

Be Careful What You Ask For:



The Danger of Asking a
Court to Enter a Judgment
that You Will Appeal



By **DAVID GEORGE** and **THERESA YOUNG**

The other side moved for summary judgment, and the judge granted it. The judge told your opponent to draft a motion and for you to “approve it as to form.” You plan to appeal, and you don’t want to waive any error—but you also don’t want to make the judge mad for no reason. What do you do?

You represent the plaintiff and you won the trial, but the damages were much less than you hoped for. Both you and the defendant plan to appeal—the defendant as to liability and you as to damages. Can you ask for judgment and still appeal?

These are situations that trial lawyers encounter every day. They do not want to unnecessarily annoy the judge, but they want to make sure that their clients’ rights are protected. What should they do?

The concern is that a party will waive its right to appeal by asking the trial court to make a particular ruling. The Texas Supreme Court has long held that, under the invited-error doctrine, a party cannot ask a court to enter an order and then challenge that order on appeal.¹ So a lawyer must be careful that his attempt to move things along—or comply with an impatient trial judge’s order—is not interpreted as seeking relief that is contrary to the relief he is seeking on appeal.²

The answer is not as simple as one might think. Unlike most areas of the law, form over substance is the order of the day. Unless lawyers use specific language in specific circumstances, they cannot be sure that they have protected their clients’ rights. So care must be taken.

Approved As To Form

One of the most common situations trial lawyers encounter is when the judge asks them to approve an order as to form. Many lawyers are worried that, by approving the form of the order, they will waive their right to challenge it on appeal. This is one area where the lawyer does not have to worry. Texas courts have held that approving an order “as to form” does not result in a consent judgment.³ So a lawyer can approve an order as to form and still challenge it on appeal.

But what if the lawyer does more than approve as to form? What if he, instead, approves “as to form and substance”? Has he accidentally agreed that the trial court’s order was proper and, therefore, waived his appeal? The Texas courts of appeals are split on the issue.⁴ Some say that approving as to substance creates a consent judgment, which cannot be appealed.⁵ Others have held that approving as to form and substance is no differ-

ent than approving as to form, so there is no waiver.⁶ A prudent lawyer should not approve “as to form and substance” an order that he might appeal, but—if he makes a mistake and does so—he has an argument that he has not waived his client’s right to appeal that order.

Asking for Judgment

The trial is over, but neither side is satisfied with the result. The jury found liability, but the damages were low. Even though it has been two months since the trial, neither side is willing to ask for judgment. The defendant is afraid that by asking for judgment he will admit that the jury’s liability finding was proper. And the plaintiff is afraid that he will admit that the damages awarded were the proper amount.

The problem is that there will not be a final judgment unless somebody asks for one. Under Texas practice, the trial court does not enter a judgment unless the parties ask it to,⁷ so there is a danger that the case will be stuck in limbo. Neither side will want to ask for judgment, because it will fear losing its right to appeal the final judgment that it has requested; but if no one asks for final judgment, then the case will never be resolved.

The Texas Supreme Court has recognized the problem and has provided a way for parties to get the case from the trial court to the court of appeals without waiving error.⁸ Parties can request a judgment and still challenge it on appeal, but they must comply with a strict procedure and use particular language.⁹ If they do not, they risk waiving their right to appeal.¹⁰

In *First National Bank v. Fojtik*, the Supreme Court allowed a party to attack the judgment that it requested when its motion for judgment said that it “agree[d] only as to the form of the judgment but disagree[d] and should not be construed as concurring with the content and result.”¹¹ The Supreme Court, however, also has held that a party waived its appeal when it said in its brief to the trial

