

KD&P
KELLY, DURHAM & PITTARD, LLP

**Preparing, Presenting, & Preserving Error in
The Jury Charge**

Thad D. Spalding
tspalding@texasappeals.com
October 9, 2014 – TTLA CLE
Dallas, Texas

Dallas: P.O. Box 224626, Dallas, Texas 75222 [Mailing Address]
601 Haines Ave., Dallas, Texas 75208
(214) 946-8000 | (214) 946-8433 (fax)

Houston: 1005 Heights Blvd., Houston, Texas 77008
(713) 529-0048 | (713) 529-2498 (fax)

Preparing the Charge

- Start as early as possible
- Will provide a useful guide:
 - Pleadings
 - Discovery
 - Mediation
- Fact questions vs. Questions of Law
- Living document – modify as your case develops

KD&P
KELLY, DURHAM & PITTARD, LLP

Useful Resources

- Texas pattern jury charges
- Federal pattern jury charges
- Jury charges submitted in other cases
 - List Servers
 - PACER
 - Helpful to find charges submitted by your judge

KD&P
KELLY, DURHAM & PITTARD, LLP

Texas PJC – The Process

- Four-volume treatise, published by SBOT
- Separate committee for each volume, with one oversight committee.
 - Committees made up of lawyers and judges
 - Meet quarterly (approximately)
 - Generally updated every two years, so if new law occurs in the interim, there will be some lag time before it is reflected in the PJC volume



Texas PJC – The Process

- Committees make an effort to stay “behind the curve” –instructions or questions change only if there is TSC precedent to do so, statutory changes
- Examples
 - Proximate cause (PJC 2.4)
 - Dram shop “safe harbor” defenses (PJC 5.6)
 - Conditioning instruction on damages (PJC 15.1)
 - Manufacturing defects (PJC 71.3)



Texas PJC – The Product

- Separated, generally, by legal theory
- Instructions assist in explaining the questions
 - Negligence explained by standard of care and proximate cause instructions
- Instructions may also be used to condition questions
 - Damage questions conditioned on liability (actual/punitive)
- Admonitory instructions (PJC 1.3) and Certificate (PJC 1.3 & TRCP 226a)



Texas PJC – The Limitations

- PJC is not always correct (e.g., proximate & producing cause)
- May not reflect changing law
- Comments often attempt to warn of possible issues
 - Submitting duplicative theories of liability (PJC 71.4)
 - Paid vs. Incurred (PJC 15.3)
 - Broad form vs. granulated submissions – i.e., the *Casteel* issue (PJC 4.1, 15.3)



Texas PJC – Ever Changing

- Nuisance (Ch. 12 – added 2012)
- SOL's – tolling by diligence in service (Ch. 14 - added 2012)
- Workers' compensation chapters (coming soon)
- Spoliation instruction & comment (coming soon?) – *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)
- Dog Bite (coming soon)



Federal Pattern Jury Instructions

- Can be found on the 5th Circuit's website
- Tend to deal more with federal causes of action
- Different admonitory instructions
- Tend to "comment on the evidence" a lot more
- In diversity cases, federal courts will still look mainly to the Texas PJC



Presenting the Charge - Pretrial

- State court
 - Proposed charge you submit pretrial will not preserve any error
 - Strategy decision regarding how much or how little of the jury charge you choose to exchange with the other side
 - Do not want to tacitly admit that evidence supports a particular defense by submitting an instruction or definition supporting it



Presenting the Charge - Pretrial

- Federal Court
 - Will, and often does, preserve error
 - Federal courts typically expect the entire charge to be submitted, jointly, with the pretrial documents
 - Where parties disagree on how a particular issue is to be submitted, objections are to be lodged at that time
 - FRCP 51



Informal Charge Conference

- Great opportunity to discuss how the judge wants the charge submitted
- Listen to the other side's objections – to the extent you can eliminate objections to your charge, you remove potential error from your verdict
- BUT – Nothing in the Informal Conference preserves error!



Formal Charge Conference

- On the record, outside presence of the jury, prior to the time that the charge is read to the jury
- By this time, you should have a good idea what the final charge will look like
- This is the time to preserve error



Preservation of Error

- PJC Volumes each now have a “preservation of error” comment (PJC 19.1)
- Objections & Requests
 - Must be made before the charge is read to the jury (TRCP 272)
- Objections – nothing surprising here:
 - In writing, or dictated on the record (TRCP 272)
 - Specifically point out basis for objection (TRCP 274)
 - Ruling must be on the record (TRCP 272)



Preservation of Error

- Requests – a bit trickier
 - Separate and apart from objections (TRCP 273)
 - In writing and tendered to the court (TRCP 278)
 - Dictating request on the record maybe not enough
 - Must be in “substantially correct wording” (TRCP 278); *Palencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987); see also *Barneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 413 (Tex. 2000) (statutory cause of action should track language of the statute as closely as possible)
 - Ruling must be in writing and must indicate whether court refused, granted, or granted but modified request (TRCP 276)



Preservation of Error

- **Big Question** - When do I object, when do I request, and when do I do both?
- Rules have always elevated form over substance
 1. Defective question, instruction, definition – OBJECT
 2. Omitted definition or instruction – REQUEST
 3. Omitted question – OBJECT or REQUEST (depending on whose question it is)
- Too confusing

KD&P
KELLY, DURHAM & PITTARD, LLP

Preservation of Error – Better Practice

- Defective question, definition, instruction – OBJECT (TRCP 274)
- Omitted definition or instruction – OBJECT and REQUEST (TRCP 274, 278)
- Your question omitted – OBJECT and REQUEST (TRCP 274, 278)
- Your opponent’s question omitted – OBJECT (TRCP 278)

KD&P
KELLY, DURHAM & PITTARD, LLP

Preservation of Error – Best Practice

- OBJECT and REQUEST whenever practicable!
- Defective submission – OBJECT and REQUEST what you feel to be the properly worded question, instruction, or definition.
- Omitted definition/instruction/question – OBJECT and REQUEST the definition/instruction/question you believe should be submitted in “substantially correct wording”

KD&P
KELLY, DURHAM & PITTARD, LLP



Preparing, Presenting, & Preserving Error in
The Jury Charge

Thad D. Spalding
tspalding@texasappeals.com
October 9, 2014 – TTLA CLE
Dallas, Texas

Dallas: P.O. Box 224626, Dallas, Texas 75222 [Mailing Address]
601 Haines Ave., Dallas, Texas 75208
(214) 946-8000 | (214) 946-8433 (fax)
Houston: 1005 Heights Blvd., Houston, Texas 77008
(713) 529-0048 | (713) 529-2498 (fax)
