# CRAFTING A COURT'S CHARGE FROM THE DEFENDANT'S PERSPECTIVE

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## Introduction

Defense attorneys usually want one of three types of charges, in descending order of preference:

(i) a charge that is favorable to the defendant, but not so much so that it contains reversible error (strategy one);
(ii) a balanced charge that gives the defendant a fighting chance (strategy two); or
(ii) a charge containing error that would require reversal of a judgment for the plaintiff (strategy three).

In this paper, I will offer suggestions on how to implement the three strategies outlined above during each phase of the charge process: the pre-trial filing of the proposed charge, the informal charge conference, and the formal charge conference.

### I. Preparing the pre-trial proposed charge.

There are a lot of misconceptions about what should be prepared in response to a trial court's request that the parties file a proposed charge at the start of or before the trial. These misconceptions are dispelled by keeping one thing in mind: You do not preserve error by filing a proposed charge with the court.[1] Courts ask for a proposed charge at or before the start of the case so they can get an idea of what the parties think the jury charge should look like. The proposed charge is nothing more than a starting point for the laborious process of preparing the actual jury charge.

### A. File a proposed charge that looks like something the court could give the jury with few changes.

Your goal should be for the court to use your proposed charge as the template for the actual charge. In other words, you want the court to open the informal charge conference by announcing, "I've looked at both of the proposed charges, and I'd like to work off of the defendant's because it comes the closest to what I think should actually be submitted to the jury."[2] Achieving that goal requires you to make your proposed charge look like an actual jury charge, *i.e.*, something the court could hand to the jury with few revisions. To do that you should:

- give the court a computer diskette containing your proposed charge (find out in advance whether the court prefers Word® or Wordperfect®)
- include the boilerplate instructions concerning the deliberations from the Pattern Jury Charge (PJC);
- place the instructions and definitions with the question they will accompany (when it comes time to preserve error with written proposals at the formal charge conference, instructions and definitions should be separated from the questions);
- submit both the PJC version of the plaintiff's questions, definitions, and instructions as well as defensive questions, definitions, and instructions;
- in commercial cases, include a carefully-conceived measure of damages that is legally correct and, if at all possible, enables the jury to consider not just the defendant's damage model, but also the plaintiff's,[3]
- avoid submitting every imaginable affirmative defensive and instead submit only those that are likely to be supported by the law and the evidence;
- avoid larding up the charge with a plethora of non-PJC instructions designed to nudge the jury in favor of the defense; and
- omit the "Given, Refused, Modified" blanks that typically accompany a written request tendered to the court in the formal charge conference.

You may be asking, "But don't I need the "Given, Refused, Modified" blanks for error preservation purposes?" The answer is yes, but you don't need them in the proposed charge filed at the start of the case. You need them on the individual submissions that you will tender during the formal charge conference. The formal charge conference is when you preserve error by tendering individual requests for questions, instructions, and definitions. And handing the judge a page torn out of your proposed charge may not preserve error if a portion of what is contained on that page is already in the charge.[4]

Ordinarily, the only thing I include in my proposed charge that would not appear in an actual jury charge is the authority for my proposed submissions. But I try to make the authorities

as unobtrusive as possible so that they do not detract from the overall look of my proposal as something that could be handed to the jury without any significant alterations. I do so by placing the authorities at the bottom of the page, well separated from the questions, definitions, and instructions. I also make clear which instruction or definition each authority supports.

My theory is that if the plaintiff's proposed charge is overtly slanted, just plain sloppy, or contains only the plaintiff's questions, definitions, and instructions, the court is more likely to view my complete and cleaner-looking proposed charge as the starting place for the negotiations on what the actual charge should look like. Again, I want the judge to be thinking, "this one looks like a charge I could hand to the jury with few or no changes."

A Miranda warning about the proposed charge — it can and will be used against you. Once you put something in your proposed charge, it will be hard to back away from it later. You can file an amended proposed charge, but that won't stop the plaintiff's attorney from pointing to your original proposal and arguing: "Your honor, even defense counsel believed that instruction was proper." Plaintiff's counsel can make the same argument on appeal if you are attacking as reversible error an instruction or definition you included in your proposed charge.

This is not to say that your proposed charge shouldn't, as general rule, contain the PJC version of the questions submitting the plaintiff's legitimate claims; you can always argue later that the plaintiff failed to follow through by introducing legally sufficient evidence to support those claims. What I'm suggesting is that you shouldn't, for example, include a DTPA question if you intend to argue that the plaintiff does not qualify as a "consumer" under the DTPA. Or, if the plaintiff has asserted a fraud claim and is alleging both affirmative misrepresentations and failure to disclose, you shouldn't submit the PJC definition of fraud by omission if it is your position that the defendant owed no duty to disclose information to the plaintiff.

**B. Implementing strategies one and two in the proposed charge.**

When drafting a proposed charge, the defense attorney should be pursuing strategy one — a charge that is favorable to the defendant, but not so much so that it contains reversible error — or strategy two — a balanced charge that gives the defendant a fighting chance. Pursuing strategy three at this stage is a bad idea even if you think your client is going to lose the trial. Appellate courts do not countenance attempts to lead a trial court into error.[5]

(i) ***Strategy one.***

Implementing strategy one — a charge that nudges the jury to find for the defendant — requires careful lawyering. The charge should not be manifestly unfair to the plaintiff. If you are too aggressive, you may create reversible error, either through a single instruction that by itself gives too strong of a nudge or through the cumulative effect of too many pro-defense instructions.[6] Bear in mind that former Texas Supreme Court Justice Kilgarlin's admonition — "The jury need not and should not be burdened with surplus instructions" — remains on the books.[7] The key is to craft a few well-chosen instructions that find support in the law and *gently* urge the jury to embrace the defendant's position.

In one case, for example, the controlling issue was whether any reasonable method of extracting uranium from a particular piece of land would destroy the surface of the land. The trial court instructed the jury that "to be 'reasonable,' a method does not have to be the best or the most economical method, nor does it mean that the uranium must be removed by that method." The Texas Supreme Court acknowledged that this nudging instruction was "counter" to the "evidentiary arguments" asserted by the party challenging the instruction, but nonetheless held that it was not reversible error: "Although the instruction might incidentally comment on the evidence, a court's charge is not objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence when it is properly a part of an instruction or definition."[8]

If you use Westlaw,® you can often find a case from which you can craft a definition or instruction by using a search term like this: "WP(ratification)." "WP" means "words and phrases," and a "WP(term)" search will pull up cases that define the term within the parentheses. You can then find the case containing the most defense-oriented definition of the legal concept you intend to rely on.

In addition, published opinions addressing facts and issues similar to those in your case may be a useful source for favorable instructions. Consider, for example, a case in which you are defending a stockbroker against allegations that he deceived an elderly plaintiff into making inappropriate investments. In that situation, you might want to include an instruction paraphrasing the Texas Supreme Court's holding that a stockbroker does not owe a duty to determine the mental capacity of an elderly client.[9]

(ii) *Strategy two.*
Even when you are pursuing a strategy two — a balanced charge that gives the defendant a fighting chance — you must sometimes depart from the PJC. For example, in the stockbroker hypothetical mentioned above, if you anticipate that the plaintiff's attorney is going to actively portray the stockbroker as having taken advantage of a mentally-impaired plaintiff, fairness may require an instruction advising the jury that the defendant had no duty to determine the plaintiff's mental capacity.

Another example is the PJC instruction accompanying a breach of fiduciary duties question. One commentator has observed that even Mother Theresa could not have gotten through that instruction unscathed.[10] You should therefore consider whether the facts and the law would support an argument that the defendant was not an absolute fiduciary and therefore owed only limited fiduciary duties to the plaintiff. If so, then it is reversible error to submit the PJC's "Mother Theresa" instruction.[11]

You should also check to see whether any recent cases have effectively rendered the PJC question or instruction applicable to your case incorrect. For example, in 2001, the Texas Supreme Court held that to recover for tortious interference with a prospective business relationship, a plaintiff must prove that the defendant's conduct was independently tortious or wrongful.[12] That change was not reflected in the PJC until the 2002 edition was issued.[13] And in the 2002 edition, the Committee on Pattern Jury Charges "expresses no opinion on the proper submission of the cause of action."[14]

Additionally, consider whether a contract between the parties requires a departure from the standard PJC submissions. For example, the parties may have agreed to limit the type of damages recoverable by the non-breaching party, which would require a special measure of damages instruction.[15] Or, the parties may have entered into a preliminary agreement specifying that certain events must occur before the parties will be bound by a contemplated contractual arrangement.[16] In that case, the PJC contract formation question should be accompanied by an instruction advising the jury what events were required to occur before the parties may be deemed to have entered into a binding contract.[17]

**II. The informal charge conference.**
Near the end of the trial, the court will hold an informal charge conference to discuss with the attorneys what the charge ought to contain. Ordinarily, the informal charge conference is off the record and is not intended to be a forum for preserving error; the court will conduct a separate "formal" charge conference on the record so that the attorneys can make objections and requests for the purpose of preserving error. If the court asks the court reporter to record the "informal" charge conference, you should ask whether there will be a separate formal charge conference for the purpose of preserving error. If not, you must treat the conference as the formal charge conference and follow the preservation of error rules.

If you've handled a few charge conferences, you know that this part of the process can be a frustrating ordeal. An indecisive judge can make your life miserable by allowing the attorneys to argue for hours about the instructions, definitions, and questions. And if the defense attorney who will be giving the closing argument must participate in this ordeal, it can be a serious distraction. Ideally, a second chair counsel and, if possible, an appellate attorney, should handle the charge conference while lead counsel prepares the closing argument.

**A. Implementing strategy one in the informal charge conference.**
In a strategy one situation, where the goal is to get a charge that gently nudges the jury to rule in the defendant's favor, you must be prepared to forcefully argue that your version of an instruction, definition, or question should be submitted in addition to, or in place of, the recommended PJC question, instruction, or definition. For example, in its 2001 decision addressing tortious interference with prospective contractual relationships, the Texas Supreme Court explained that "'in an economic system founded upon the principle of free competition, competitors should not be liable in tort for seeking a legitimate business advantage.'"[18] Accordingly, you might want to argue that it is error to submit an interference with prospective business relations claim without instructing the jury as follows: "Conduct that is merely 'sharp' or unfair is not tortious interference."[19]

I am not suggesting that the informal charge conference should become a shouting match. Often, however, the attorney who argues the most doggedly prevails. Figure out which style works best for you with your particular judge. If the calm and rational approach works, let the plaintiff's attorney be the one who puts the judge off with loud and abusive arguments. But if the table-pounding approach appears to be the style that carries the day, then by all means fight tooth and nail, and come to the informal charge conference well armed with authority showing why your non-PJC question, definition, or instruction is necessary and proper.

**B. Implementing strategy two in the informal charge conference.**

Let's assume you've got a judge who actively participates in preparing the charge rather than simply urging the lawyers to work it out and then ultimately ceding drafting responsibility to the plaintiff's attorney. In that case, you will probably be dealing with a judge who wants a balanced charge and is inclined to stick with the recommended submissions in the various PJC publications. In that strategy two situation, your arguments during the informal charge conference will consist mostly of comments like, "it's straight out of PJC, your honor." Nine times out ten, that argument will win the day.

A word of caution: If you will be asking the court for an instruction or definition that is not contained in PJC, don't set yourself up by arguing that PJC is the final word on what ought to be contained in the charge. If you even imply the PJC is controlling, the plaintiff attorney will jump all over you when you ask for a non-PJC submission — "Oh, *now* he's saying that PJC isn't controlling, your honor." And if the judge is already inclined to stick with the PJC, then that snide little remark is likely to be persuasive.

In those instances where you need to depart from the PJC to ensure that the charge is fair and balanced, be prepared to offer a strong defense of your substitute by citing authority. You might even want to direct the court's attention to one of the Texas Supreme Court cases indicating that the PJC is not always correct.[20]

An example of a situation where you may need to argue for a non-PJC submission is a case where the plaintiff is seeking exemplary damages and neither party has introduced evidence of the defendant's net worth. The PJC instruction accompanying the exemplary damages question lists the defendant's net worth as a factor the jury may consider in determining the amount of exemplary damages to award.[21] In the absence of net worth evidence, however, the jury will be forced to speculate. If the defendant is a corporation, for example, the jury might erroneously conclude the defendant's net worth is far higher than it really is. In that case, you may want to ask the court to strike net worth of the defendant from the list of factors the jury may consider.

Another example: the PJC appears to suggest that a finding of fraud by clear and convincing evidence is a proper predicate for exemplary damages even when the underlying liability theory is fraud.[22] But a jury that has found fraud once is likely to find it again despite the supposedly higher, but actually vague, "clear and convincing evidence" burden of proof.[23] If you believe that a malice finding is the appropriate predicate when the underlying theory of recovery is fraud, you must be prepared to argue that the legislature could not possibly have intended a finding of "fraudulent fraud" to open the door to exemplary damages.

When presenting your arguments to a judge who takes an active role in preparing the charge to ensure that it is even-handed, you must appeal to the judge's sense of fair play. Don't destroy your credibility by insisting on submissions that are unsupported by the evidence or the law. And don't be obstinate. Make acceptable concessions and present yourself as the voice of reason.

For example, most judges will submit a theory of recovery unless it is absolutely clear that the theory is legally untenable as a matter of law or lacks any support in the evidence. You may be convinced that a theory of recovery should not be submitted, but if the court has stated that it will seriously consider disregarding a finding for the plaintiff on that claim, you might want to save your powder for a more important problem elsewhere in the charge: make your position known and move on.[24]

On the other hand, sometimes there are good reasons to fight hard against submission of a claim with questionable legal or evidentiary support. The trial court might not follow through with a threat to disregard a "yes" answer on that claim. Also, in some instances even the mere submission of a claim might prejudice the jury against your client. For example, improperly submitting a breach of fiduciary duties claim could give the jury an erroneous impression that your client owed a heightened duty to the plaintiff; the jury might subconsciously hold your client to a stricter standard of care when answering other liability questions. In a situation like that, calmly explain that the Texas Supreme Court has stated that improperly submitting a claim for which there is no evidence can be harmful error if the jury is misled or confused.[25]

**C. Handling the "strategy three" situation in the informal charge conference.**

Now let's deal with the situation where the court incorrectly believes it is "the plaintiff's charge," not "the court's charge." You'll know you're in that situation when the court responds to one of your arguments by saying something like this: "It's the plaintiff's case, and if they're willing to risk reversible error, I'll let them have that instruction." When that happens, you will probably have no choice but to implement strategy three.

(1) *Let the plaintiff's attorney "overrule" your valid objections for the court.*

It is wrong to lead a trial court into error. But when there is no hope of persuading the court that it isn't "the plaintiff's charge," I do not believe it is the defense counsel's job to prevent the plaintiff's attorney from running amok by creating a charge that contains reversible error. A judge who abdicates responsibility for preparing the court's charge by letting the plaintiff's attorney have whatever he or she wants probably isn't very interested in hearing what the defense counsel has to say about the charge. When the judge has made it clear that he or she isn't going to heed your suggestions anyway, state your objections in a calm and unemotional manner and let the plaintiff's attorney "overrule" them for the court.[26]

One objection plaintiff's attorneys will often "overrule" is that there is no pleading to support the submission of a question or instruction. The plaintiff's attorney will usually argue that the issue has been "tried by consent." Under Texas case law, however, there is no trial by consent if the defendant objects to the submission of an issue in the charge.[27] "Even if the complaining party did not object to testimony on an issue not pled, if he objects to the submission of that issue on some tenable grounds, he cannot be regarded as having impliedly consented to the trial of such issue."[28] Instead of resisting the objection, the plaintiff's attorney should ask for a trial amendment, which ordinarily should be freely granted.[29] If the plaintiff's attorney does not seek a trial amendment, and there truly is no pleading to support the submission of a question or instruction, the defendant will have a strong argument for reversal.[30]

Another objection that plaintiff's attorneys will sometimes "overrule" is a "Casteel" objection. After the Texas Supreme Court's recent decisions in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), it is extremely risky for a plaintiff's attorney to resist a request for separate answer blanks in a question submitting multiple theories of liability or elements of damage. If the plaintiff's attorney "overrules" a Casteel objection and one or more of the various theories of liability or elements of damages should not have been submitted, the defendant will have a strong argument for reversal.

(2) *But don't sandbag the court.*

Fortunately, the vast majority of judges are too conscientious to simply defer to the wishes of the plaintiff's attorney. Usually, the judge will want to have a good idea of the objections you are going to make in the formal charge conference. That way, he or she can correct a problem before the formal charge conference, which usually occurs shortly before the closing arguments while the jury members are cooling their heels in the jury room. If you didn't make your objection known during the informal charge conference, then during the formal charge conference you may be on the receiving end of an angry outburst from a judge who thinks you've been lying behind the log and who must now make the jury wait while changes are made to the charge.

By the way, during the formal charge conference do not ignore inaccurate comments by plaintiff's counsel that you said or did something during the informal charge conference that is inconsistent with your objection or request. Respond on the record to prevent the plaintiff's attorney from later arguing that you invited the error. Conversely, if the plaintiff's attorney suddenly changes his or her tune in the formal charge conference, consider making a statement on the record indicating what his or her position was in the informal charge conference. The court of appeals will be less interested in helping a party whose attorney sandbagged the trial court.

**III. The formal charge conference.**

Once the court is ready for the formal charge conference, there is little chance of persuading the judge to revise the charge. Still, if you have decided to go with strategy one or two, the formal charge conference does give you one last long-shot opportunity to secure a favorable or at least balanced charge through the use of "ethos":

> The ancient Greeks knew that whatever the context, there are elements common to any argument that will determine its effectiveness. One of the most significant of these elements, in fact Aristotle called it the most potent, is ethos—the character of the advocate as perceived by the listener. In other words, ethos concerns the persuasive effect that results from what the audience thinks of the speaker.[31]

The theory of ethos suggests that if you can demonstrate that you, unlike opposing counsel, know how to preserve error, the judge may realize he or she has bet on the wrong horse and agree to make one or more of the changes you want.

It will quickly become apparent which attorney knows how to preserve error. The attorney who knows how to preserve error speaks clearly so that the court reporter can hear and understand what is being said and begins with a preamble such as:

> Comes now defendant, in the presence of the Court and opposing counsel, and before the charge has been submitted to the jury, and makes the following objections and requests with respect to the Court's charge.

The attorney who knows how to preserve error makes a note of the exact time the final draft of the court's charge was given to the attorneys. If the court has not allowed sufficient time to formulate objections and has refused an off-the-record request for more time, the attorney prefaces his objections with a statement on the record of how much time was given and follows it up with a request for additional time to formulate objections and requests.

The attorney who knows how to preserve error makes precise objections that inform the court of the basis of the complaint. Vague and general objections, such as "defendant objects to the definition of 'agent'" or "that instruction will prejudice the defendant" are not made.[32] Nor are spurious objections, such as: "Question 1 should not be submitted because the evidence is factually insufficient to support that ground of recovery."[33] An objection to one part of the charge is not incorporated by reference for another part of the charge.[34] And the attorney who knows how to preserve error makes sure to get a ruling on his or her objections and may even dictate an order for the court, such as:

> The above objections were duly and timely presented to the court by dictation to the court reporter in the presence of the court and all counsel, before submission of the charge to the jury, and are hereby in all things: "Overruled" (by the court).[35]

An attorney who knows how to preserve error does not make an en masse tender of his various written requests; instead, they are tendered one at a time.[36] Requests are made on a piece of paper that does not include anything already contained in the charge and does not include more than one instruction, definition, or question.[37] The attorney does not tender the request and ask that it be "overruled" but instead that the request be "granted."

The attorney who knows how to preserve error makes sure that the court signs each refused request. And after tendering all of his or her written requests, the attorney asks the court to "place defendant's written requests with the papers of the cause" and also asks permission to photocopy the endorsed requests (in case the originals are misplaced or lost by the court staff).

Most attorneys do not follow these rules and conventions, and their presentations during the formal charge appear feckless at best. If the plaintiff attorney's objections and requests are presented haphazardly, and you are very lucky, the trial court may realize that you knew what you were talking about during the informal charge and take the time to correct one or more of errors set out in your objections and requests.

## Conclusion

Securing a favorable court's charge is as much an exercise in amateur psychology as it is good lawyering. At every step of the process, you must consider your audience. If the judge is likely to be put off by any attempt to secure a non-PJC submission, then consider whether the comments accompanying a PJC recommendation will support an argument in favor of a slight, pro-defense deviation from the suggested submission. If the judge believes it's "the plaintiff's charge" rather than the court's charge, then consider whether you can turn opposing counsel's aggressiveness to your advantage by letting him or her "overrule" your objections and create a charge that contains reversible error. No matter which strategy you employ, however, remember the theory of "ethos" and never sacrifice your credibility by inviting error or misleading the court.

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[1] *See F.S. New Products, Inc. v. Strong Indus., Inc.* 129 S.W.3d 606 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

[2] *See Patlyek v. Brittain*, __ S.W.3d __ (Tex. Civ. App.—Austin 2004, no pet. h.) ("An informal charge conference began on July 8, and because Brittain's attorney had a more comprehensive proposed charge on a computer diskette, his was used as the court's working copy.").

[3] Frequently, the plaintiff's damages model cannot be reconciled with the facts and/or the governing law and therefore should not be reflected in the measure of damages you submit. *See Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 643 (Tex. App.—Austin 2000, pet. denied) ("The court's charge must be sufficiently instructive to enable the jury to make an award of damages on proper grounds and correct principles of law. The trial court should limit the jury's consideration to the specific facts that are properly a part of the damages allowable. Failure to guide the jury on a proper legal measure of damages results in a fatally defective submission.") (citations omitted); *see also Chrysler Corp. v. McMorries*, 657 S.W.2d 858, 862 (Tex. App.—Amarillo 1983, no writ).

[4] *See Wright v. Cardox Corp.*, 774 S.W.2d 407, 409-10 (Tex. App.—Houston [14th Dist.] 1989, writ denied); *Riddick v. Quail Ridge Condominium Assoc., Inc.*, 7 S.W.3d 663, 674 (Tex. App.—Houston [14th

Dist.] 1999, no pet.); *Wal-Mart Stores, Inc. v. Deggs*, 971 S.W.2d 72, 81 (Tex. App.—Beaumont 1996), *rev'd on other grounds*, 968 S.W.2d 354 (Tex. 1998); *Munoz v. The Bierne Group, Inc.*, 919 S.W.2d 470, 471-72 (Tex. App.—San Antonio 1996, no writ).

[5] *See General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993).

[6] *See, e.g., Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) ("Given the vigorous evidentiary dispute over the significance of written notice and counsel's closing argument, we conclude that the surplus instruction probably did improperly and unduly nudge the jury to find against Cain. Accordingly, we agree with the court of appeals that the district court's error in instructing the jury regarding Section 92.052 was reversible error."); *see also Lemos v. Montez*, 680 S.W.2d 798, 800-801 (Tex.1984).

[7] *Acord v. General Motors, Inc.*, 669 S.W.2d 111, 116 (Tex. 1984).

[8] *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995); *see also Raiford v. May Dept. Stores Co.*, 2 S.W.3d 527, 532 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (instruction added to PJC's recommended submission may have been incidental comment on the weight of the evidence but was not harmful error).

[9] *See Edward D. Jones & Co. v. Fletcher*, 975 S.W.539, 545 (Tex. 1998).

[10] Keith B. O'Connell, *Fraud, Conspiracy, Breach of Fiduciary Duty and Plaintiff's Conduct as a Defense to Intentional Torts: Issue Submission under Pattern Jury Charge Vol. IV* at p. 15, Texas Association of Defense Counsel Spring Meeting (1999).

[11] *Jochec v. Clayburne*, 863 S.W.2d 516 (Tex. App.–Austin 1993, writ denied).

[12] *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

[13] *See* Texas Pattern Jury Charges 106.2 (State Bar of Texas 2002).

[14] *Id.*

[15] *See, e.g., COC Services, Ltd. v. CompUSA Inc.*, __ S.W.3d __ (Tex. App.—Dallas 2004, no pet. h.) (holding that contract clause precluding recovery of lost profits was enforceable).

[16] *See id.*

[17] *See Texaco v. Pennzoil*, 729 S.W.2d 768, 812 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[18] *Sturges*, 52 S.W.3d at 716 (citation omitted).

[19] *Id.* at 726.

[20] *See, e.g., Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 n.1 (Tex. 1992).

[21] Texas Pattern Jury Charges 110.34 (State Bar of Texas 2002).

[22] Texas Pattern Jury Charges 110.33 (State Bar of Texas 2002).

[23] *Huckabee v. Time Warner Entertainment Co, L.P.*, 19 S.W.3d 413, 422 (Tex. 2000) ("We have defined clear and convincing evidence as 'that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.' Clearly, this standard is vague.") (citations omitted).

[24] "No evidence" points may be raised by either (i) a motion for instructed verdict, (ii) a motion for judgment notwithstanding the verdict, (iii) an objection to the submission of the issue to the jury, (iv) a motion to disregard the jury's answer to a vital fact issue or (v) a motion for new trial. *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985).

[25] *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex.1995) ("When determining whether a particular question could have confused or misled the jury, we 'consider its probable effect on the minds of the jury in the light of the charge as a whole.'").

[26] *See, e.g., Castle Texas Production Ltd. Partnership v. The Long Trusts*, 134 S.W.2d 267, 287 (Tex. App.—Tyler 2003, pet. denied) (plaintiff's attorney created harmful error by insisting on instruction that attributed to plaintiffs contractual rights they did not have and that effectively deprived defendant of its rightful defenses).

[27] *See Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 803 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

[28] *Hirsch v. Hirsch*,770 S.W.2d 924, 926 (Tex. App.—El Paso 1989, no writ).

[29] Tex. R. Civ. P. 66; *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990)

[30] *See* Tex. R. Civ. P. 278; *Jenkins v. Hennigan*, 298 S.W.2d 905, 911 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.); *Harvey v. Crockett Drilling Co.*, 242 S.W.2d 952, 954 (Tex. Civ. App.—Waco 1951, no writ).

[31] Ronald J. Waicukauski, JoAnne Epps, Paul Mark Sandler, *Ethos and the Art of Argument*, 26 Litigation 31 (1999).

[32] *See Carousel's Creamery, LLC v. Marble Slab Creamery, Inc.*, 134 S.W.3d 385, 403-05 (Tex. App.—Houston [1st Dist.] 2004, pet. pending).

[33] Whether to submit or not is determined on "no evidence – some evidence" grounds, not on factual sufficiency grounds. *See Strauss v. LaMark*, 366 S.W.2d 555 (Tex. 1963).

[34] *See* Tex. R. Civ. P. 274.

[35] *See* Louis S. Muldrow, *Mechanics of Charging the Jury A-5, St. Mary's Tenth Annual Procedural Law Institute, Jury Charges* (November 1988).

[36] *See Gutierrez v. County of Zapata*, 951 S.W.2d 831, 843 (Tex. App.—San Antonio 1997, no pet.) ("Requested issues and instructions submitted en masse will not be considered by the trial court and result in waiver.").

[37] *See id.*