PROTECTING THE RECORD

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BIOGRAPHICAL INFORMATION

EDUCATION

B.S. with Honors, The University of Texas at Austin, 1977
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PROFESSIONAL ACTIVITIES

Innocence Project of Texas, President; State Bar of Texas (Member, Criminal Law Section, Appellate Section); Dallas Bar Association; Fellow, Dallas Bar Association; Texas Criminal Defense Lawyers Association, Board Member, Chairman, Appellate Committee, Specialization Committee, Co-Chairman, Strike Force; National Association of Criminal Defense Lawyers; Dallas County Criminal Defense Lawyers Association; Dallas Inn of Courts, LVI; Board Certified, Criminal Law, Texas Board of Legal Specialization; Instructor, Trial Tactics, S.M.U. School of Law, 1992, Texas Criminal Justice Integrity Unit, Member.

LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS:

Features Article Editor, Voice for the Defense, 1993-2000
Author/Speaker: Advanced Criminal Law Course, 1989, 1994, 1995, 2003, 2006, 2009
Author/Speaker: Criminal Defense Lawyers Project Seminars, Dallas Bar Association Seminars, Texas Criminal Defense Lawyers Seminars, Center for American and International Law Seminars, 1988-2010
Author: Various articles in Voice for the Defense, 1987-2005
Author: S.M.U. Law Journal, Annual Survey of Texas Law; 1991, 1993, 1994, 1995, 1998
Criminal Law Expert - Texas Lawyer Magazine Podcasts, 2006-2010
Texas Monthly Super Lawyer - Criminal Law, 2003-2010
Best Lawyers in America in Appellate Law, White Collar Criminal Defense and Non-White Collar Criminal Defense, 2006-2010

Robert Udashen graduated from The University of Texas School of Law in 1977 where he received the Perry Jones Award as the school's most outstanding criminal law student. Following graduation, Mr. Udashen joined the Staff Counsel for Inmates at the Texas Department of Corrections. There he represented prisoners in all types of post-conviction proceedings.

In 1979 Mr. Udashen left the Staff Counsel for Inmates to become an associate and then a partner with then United States Congressman and later Texas Attorney General Jim Mattox's law firm in Dallas, Crowder & Mattox. While there, Mr. Udashen partnered with Don Crowder to successfully defend Candy Montgomery, the so-called axe murderer. The axe murder defense was recreated in a book, *Evidence of Love,* and in an Emmy award-winning movie, *A Killing in a Small Town.* CourtTV profiled the case in the fall of 2007 on the show *Murder by the Book.*

In 2004 Mr. Udashen teamed up with another Crowder, this time Darlina, to represent Lisa Diaz on a charge of capital murder for drowning her two children. Once again the Udashen-Crowder team was successful. Ms. Diaz was found not guilty by reason of insanity.

Mr. Udashen is now a partner in the prominent Dallas criminal defense firm of Sorrels, Udashen & Anton where he handles state and federal criminal trials and appeals. In addition, Mr. Udashen is an adjunct professor of Texas Criminal Procedure at the Dedman School of Law at Southern Methodist University. Mr. Udashen is a past president of the Dallas Criminal Defense Lawyers Association.

Mr. Udashen is Board Certified in Criminal Law. He is also listed in *The Best Lawyers in America,* the *Bar Register of Preeminent Lawyers, Who's Who in American Law, and Who's Who in America. Texas Monthly Magazine* has named Mr. Udashen a Texas Super Lawyer every year beginning in 2003. In 2007 *Texas Lawyer* named Mr. Udashen one of 5 "Top Notch" criminal defense attorneys in the State of Texas. In 2009 *D Magazine* selected Mr. Udashen as one of the best criminal defense attorneys in Dallas.

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A trial lawyer has two jobs: 1) to persuade the jury of the justness of his client's cause; and 2) to make a record that will lead to a reversal on appeal in the event that the jury remains unpersuaded at the end of the trial. Unfortunately, the second job is often short-changed by lawyers who consider themselves trial lawyers but not "book" lawyers. Unless you are a lawyer who never loses a trial, it is very dangerous to ignore the obligation to make a record. If you do not make a proper record during the trial, you better persuade the jury to rule in your favor. Otherwise, your client will have the unsatisfying experience of losing twice, first at trial and then on appeal.

Making a proper record requires a familiarity with the Rules of Appellate Procedure and the Rules of Evidence. There are three rules in particular that provide the broad outlines of preserving a point for appeal. The first is Texas Rule of Appellate Procedure 33.1 which reads as follows:

> **33.1 Preservation; How Shown**
> **(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 Civil or Criminal 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.
> **(b)** ***Ruling by operation of law.*** In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.
> **(c)** ***Formal exception and separate order not required.*** Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.
> **(d)** ***Sufficiency of Evidence Complaints in Non-Jury Cases.*** In a non-jury case, a complaint regarding the legal or factual sufficiency of the evidence -- including a complaint that the damages found by the court are excessive or inadequate, as distinguished from a complaint that the trial court erred in refusing to amend a fact

finding or to make an additional finding of fact -- may be made for the first time on appeal in the complaining party's brief.

The second is Rule of Appellate Procedure 33.2 which reads as follows:

33.2 Formal Bills of Exception. To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.

(a) ***Form***. No particular form of words is required in a bill of exception. But the objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint.

(b) ***Evidence***. When the appellate record contains the evidence needed to explain a bill of exception, the bill itself need not repeat the evidence, and a party may attach and incorporate a transcription of the evidence certified by the court reporter.

(c) ***Procedure***.

(1) The complaining party must first present a formal bill of exception to the trial court.

(2) If the parties agree on the contents of the bill of exception, the judge must sign the bill and file it with the trial court clerk. If the parties do not agree on the contents of the bill, the trial judge must -- after notice and hearing -- do one of the following things:

(A) sign the bill of exception and file it with the trial court clerk if the judge finds that it is correct;

(B) suggest to the complaining party those corrections to the bill that the judge believes are necessary to make it accurately reflect the proceedings in the trial court, and if the party agrees to the corrections, have the corrections made, sign the bill, and file it with the trial court clerk; or

(C) if the complaining party will not agree to the corrections suggested by the judge, return the bill to the complaining party with the judge's refusal written on it, and prepare, sign, and file with the trial court clerk such bill as will, in the judge's opinion, accurately reflect the proceeding in the trial court.

(3) If the complaining party is dissatisfied with the bill of exception filed by the judge under (2)(C), the party may file with the trial court clerk the bill that was rejected by the judge. That party must also file the affidavits of at least three people who observed the matter to which the bill of exception is addressed. The affidavits must attest to the correctness of the bill as presented by the party. The matters contained in that bill of exception may be controverted and maintained by additional affidavits filed by any party within ten days after the filing of that bill. The truth of the bill of exception will be determined by the appellate court.

(d) ***Conflict***. If a formal bill of exception conflicts with the reporter's record, the bill controls.

(e) ***Time to file***.

(1) *Civil cases*. In a civil case, a formal bill of exception must be filed no later than 30 days after the filing party's notice of appeal is filed.

(2) *Criminal cases*. In a criminal case, a formal bill of exception must be filed:

(A) no later than 60 days after the trial court pronounces or suspends sentence in open court; or

(B) if a motion for new trial has been timely filed, no later than 90 days after the trial court pronounces or suspends sentence in open court.

(3) *Extension of time.* The appellate court may extend the time to file a formal bill of exception if, within 15 days after the deadline for filing the bill, the party filed in the appellate court a motion complying with Rule 10.5(b).

(f) *Inclusion in clerk's record.* When filed a formal bill of exception should be included in the appellate record.

The third rule governing error preservation is Texas Rule of Evidence 103 which reads as follows:

TRE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

The first thing that should be obvious from reading Texas Rules of Appellate Procedure 33.1 and 33.2 and Texas Rule of Evidence 103 is that in order to complain about something on appeal the complaint must first have been made to the trial court. In other words, "as a prerequisite to

presenting a complaint for appellate review, the record must show that the party 'stated the grounds for the ruling that [he] sought from the trial court with sufficient specificity to make the trial court aware of the complaint.'" *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005) (citing TEX. R. APP. P. 33.1(a)(1)). This is not difficult to do. As the Court of Criminal Appeals explained in *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992):

> . . .
>
> [T]here are no technical considerations or form of words to be used [to preserve error]. Straight forward communication in plain English will always suffice.
>
> The standards of procedural default, therefore, are not to be implemented by splitting hairs in the appellate courts. As regards specificity, all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it . . . [Appellate courts] should reach the merits of those complaints without requiring that the parties read some special script to make their wishes known.

The most common way to bring something to the attention of a trial court is by objection. Saying the word "objection," however, is not enough. The objection must be

Timely; and

Specific.

In fact, a defendant has an obligation to make a timely specific objection to inadmissible evidence. *See*, *Martinez v. State*, 22 S.W.3d 504, 507 (Tex. Crim. App. 2000) (to preserve error regarding admission of evidence defendant must lodge timely and specific objection).

An objection is timely if made at the earliest opportunity. This generally means that the objection must be made before the objectionable tangible evidence is admitted or before the question calling for objectionable testimony is answered. *See*, *Polk v.* State, 729 S.W.2d 749, 753 (Tex. Crim. App. 1987); *Hernandez v. State*, 808 S.W.2d 536, 544-45 (Tex. App. - Waco 1991, no pet.). The safest practice with physical evidence is to object when the evidence is first displayed to the jury.

See, Griffin v. State, 665 S.W.2d 762, 770 (Tex. Crim. App. 1983), *cert. denied*, 465 U.S. 1051 (1984). If the question is proper but the answer is not, the objection must be made when the answer is given. *See, Johnson v. State*, 878 S.W.2d 164, 167 (Tex. Crim. App. 1994); *Sierra v. State*, 482 S.W.2d 259, 262-63 (Tex. Crim. App. 1972). Failure to make objection at the earliest possible opportunity constitutes waiver of the complaint. *Mendez v. State*, 138 S.W.3d 334 (Tex. Crim. App. 2004). *See, Griggs v. State*, 213 S.W.3d 923 (Tex. Crim. App. 2007) (motion for mistrial based on State's witness testimony in violation of motion in limine, not made until testimony presented is not timely).

In some situations, whether an objection is timely, depends on compliance with special rules. For example, if the trial court schedules a pretrial hearing pursuant to TEX. CODE CRIM. PROC. ANN. art. 28.01 you must file any motion specified in that statute seven days before the hearing. A complaint about a charging instrument must be made before the date the trial commences, if no pretrial hearing is scheduled. *See*, TEX. CODE CRIM. PROC. ANN. art. 1.14(b); *Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990). A request for a limiting instruction must be made at the time the evidence is offered and is untimely if requested at the time of the charge conference. *See*, TEX. R. EVID. 105(a); *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994) (limiting instruction must be requested at introduction of evidence otherwise evidence may be considered for all purposes).

An objection should be specific enough to put the judge on notice of the grounds for the objection so the judge will know why the objection should be sustained and/or to give the opposing party an opportunity to correct the error or remove the basis for the objection. *Martinez v. State*, *supra*; *Zillender v. State*, 557 S.W.2d 515 (Tex. Crim. App. 1977). Specificity is also important in order to map out the point of error on appeal should the judge overrule the objection. *See, Keeter*

v. State, 2005 WL 766974 (Tex. Crim. App. 2005) (motion for new trial that alleges a defendant is actually innocent because a state's witness withheld evidence of innocence does not raise a *Brady* claim); *Heidelberg v. State*, 144 S.W.3d 535, 537 (Tex. Crim. App. 2004) (an objection on Fifth Amendment grounds does not preserve error under Texas Constitution). This means you must state all the grounds for the objection in order to maintain maximum flexibility on appeal. If, for example, you object that certain evidence offered by the State would violate TEX. R. EVID. 404(b), you may have preserved error as to a violation of that rule but you have not preserved error as to a violation of TEX. R. EVID. 403. Moreover, a general objection such as "the evidence is immaterial" or "a proper predicate has not been laid" fails to preserve anything for review. *See*, *Wilson v. State*, 541 S.W.2d 174, 175 (Tex. Crim. App. 1976). *Williams v. State*, 596 S.W.2d 862, 866 (Tex. Crim. App. 1980). Also, if some portion of evidence or an exhibit is admissible and other portions inadmissible, it is the objecting parties burden to specify which portions are inadmissible. *Willover v. State*, 70 S.W.3d 841 (Tex. Crim. App. 2002). Finally, if one ground for the objection is stated in the trial court and another ground is raised on appeal, the appellate court will not consider the point of error because the ground was not presented to the trial court. *See*, *Euziere v. State*, 648 S.W.2d 700, 703-04 (Tex. Crim. App. 1983).

There is an exception to the rule that you should state all of the grounds for your objection as specifically as possible. If you object but wait a few seconds before stating your grounds, the judge may immediately sustain the objection. Unless your opponent complains and asks the judge for the basis of the ruling, you will benefit from the proposition of law that a judge's ruling will be upheld if there is any proper basis for the ruling. *See*, *Hailey v. State*, 87 S.W.3d 118, 121 (Tex. Crim. App. 2002) (court of appeals may affirm trial court's decision on legal theory not presented to trial court). Conversely, if you state a specific ground for the objection, but it is not a proper one,

the trial judge may overrule the objection with impunity.

Once you have made your timely and specific objection, you should not sit down in smug satisfaction admiring your brilliance. You must

Get a ruling.

Absent a ruling, all you have is a forfeiture of your objection. There is nothing preserved for appeal. Don't let the judge say: "The jury will remember the testimony;" or "Move on please;" or some other non-ruling. *See*, *Darty v. State*, 709 S.W.2d 652, 653 (Tex. Crim. App. 1986) (admission of evidence over objection does not preserve error if no ruling on the objection appears in the record; the mere fact that evidence is admitted over objection is not an implied overruling of objection). Ask the judge to rule on the objection and if he does not, object to the failure of the judge to rule. This preserves your error for purposes of appeal. *See*, TEX. R. APP. P. 33.1(2)(B); *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991).

If your objection is sustained, you must carry on until you get an adverse ruling if you want to preserve the objection for appeal. *See*, *Boyd v. State*, 643 S.W.2d 700, 707 (Tex. Crim. App. 1982) (defendant obtained all relief requested when objection sustained). As the Court of Criminal Appeals explained in *Cruz v. State*, 2007 WL 1610466 (Tex. Crim. App. 2007), "[t]he only essential requirement to ensure preservation is a timely, specific request that is refused by the trial court." *Id.* at *1. This is where the familiar litany of objection, instruction to disregard, and motion for mistrial comes into play. For appellate purposes, this litany should be followed in the order stated. Appellate courts usually do not approve of skipping the first two steps and immediately requesting a mistrial. *See*, *DeRusse v. State*, 579 S.W.2d 224, 236 (Tex. Crim. App. 1979); *cf. Young v. State*, 137 S.W.3d 65, 70 (Tex. Crim. App. 2004) (if instruction to disregard would not cure harm error preserved by request for mistrial). When a defendant moves for a mistrial without first seeking an instruction to

disregard, appellate review is limited to whether the trial court erred in denying the motion for mistrial. *Cruz v. State*, *supra*.

Once your specific, timely objection is overruled, do not assume you have done your job as far as protecting the record for appeal. It is critical that you

Keep objecting.

If you allow the same evidence to which you earlier objected to come in without objection, you will have forfeited your right to raise the overruling of the earlier objection on appeal. *See*, *Hudson v. State*, 675 S.W.2d 507, 511 (Tex. Crim. App. 1984) (counsel must object every time allegedly inadmissible evidence is offered); accord, *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004). This means that if your opponent is going to ask a number of questions about an objectionable subject you must object to each question unless the judge rules on your objection in a hearing outside the presence of the jury or allows you a continuing objection to all of the objectionable questions. *See*, *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). A continuing objection preserves error if it is made in a timely fashion, states a specific ground, and requests a ruling from the trial court. *See*, *Sattiewhite v. State*, 786 S.W.2d 271, 283-84 (Tex. Crim. App. 1989). You should be careful, however, that the record reflects exactly what subject matter is covered by the continuing objection and the grounds for the continuing objection. If the witness strays ever so slightly into a different but still objectionable subject matter, a new objection should be made. Similarly, if a new witness takes the stand to testify about the same subject matter, it would be wise to renew the objection. *See*, *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985).

A hearing outside the presence of the jury will preserve your error without the need of objecting again in the presence of the jury. *See*, TEX. R. EVID. 103(a)(1); *Ethington v. State*, 819

S.W.2d 854, 859 (Tex. Crim. App. 1991); *Geuder v. State*, 115 S.W.3d 11, 14-16 (Tex. Crim. App. 2003). But remember, do not say "no objection" when the evidence is offered in the presence of the jury or you will waive your objection. *See*, *James v. State*, 772 S.W.2d 84, 97 (Tex. Crim. App. 1989), vacated on other grounds, 493 U.S. 885 (1989); *Gearing v. State*, 685 S.W.2d 326, 329 (Tex. Crim. App. 1985).

The keep objecting rule applies to sustained objections the same as it does to overruled objections, particularly if the objectionable evidence is something you really want to keep from the jury. Thus, do not become complacent and assume that your opponent will never stray into objectionable territory again because the judge sustained your objection the first time your opponent tried this tack. A good trial lawyer will always come back at you from a different direction. You must therefore be alert and object each time your opponent returns to the objectionable subject. *See*, *Abbott v. State*, 726 S.W.2d 644, 648 (Tex. App. - Amarillo 1987, pet. ref'd) (when objection sustained outside of jury's presence and prosecutor still offers evidence in jury's presence, defendant must object in presence of jury or error is waived). Error in the admission of evidence is cured if the same evidence is previously or subsequently admitted without objection. *See*, *Martinez v. State*, 99 S.W.3d 189, 191 (Tex. Crim. App. 2003); *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985).

Motions in Limine.

It is important to remember that the granting of a motion in limine does not preserve error. To preserve error with regard to the subject matter of the motion in limine, a party must object at the time the issue is raised during the trial. *See*, *Martinez v. State*, 98 S.W.3d 189 (Tex. Crim. App. 2003); *Gonzales v. State*, 685 S.W.2d 47, 50 (Tex. Crim. App. 1985), *cert. denied*, 472 U.S. 1009 (1985); *Geuder v. State*, 115 S.W.3d 11, 15 (Tex. Crim. App. 2003).

Motions to Strike.

When evidence is conditionally admitted subject to being connected up, it is necessary to renew the objection to strike the evidence in order to preserve error. Likewise, when it is not possible to lodge an objection prior to evidence being admitted, in addition to objecting, the party must move to strike the evidence and have it removed from the jury's consideration. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991); *McMillon v. State*, 940 S.W.2d 767, 769-770 (Tex. App. - Houston [14th Dist.] 1997, pet. ref'd).

Doctrine of Curative Admissibility.

If a defendant offers the same evidence that he previously objected to, he waives any appellate complaint under the doctrine of curative admissibility. *Aguilar v. State*, 980 S.W.2d 824, 826 (Tex. App. - San Antonio 1998, no pet.). This waiver rule can be avoided if defense counsel makes it a matter of record that the defendant's rebuttal testimony is being offered to meet, destroy or explain the evidence that was erroneously admitted over his objection. *Rogers v. State*, 853 S.W.2d 29 (Tex. Crim. App. 1993).

Preserving Review on Pre-trial Rulings.

If the court makes a ruling pre-trial or outside the presence of the jury, it is not necessary to object again in front of the jury to preserve error. *See* TRE. 103; *Geuder v. State*, 115 S.W.3d 11 (Tex. Crim. App. 2003). It is important, however, that defense counsel does not state that there is no objection when the evidence is offered in front of the jury, or the objection will be waived.

Offer of proof.

You may have the misfortune of being in a trial from time to time with an opponent who knows how to make timely, specific objections and get rulings on those objections. Your opponent may even be so good as to get his objections sustained. If the sustained objection prevents you from

presenting certain testimony or evidence to the jury, then you must make an offer of proof.

An offer of proof serves two purposes. One is to try to persuade the trial judge to change his mind and permit the evidence to be introduced. The other is to make a record for the appellate court so they will know the nature of the excluded evidence. *See*, *Rumbaugh v. State*, 629 S.W.2d 747, 754 (Tex. Crim. App. 1982); *James v. State*, 546 S.W.2d 306, 311 (Tex. Crim. App. 1977) (nothing presented for review in absence of offer of proof showing what excluded testimony would have been). In order "to preserve error in the exclusion of evidence, the proponent is required to make an offer of proof and obtain a ruling." *Reyna v. State*, 168 S.W.3d 173, 176 (Tex. Crim. App. 2005).

An offer of proof may be made in either narrative form or question and answer form, at your discretion. *See*, TEX. R. EVID. 103(b); *Kipp v. State*, 876 S.W.2d 330, 334 (Tex. Crim. App. 1994) (court must allow making of offer of proof in question and answer form at request of party). It should be remembered that in whatever form the offer of proof takes the proffered evidence must be admissible under the rules of evidence. If the proffer contains both admissible and inadmissible evidence, a party may not complain on appeal about the exclusion of evidence unless the admissible evidence was specifically offered by the proponent. *Id.* at 179.

An offer of proof is not the same thing as a Bill of Exception. Thus, when the judge excludes evidence you want to present to the jury, do not ask the judge if you can make a "bill." Ask if you can make an offer of proof. The judge may be so impressed with your proper use of legal terminology that he may change his mind and allow the evidence to be presented to the jury.

A Bill of Exception has importance only in making a record for appellate purposes. It is done after a trial is concluded in order to make the record reflect something that was not taken down by the court reporter. This may be something that occurred outside the presence of the court reporter or may be something, such as a bench conference that the court reporter did not take down. Texas

Rule of Appellate Procedure 33.2 is very specific on how to prepare a Bill of Exception.

Never waive a court reporter

A Bill of Exception is a rare device that could be made even rarer if lawyers would make certain that the court reporter is recording all proceedings. Thus, a lawyer should never waive a court reporter for any portion of the trial. The court reporter should take voir dire, should take bench conferences*, should take everything. If the court reporter is not recording certain proceedings, you must object in the trial court in order to preserve error for appeal. *See, Williams v. State*, 937 S.W.2d 479, 487 (Tex. Crim. App. 1997). Do not rely on the fact that Texas Rule of Appellate Procedure 13.1 requires court reporters to record all proceedings. Many don't. When you go to the bench for a conference, take the court reporter with you. When you are giving a final argument, make sure the reporter's fingers are moving. Do not let the trial judge intimidate you into waiving a court reporter for some portion of the trial. Just the fact that the court reporter is there keeps your opponent and the judge honest. More importantly, there is no record without the court reporter. Absent a record, there is no error on appeal.

Preserving Error on Voir Dire.

First, always record the voir dire. If the voir dire is not recorded, there will be no record to show any error during voir dire. *See Broussard v. State*, 471 S.W.2d 48, 50 (Tex. Crim. App. 1971).

Improper Comment by Prosecutor.

If, during voir dire, the prosecutor makes an improper comment, the defense attorney must immediately object to the comment. If the objection is sustained, defense counsel must ask that the panel be instructed to disregard the comment. If the instruction to disregard is given, then counsel must move to quash the panel. Lastly, counsel must use all of his peremptory challenges to strike

*Adapted from Modern Trial Advocacy, Stephen Lubet 1997.

jurors who heard the comment. *Tucker v. State*, 990 S.W.2d 261, 262 (Tex. Crim. App. 1999); *Dancer v. State*, 253 S.W.3d 368 (Tex. App. - Fort Worth 2008).

Improper Comments by Judge.

Improper comments by the judge, in front of the jury, may, in extreme circumstances, constitute reversible error without a contemporaneous objection. *Blue v. State*, 41 S.W.3d 129 (Tex. Crim. App. 2000) (trial judge's multiple comments that infringed on presumption of innocence warranted reversal even without a defense objection).

Limiting Defense Questions.

Counsel must ensure that the record on appeal contains the question he wished to ask. Otherwise, nothing is preserved for appeal. *Franklin v. State*, 12 S.W.3d 473 (Tex. Crim. App. 2000).

Commitment Question.

Neither party may ask questions that seek to commit a juror to resolve an issue in the case in a certain way. *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

Denial of Challenge for Cause.

If a defense challenge for cause is denied, defense counsel must:

1. Make a timely objection specifying the reason why the challenge was appropriate.

2. Exhaust all defense peremptory challenges.

3. Request additional peremptory challenges.

4. State on the record that if he had not been compelled to use a peremptory challenge on the objectionable juror who would have used that peremptory challenge to remove a juror who was seated. State why that juror was objectionable. *Johnson v. State*, 43 S.W.3d 1 (Tex. Crim. App. 2001); *Escamilla v. State*, 143 S.W.3d 814 (Tex. Crim. App. 2004).

Improper Granting of the State's Challenge for Cause.

Defense counsel must object to the courts action and assert that the error deprived him of lawfully constituted jury. The record must also show that the state exercised all of its peremptory challenges. *Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998).

Batson Claims.

A defendant can establish a *prima facie* case of purposeful discrimination in jury selection based solely on the use of the prosecutor's peremptory challenges at the trial. A *prima facie* case is made by showing that the prosecutor has exercised peremptory challenges to remove members of a cognizable minority. *Batson v. Kentucky*, 476 U.S. 79 (1986). *Purkett v. Elam*, 514 U.S. 765 (1995) set out a three step process to establish a *Batson* violation.

1. Opponent of strike must make a *prima facie* case of racial discrimination. This can be shown by counsel stating in the record that race of the jurors struck by the state and showing that the state used their strikes disproportionately to remove minority jurors.

2. If a *prima facie* case is made, the prosecutor must respond with race neutral reasons for the strike. Defense counsel has the right to cross examine the prosecutor and present contrary evidence. *Williams v. State*, 767 S.W.2d 872, 874 (Tex. App. - Dallas 1989, pet. ref'd).

3. The trial court then must decide whether the prosecutor used improper racial considerations in their strike. *See Miller-El v. Dretke*, 125 S.Ct. 2317 (2005).

4. Defense counsel should object to the trial court's overruling of the *Batson* claim at the end of this process to preserve the issue for appeal.

Objections to Court's Charge.

Requested jury instructions must be in writing or dictated to the court reporter. Art. 36.15, Tex. Code Crim. Proc. They must be presented to the trial court and ruled on in a timely manner,

before the jury is given the instruction. *Brackenridge v. State*, 489 S.W.2d 287, 288-89 (Tex. Crim. App. 1973); *McCloud v. State*, 527 S.W.2d 885, 887 (Tex. Crim. App. 1975).

Objections to the court's instruction must be made before the charge is read to the jury. Tex. Code Crim. Proc. art. 36.14. The objection must distinctly specify the grounds. *Wood v. State*, 516 S.W.2d 667, 670 (Tex. Crim. App. 1974); *Reece v. State*, 683 S.W.2d 873, 874 (Tex. App. - Houston [14th Dist.] 1984, no pet.).

Final Argument.

Objections on final argument are the same as other objections. They must be timely, specific and an adverse ruling must be obtained.

Time Limits on Final Argument.

The trial court can abuse discretion by unduly limiting the time for a final argument. *Dang v. State*, 154 S.W.3d 616 (Tex. Crim. App. 2005). Counsel should:

1. Object to the time limit when it is announced.

2. When the trial court ends the final argument, the objection must be renewed.

3. Counsel must state on the record the areas he was unable to cover in the final argument based on the time limit.

4. Counsel should also renew this issue in a motion for new trial.

A SHORT LIST OF COMMON OBJECTIONS[**]

A. Objections to the Form of the Question (or Answer)

1. Leading Question

A leading question suggests or contains its own answer. Leading questions are objectionable on direct examination. They are permitted on cross examination. *See* TEX. R. EVID. 611(c).

[**]Adapted from Modern Trial Advocacy, Stephen Lubet, 1997.

Responses. The question is preliminary, foundational, directing the witness's attention, or refreshing the witness's recollection. The witness is very old, very young, infirm, adverse, or hostile. Leading questions can most often be rephrased in non-leading form.

2. Compound Question

A compound question contains two separate inquiries that are not necessarily susceptible of a single answer. For example, "Wasn't the fire engine driving in the left lane and flashing its lights?"

Responses. Dual inquiries are permissible if the question seeks to establish a relationship between two facts or events. For example, "Didn't he move forward and then reach into his pocket?" Other than to establish a relationship, compound questions are objectionable and should be rephrased.

3. Vague Question

A question is vague if it is incomprehensible, or incomplete, or if any answer will necessarily be ambiguous. For example, the question, "When do you leave your house in the morning?" is vague since it does not specify the day of the week to which it refers.

Responses. A question is not vague if the judge understands it. Many judges will ask the witness whether he or she understands the question. Unless the precise wording is important, it is often easiest to rephrase a "vague" question.

4. Argumentative Question

An argumentative question asks the witness to accept the examiner's summary, inference, or conclusion rather than to agree with the existence (or nonexistence) of a fact. Questions can be made more or less argumentative depending upon the tone of voice of the examiner.

Responses. Treat the objection as a relevance issue and explain its probative value to the

court: "Your Honor, it goes to prove . . ." (It will not be persuasive to say, "Your Honor, I am not arguing." It might be persuasive to explain the non-argumentative point that you are trying to make.) Alternatively, make no response, but wait to see if the judge thinks that the question is argumentative. If so, rephrase the question.

5. Narratives

Witnesses are required to testify in the form of question and answer. This requirement insures that opposing counsel will have the opportunity to frame objections to questions before the answer is given. A narrative answer is one which proceeds at some length in the absence of questions. An answer that is more than a few sentences long can usually be classified as a narrative. A narrative question is one that calls for a narrative answer, such as, "Tell us everything that you did on July 14." Objections can be made both to narrative questions and narrative answers.

Responses. The best response is usually to ask another question that will break up the narrative. Note that expert witnesses are often allowed to testify in narrative fashion since technical explanations cannot be given easily in question-and-answer format. Even then, however, it is usually more persuasive to interject questions to break up big answers.

6. Asked and Answered

An attorney is not entitled to repeat questions and answers. Once an inquiry has been "asked and answered," further repetition is objectionable. Variations on a theme, however, are permissible, so long as the identical information is not endlessly repeated. The asked and answered rule does not preclude inquiring on cross examination into subjects that were covered fully on direct. Nor does it prevent asking identical questions of different witnesses. Judges do, however, have the inherent power to exclude cumulative testimony. *See* TEX. R. EVID. 611(a).

7. Assuming Facts Not in Evidence

A question, usually on cross-examination, is objectionable if it includes as a predicate a statement of fact that has not been proven. The reason for this objection is that the question is unfair; it cannot be answered without conceding the unproven assumption. Consider, for example, the following question: "You left your home so late that you only had fifteen minutes to get to your office." If the time of the witness's departure was not previously established, this question assumes a fact not in evidence. The witness cannot answer yes to the main question (fifteen minutes to get to the office) without implicitly conceding the unproven predicate.

Responses. A question assumes facts not in evidence only when it utilizes an introductory predicate as the basis for another inquiry. Simple, one-part cross examination questions do not need to be based upon facts that are already in evidence. For example, it would be proper to ask a witness, "Didn't you leave home late that morning?" whether or not there had already been evidence as to the time of the witness's departure. As a consequence of misunderstanding this distinction, "facts not in evidence" objections are often erroneously made to perfectly good cross examination questions. If the objection is well taken, most questions can easily be divided in two.

8. Non-responsive Answers

It was once hornbook law that only the attorney who asked the question could object to a non-responsive answer. The theory for this limitation was that opposing counsel had no valid objection so long as the content of the answer complied with the rules of evidence. The more modern view is that opposing counsel can object if all, or some part, of an answer is unresponsive to the question, since counsel is entitled to insist that the examination proceed in question-and-answer format. Jurisdictions that adhere to the traditional view may still recognize an objection that the witness is "volunteering" or that there is "no question pending."

B. Substantive Objections

1. Hearsay

The Texas Rules of Evidence define hearsay as "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). Thus, any out-of-court statement, including the witness's own previous statement, is potentially hearsay. Whenever a witness testifies, or is asked to testify, about what she or someone else said in the past, the statement should be subjected to hearsay analysis. Statements are not hearsay if they are offered for a purpose other than to "prove the truth of the matter asserted." For example, consider the statement, "I warned him that his brakes needed work." This statement would be hearsay if offered to prove that the brakes were indeed defective. On the other hand, it would not be hearsay if offered to prove that the driver had notice of the condition of the brakes and was therefore negligent in not having them repaired. There are also numerous exceptions to the hearsay rule.

Responses. Out-of-court statements are admissible if they are not hearsay or if they fall within one of the exceptions to the hearsay rule.

In addition to statements that are not offered for their truth, the Texas Rules of Evidence define three other types of statements as non-hearsay. The witness's own previous statement is not hearsay if (A) it was given under oath and it is inconsistent with the current testimony, or (B) it is consistent with the current testimony and it is offered to rebut a charge of recent fabrication, or (C) it is a statement of past identification. *See* TEX. R. EVID. 801(e)(1). In addition, an admission of a party opponent is defined as non-hearsay, if offered against that party. TEX. R. EVID. 801(e)(2).

Some of the more frequently encountered exceptions to the hearsay rule are as follows:

Present Sense Impression. A statement describing an event made while the declarant is

observing it. For example, "Look, there goes the President." TEX. R. EVID. 803(1).

Excited Utterance. A statement relating to a startling event made while under the stress of excitement caused by the event. For example, "A piece of plaster fell from the roof, and it just missed me." TEX. R. EVID. 803(2).

State of Mind. A statement of the declarant's mental state or condition. For example, "He said that he was so mad he couldn't see straight." TEX. R. EVID. 803(3).

Past Recollection Recorded. A memorandum or record of a matter about which the witness once had knowledge but which she has since forgotten. The record must have been made by the witness when the events were fresh in the witness's mind and must be shown to have been accurate when made. TEX. R. EVID. 803(5).

Business Records. The business records exception applies to the records of any regularly conducted activity. To qualify as an exception to the hearsay rule the record must have been made at or near the time of the transaction by a person with knowledge or transmitted from a person with knowledge. It must have been made and kept in the ordinary course of business. The foundation for a business record must be laid by the custodian of the record or by some other qualified witness. TEX. R. EVID. 803(6).

Reputation as to Character. Evidence of a person's reputation for truth and veracity is an exception to the hearsay rule. Note that there are restrictions other than hearsay on the admissibility of character evidence. TEX. R. EVID. 803(2). See also TEX. R. EVID. 404, 405.

Prior Testimony. Testimony given at a different proceeding, or in deposition, qualifies for this exception if (1) the testimony was given under oath; (2) the adverse party had an opportunity to cross examine; and (3) the witness is currently unavailable. TEX. R. EVID. 804(b)(1).

Dying Declaration. A statement by a dying person as to the cause or circumstances of what

he or she believed to be impending death. Admissible only in homicide prosecutions or civil cases. TEX. R. EVID. 804(b)(2).

Statement Against Interest. A statement so contrary to the declarant's pecuniary, proprietary, or penal interest that no reasonable person would have made it unless it were true. The declarant must be unavailable, and certain other limitations apply in criminal cases. TEX. R. EVID. 803(24).

2. Irrelevant

Evidence is irrelevant if it does not make any fact of consequence to the case more or less probable. Evidence can be irrelevant if it proves nothing or if it tends to prove something that does not matter. TEX. R. EVID. 401, 402.

3. Unfair Prejudice

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Note that evidence cannot be excluded merely because it is prejudicial; by definition, all relevant evidence must be prejudicial to some party. Rather, the objection only obtains if the testimony has little probative value and it is unfairly prejudicial. The classic example is a lurid and explicit photograph of an injured crime victim offered to prove some fact of slight relevance, such as the clothing that the victim was wearing. The availability of other means to establish the same facts will also be considered by the court. TEX. R. EVID. 403.

Responses. Most judges are hesitant to exclude evidence on this basis. A measured explanation of the probative value of the testimony is the best response.

4. Improper Character Evidence, Generally

Character evidence is generally not admissible to prove that a person acted in conformity with his or her character. For example, a defendant's past burglaries cannot be offered as proof of a current charge of burglary. A driver's past accidents cannot be offered as proof of current

negligence. TEX. R. EVID. 404(a).

Responses. A criminal defendant may offer proof of good character, which the prosecution may then rebut. TEX. R. EVID. 404(a)(1).

Past crimes and bad acts may be offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. TEX. R. EVID. 404(b).

5. Improper Character Evidence, Conviction of Crime

As noted above, the commission, and even the conviction, of past crimes is not admissible to prove current guilt.

The credibility of a witness who takes the stand and testifies, however, may be impeached on the basis of a prior criminal conviction, but only if the following requirements are satisfied. The crime must have been either (1) a felony, or (2) one which involved dishonesty or false statement, regardless of punishment. With certain exceptions, the evidence is not admissible unless it occurred within the last ten years. Juvenile adjudications are generally not admissible. TEX. R. EVID. 609.

Note that the impeachment is generally limited to the fact of conviction, the name of the crime, and the sentence received. The details and events that comprised the crime are generally inadmissible.

Responses. If the crime was not a felony the conviction may still be admissible if it involved dishonesty. If the conviction is more than ten years old it may still be admissible if the court determines that its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b).

6. Improper Character Evidence, Reputation

Reputation evidence is admissible only with regard to an individual's character for truthfulness or untruthfulness. Moreover, evidence of a truthful character is admissible only after

the character of the witness has been attacked. TEX. R. EVID. 608(a).

7. Lack of Personal Knowledge

Witnesses (other than experts) must testify from personal knowledge, which is generally defined as sensory perception. A witness's lack of personal knowledge may be obvious from the questioning, may be inherent in the testimony, or may be developed by questioning on voir dire. TEX. R. EVID. 602.

8. Improper Lay Opinion

Lay witnesses (nonexperts) are generally precluded from testifying as to opinions, conclusions, or inferences. TEX. R. EVID. 701.

Responses. Lay witnesses may testify to opinions or inferences if they are rationally based upon the perception of the witness. Common lay opinions include estimates of speed, distance, value, height, time, duration, and temperature. Lay witnesses are also commonly allowed to testify as to the mood, sanity, demeanor, sobriety, or tone of voice of another person.

9. Speculation or Conjecture

Witnesses may not be asked to speculate or guess. Such questions are often phrased as hypotheticals in a form such as, "What would have happened if . . . ."

Responses. Witnesses are permitted to make reasonable estimates rationally based upon perception.

10. Authenticity

Exhibits must be authenticated before they may be admitted. Authenticity refers to adequate proof that the exhibit actually is what it seems or purports to be. Virtually all documents and tangible objects must be authenticated. Since exhibits are authenticated by laying a foundation, objections may be raised on the ground of either authenticity or foundation. See TEX. R. EVID.

901(a).

Responses. Ask additional questions that establish authenticity.

11. Lack of Foundation

Nearly all evidence, other than a witness's direct observation of events, requires some sort of predicate foundation for admissibility. An objection to lack of foundation requires the judge to make a preliminary ruling as to the admissibility of the evidence. TEX. R. EVID. 104. The evidentiary foundations vary widely. For example, the foundation for the business records exception to the hearsay rule includes evidence that the records were made and kept in the ordinary course of business. The foundation for the introduction of certain scientific evidence requires the establishment of a chain of custody. The following list includes some, though by no means all, of the sorts of evidence that require special foundations for admissibility: voice identifications, telephone conversations, writings, business records, the existence of a privilege, dying declarations, photographs, scientific tests, expert and lay opinions, and many more.

Response. Ask additional questions that lay the necessary foundation.

12. Best Evidence

The "best evidence" or "original document" rule refers to the common law requirement that copies or secondary evidence of writings could not be admitted into evidence unless the absence of the original could be explained. Under modern practice, most jurisdictions have significantly expanded upon the circumstances in which duplicates and other secondary evidence may be admitted.

Under the Texas Rules of Evidence, "duplicates" are usually admissible to the same extent as originals. Duplicates include carbons, photocopies, photographs, duplicate printouts, or any other copies that are made by "techniques which accurately reproduce the original." TEX. R. EVID. 1001-

1003.

Other secondary evidence, such as oral testimony as to the contents of a document, is admissible only if the original has been lost or destroyed, is unavailable through judicial process, or if it is in the exclusive possession of the opposing party. TEX. R. EVID. 1004.

Response. Ask additional questions demonstrating either that the item offered is a duplicate or that the original is unavailable.