days notice of the hearing at issue. *Metzger v. Sebek*, 892 S.W.2d 20, 49 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

D. Trial

1. Seating a jury

To complain about the trial court’s allocation of peremptory strikes, that party must object after voir dire, but before the strikes are made. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex. 1986). Regarding overruled challenges for cause, before the jury is seated, the complaining party must (1) exhaust its peremptory challenges, and (2) identify the specific jurors remaining on the panel who would otherwise be struck by the party. *See Hallett v. Houston N.W. Med. Center*, 689 S.W.2d 888, 889–90 (Tex. 1985).

2. Evidence

a. Motion in limine

If a motion in limine is denied, the party opposing admission of the evidence must still object when the evidence is offered. *E.g., Metro Aviation, Inc. v. Bristow Offshore Helicopters, Inc.*, 740 S.W.2d 873, 875 (Tex. App.—Beaumont 1987, no writ). If a motion in limine is granted, the party

seeking to introduce the evidence must still offer the evidence on the record. *E.g., Commercial Ins. Co. v. Lane*, 480 S.W.2d 781, 783-84 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

This rule generally applies also to expert challenges. However, in *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-05 (Tex. App.—Texarkana 2000, pet. denied), the court distinguished “between a motion in limine and a pretrial ruling on admissibility, and concluded that while motions in limine preserve nothing for appeal, the plaintiff’s pretrial motion “to exclude evidence preserved the complaint about the admission of expert testimony. *Id.* at 203, 204.

b. Admission of evidence

Ideally, your objection should not only identify what specific evidence is objectionable, but also why it is objectionable. *Haney v. Purcell Co.*, 796 S.W.2d 782, 789 (Tex. App.—Houston [1st Dist.] 1990, writ denied). You must object when the evidence is offered, not later. *Boyer v. Scruggs*, 806 S.W.2d 941, 946 (Tex. App.—Corpus Christi 1991, no writ).

The admission of similar evidence without objection, either before or after an objection is made, waives any error concerning admission of the complained of improper evidence. *See Port Terminal R.R. Ass’n v. Richardson*, 808 S.W.2d 501-510 (Tex. App.—Houston [14th Dist.] 1991, writ denied). “Where a party makes a proper objection to the introduction of testimony and is overruled, he is entitled to assume that the judge will make the same ruling as to the other offers of similar testimony, and he is not required to repeat the objection. *Bunnett/Smallwood & Co. v. Helton Oil Co.*, 577 S.W.2d 291, 295 (Tex. Civ. App.—Amarillo 1978, no writ). Although an objection to evidence is made and overruled, it must be repeated if similar evidence is subsequently sought to be introduced, or the objection will be waived or the trial court’s error will be deemed harmless. *See Badger v. Symon*, 661 S.W.2d 163, 164-65 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.). Which line do you follow? It depends on how lucky you feel. (And you can’t even trust the forum you are in, because your case could get “equalized” to another on appeal.)

When the parties and the trial court expressly agree that an objection by one party will preserve error for all similarly situated parties, then a specific party may be able to rely on another party’s objection. *See Celotex Corp. v. Tate*, 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, writ dismissed). But you usually should run from running objections. The test for whether running objections work is complex. It weighs (1) the similarity of the subsequent testimony to the prior testimony, (2) the proximity of the running objection to the subsequent testimony, (3) whether the subsequent testimony is from a different witness, and (4) any other relevant circumstances. *In re A.P.*, 42 S.W.3d 248, 261 (Tex. App.—Waco 2001, orig. proceeding [pet. denied]).

c. Exclusion of evidence.

If your evidence is excluded, you need to make an offer of proof of the substance of the evidence unless it was apparent from the context—which it rarely is. Tex. R. App. P. 103(a)(2). If a party so requests, you will have to make the offer in question and answer form. Tex. R. Evid. 103(b). I recommend that you make a narrative offer whenever you can, since you may be able to “tweak” the record better than it might turn out otherwise. On the other side, if you are the party

whose objection was sustained, I recommend that you always demand the offer be made in question and answer form, since it is much more difficult to do correctly.

Regardless of which form is used, the offer must be made “before the court’s charge is read to the jury. Tex. R. Evid. 103(b).

3. ***Directed verdict***

A motion for directed verdict can be oral or written, and it may be made at the close of the plaintiff’s case or at the close of all the evidence. If made at the close of the plaintiffs’ case, it must be renewed at the close of all evidence or it is waived. Nevertheless, a motion for directed verdict is *not* a prerequisite to a motion for judgment n.o.v. in Texas, though it usually is in federal court.

4. ***Charge of the court***

This part of the case is so important to preservation and also so complicated that it is the subject of an entire paper and speech at this seminar. Therefore, I refer you to Mr. Carroll’s excellent paper and talk.

5. ***Closing argument***

In order to preserve a complaint concerning improper jury argument, a party should timely object to the improper argument; ask for an instruction that the jury should disregard the argument; and move for a mistrial. *See Armellini Exp. Lines v. Ansley*, 605 S.W.2d 305 (Tex. Civ. App.—Corpus Christi 1980, writ ref’d n.r.e.). The only exception is for incurable jury argument, which is very rare. *See Roger D. Townsend*, “Improper Jury Argument and Professionalism: Rethinking *Standard Fire v. Reese*,” 67 Tex. B.J. 448 (June 2004).

E. Motion for Judgment on the Verdict

If you move for judgment on the verdict, you are affirming that the jury’s verdict is supported by the evidence. *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984). Thus, do not move for judgment without also moving to disregard an adverse finding, or you will be unable to challenge that finding on appeal. *Id.* Another way to preserve your complaint is to expressly reserve the right to complain on appeal about specific unfavorable jury findings. *First Nat’l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989).

F. Motion for Judgment Notwithstanding the Verdict.

Even after the trial court has rendered judgment on the jury’s verdict, *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ), the trial court may render judgment n.o.v. (upon written motion and reasonable notice) whenever a directed verdict would have been proper. Tex. R. Civ. P. 301; *Fort Bend Cty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). Thus, a motion for JNOV can preserve a no-evidence complaint. *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, 220-21 (Tex. 1992). A motion for JNOV also preserves the complaint that a legal rule

bars the jury's findings, even if they are supported by the evidence. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999).

G. Motion to disregard jury findings

Upon written motion and notice, the trial court also may disregard any jury finding that lacks legally sufficient evidence. Tex. R. Civ. P. 301; *see Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). Thus, a motion to disregard can preserve a no-evidence complaint. *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). The trial court, moreover, may disregard an immaterial finding either upon motion or sua sponte. *Clear Lake Water Auth. v. Winograd*, 695 S.W.2d 632 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

H. Timing for post-trial motions

You must be careful to comply with the deadlines for (1) motions for new trial, Tex. R. Civ. P. 329b(a); (2) motions to modify, correct, or reform the judgment, Tex. R. Civ. P. 329b(g); and (3) requests for findings of fact and conclusions of law, Tex. R. Civ. P. 296. As an anomaly in the rules, there is no extension of time for the rule 329b motions. The timetable usually begins to run from the date a final judgment or order is signed. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995). But there is a limited exception if you did not receive notice of the judgment. If the appealing party does not learn of the judgment within 20 days of its signing, the time begins to run when notice is received or 90 days from when the judgment was signed, whichever comes first. Tex. R. Civ. P. 306a(4). In that event, you must prove the date on which you learned of the judgment. Tex. R. Civ. P. 306a(5); *Memorial Hosp. v. Gillis*, 741 S.W.2d 364, 366 (Tex. 1987). Mandamus is available to force the trial court to find the date upon which you learned of the signing of the judgment. *Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994). But I would not usually be optimistic of a favorable finding if I had to mandamus the judge even to entertain the motion.

The due date is calculated as usual under the Texas rules. The day of the event is not included, but the last day of the period is counted unless it is a Saturday, Sunday, or legal holiday, in which case the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Tex. R. Civ. P. 4; Tex. R. App. P. 4.1.

To determine whether a day qualifies as a legal holiday, you have to consult both the relevant statutes and case law. *See* Tex. Gov't Code Ann. § 662.003(a); Tex. Gov't Code Ann. § 662.003(b)(1) - (8); Tex. Gov't Code Ann. § 662.02(2); *Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770, 772 (Tex. 1992); *Dorchester Master Ltd. P'ship v. Hunt*, 790 S.W.2d 552, 553 (Tex. 1990); *Johnson v. Texas Employers Ins. Ass'n*, 674 S.W.2d 761, 762 (Tex. 1984); *Mid-Continent Refrigerator Co. v. Tackett*, 584 S.W.2d 705, 706 (Tex. 1979); *Blackman v. Housing Auth.*, 152 Tex. 21, 254 S.W.2d 103, 105 (1953). You also have an excuse if the courthouse is closed or inaccessible. Tex. R. App. P. 4.1(b). You prove this by a certificate of the clerk or counsel, by a party's affidavit, or by any other proof. *Id.*

A document received within ten days after the filing deadline is considered timely filed if: (1) it was sent to the proper clerk via the United States Postal Service, first-class, express, registered, or certified mail; (2) it was placed in an envelope or wrapper properly addressed and stamped; and

(3) it was deposited in the mail on or before the last day for filing. Tex. R. App. P. 9.2(b)(1); *see also Williams v. Flores*, 88 S.W.3d 631, 632 (Tex. 2002). I recommend that you calendar the 10-day grace period to confirm receipt. If the court did not receive the document, then move for an extension of time explaining what happened. But, since there is no grace period for Rule 329(b) motions, I recommend that you always file them by hand delivery.

I. Motion for New Trial

A motion for new trial must be filed within 30 days of the judgment being signed. There is generally a charge for filing a motion for new trial. Tex. Gov't Code Ann. § 51.317(b). The motion for new trial will be “*conditionally filed*” when presented to the clerk and it will be deemed filed at the time of presentment, despite the fact that the fee has not been paid. *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993). However, the court should *not* consider the motion until the fee is paid. *Id.* An amended motion for new trial can be filed within the 30-day period and before any preceding motion for new trial is overruled.

As a general rule, a premature motion for new trial is deemed filed on the date of, but subsequent to, the date of signing of the judgment assailed by the motion. Tex. R. Civ. P. 306c. A premature motion for new trial extends the timetable from the date of a subsequent judgment as long as the substance of the motion could properly be raised to the corrected judgment. *Miller v. Hernandez*, 708 S.W.2d 25, 27 (Tex. App.—Dallas 1986, no writ).

A premature motion for new trial overruled by operation of law, which complains of error brought forward in a subsequent judgment, preserves the complaints to the extent applicable to the subsequent judgment. *Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994).

If the motion for new trial is not resolved within 75 days after the judgment is signed, it will be overruled by operation of law. Tex. R. Civ. P. 329b(c). The trial court may “ungrant or vacate its order granting a new trial only within the 75-day period, not afterward. *Porter v. Vick*, 888 S.W.2d 789-90 (Tex. 1994). An order granting a new trial must be written and signed. Tex. R. Civ. P. 329b(c); *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993) (orig. proceeding).

Rule 324(b) provides that a point in a motion for new trial is a prerequisite to the following complaints on appeal:

- (1) a complaint on which evidence must be heard such as one of jury misconduct, or newly discovered evidence or failure to set aside a default judgment;
- (2) a complaint of factual insufficiency of the evidence to support a jury finding;
- (3) a complaint that a jury finding is against the overwhelming weight of the evidence;
- (4) a complaint of inadequacy or excessiveness of the damages found by the jury;
or

- (5) incurable jury argument if not otherwise ruled on by the trial court.

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

To obtain a new trial on the basis of jury misconduct, the complaining party must prove: (1) misconduct occurred, (2) it was material, and (3) based on the record as a whole, it probably resulted in harm. Tex. R. Civ. P. 327(a); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000). A motion for new trial based on jury misconduct must be supported by affidavit testimony alleging “outside influences were brought to bear upon the jury. Tex. R. Civ. P. 327(b). But jurors cannot testify about activities and statements that occurred during their deliberations. Tex. R. Civ. P. 327(b); Tex. R. Evid. 606(b). According to the Court that wrote the rules, rules 327(b) and 606(b) do not deprive litigants of a fair trial under the Texas Constitution, nor do they fail to afford litigants due process. *Golden Eagle Archery*, 24 S.W.3d at 375. A more impartial observer might feel differently.

The party moving for a new trial based on newly discovered evidence must demonstrate: (i) the evidence was discovered after the trial or so late in the trial that it was impossible to present the evidence before the trial ended; (ii) the party’s failure to discover the information sooner was not caused by a lack of due diligence; (iii) the new evidence is not merely cumulative and does not tend only to impeach the adversary’s testimony; and (iv) the evidence would probably produce a different result at a new trial. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983); *Kirkpatrick v. Mem’l Hosp.*, 862 S.W.2d 762, 775 (Tex. App.—Dallas 1993, writ denied). The grounds for new trial based on newly discovered evidence must be established by affidavit. *In re Thoma*, 873 S.W.2d 477, 512 (Tex. Rev. Trib. 1994).

Improper jury arguments are usually referred to as one of two types: “curable or “uncurable. *Otis Elev. Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968). A jury argument is “curable when the harmful effect of the argument can be eliminated by a trial judge’s instruction to the jury to disregard what they have heard. *Id.* The error is “cured and rendered harmless by the instruction. *Id.* On the other hand, an argument may be so inflammatory that its harmfulness can not be eliminated by an instruction to the jury to disregard. *Id.* The prejudicial nature of the argument is so acute that it is “incurable. *Id.* If the argument is “incurable, the failure to object does not result in a waiver. *Id.* There are only rare instances of incurable argument. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); Roger D. Townsend, “Improper Jury Argument and Professionalism: Rethinking *Standard Fire v. Reese*,” 67 Tex. B.J. 448 (June 2004).

A trial court may grant a new trial in the interest of justice. See *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding). A new trial also may be granted and the judgment set aside for “good cause. Tex. Rule Civ. P. 320. Rule 320 also expressly provides that the trial court may grant a new trial on its own motion.

The trial court may grant a partial new trial if (1) only part of the matters in controversy are affected, and (2) such part is clearly separable without unfairness to the parties. Tex. R. Civ. P. 320. The trial court may not, however, grant a separate trial on unliquidated damages alone if liability issues are contested. *Id.*

J. Motion to Modify, Correct, or Reform Judgment

A motion to modify, correct or reform a judgment allows the trial court to correct some error in the judgment. It must be filed within 30 days after the judgment is signed. Tex. R. Civ. P. 329b(g). If a judgment is modified, corrected or reformed during the trial court's plenary power, the time for appeal runs from the time the modified, corrected or reformed judgment is signed. Tex. R. Civ. P. 329b(h); *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988).

K. Findings of Fact and Conclusions of Law

In nonjury trials, any party may request the court to state in writing its findings of fact and conclusions of law. Tex. R. Civ. P. 296. The request must be entitled "Request for Findings of Fact and Conclusions of Law." *Id.* The request must be filed with the clerk, who is required by the rule to immediately call the request to the attention of the judge who tried the case. Tex. R. Civ. P. 296. The request must be filed with the clerk within 20 days after the judgment is signed. Tex. R. Civ. P. 296.

The trial court must file requested findings of fact and conclusions of law within twenty days after the request is filed. Tex. R. Civ. P. 297. Findings of fact must be a separate document, not merely recited in the judgment. Tex. R. Civ. P. 299a; *Valley Mech. Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 834 (Tex. App.—Corpus Christi 1995, no writ).

If the court does not prepare findings and conclusions, a "Notice of Past Due Findings of Fact" must be filed. Tex. R. Civ. P. 297. The notice must state the date the original request was filed and the date the findings and conclusions were due. *Id.* The notice must be filed with the clerk within 30 days of the original request. *Id.* But a prematurely filed notice of past due findings is not timely. *Echols v. Echols*, 900 S.W.2d 160, 161-62. The court has 40 days from the date of the original request to file the findings and conclusions. Tex. R. Civ. P. 297.

After the court files findings of fact and conclusions of law, any party may file with the clerk a request for specified additional or amended findings and conclusions. Tex. R. Civ. P. 298. The request for additional or amended findings of fact and conclusions of law must be filed within 10 days of the filing by the court of the original findings and conclusions. Tex. R. Civ. P. 298. A bare request for additional or amended findings is not sufficient; proposed findings must be submitted. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dismissed w.o.j.). The court must file any additional or amended findings and conclusions within 10 days after the request is filed. Tex. R. Civ. P. 298. The trial court is not required to make additional findings that are unsupported in the record, that relate merely to other evidentiary matters, or that are contrary to other previous findings. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 838 (Tex. App.—Texarkana 1996, writ denied). A timely request for findings of fact and conclusions of law extends the timetable for appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose—that is, they could properly be considered by the appellate court. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997).

IV. CONCLUSION

By concentrating on preserving only reversible error, you solve the dilemma. You preserve what will be useful on appeal, but not the fluff. Thus, you are less likely to antagonize the judge or jury. And with a good judge, you may find that your motions are granted and your objections sustained. This not only will give you more credibility in the eyes of the jury, but also will enable you to shape the trial to your advantage.