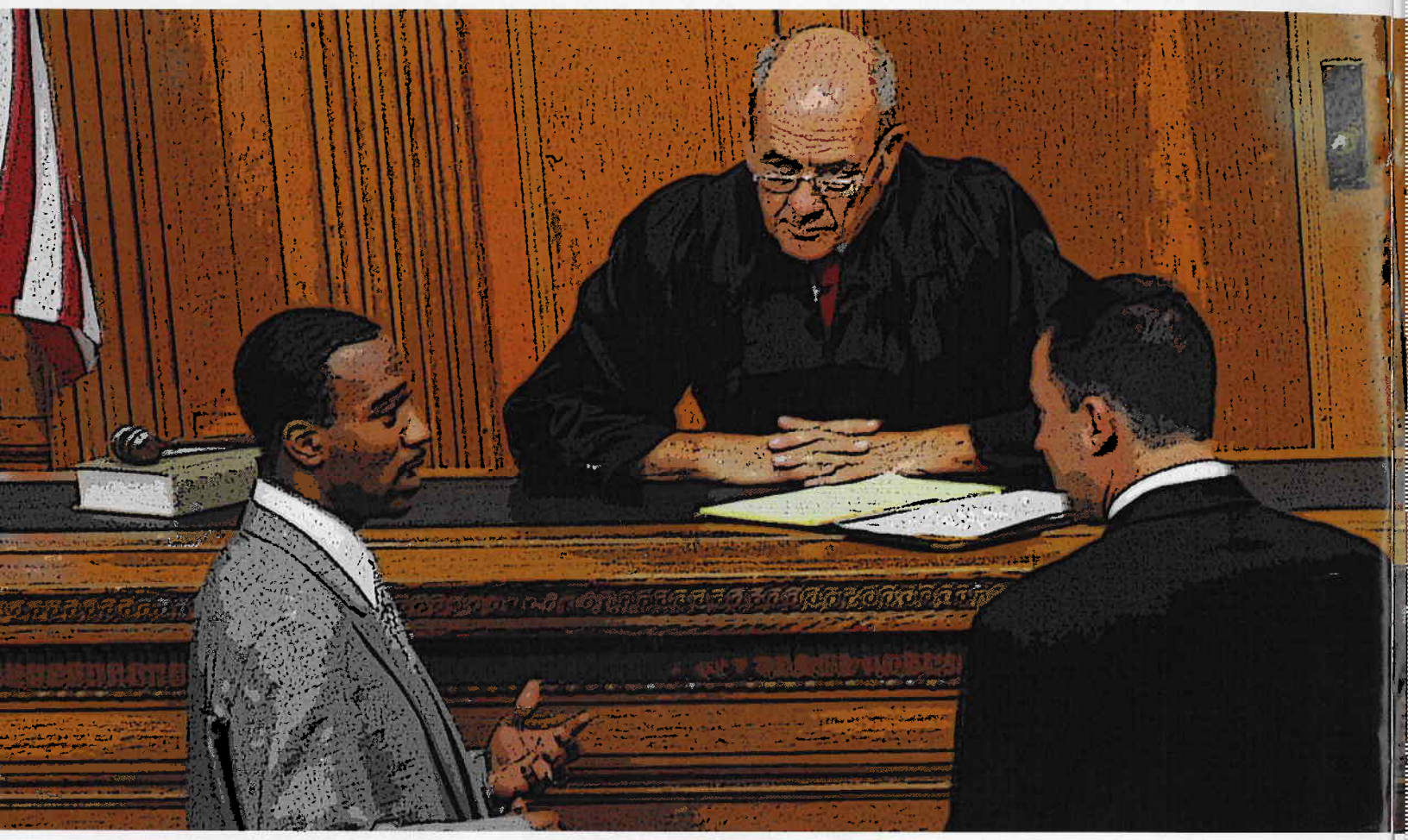
Be Careful What You Ask For:



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 different 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

court—but not its motion—that it reserved its right to appeal the judgment.[12] So a party can waive its appeal if it files a motion requesting entry of the judgment without including a statement that it disagrees with the judgment, even if it includes that statement in another filing it makes with the trial court.[13]

Lawyers should use the language that the Supreme Court approved in *Fojtik*, because doing so will avoid waiver.[14] A party will not necessarily waive its appeal if it deviates from the *Fojtik* language, but the danger is there. The First Court of Appeals in Houston recently held that a party did not waive its appeal even though it did not follow the *Fojtik* language, but the court said that it was a close call.[15] The appellant had given the trial court two different proposed judgments.[16] It asked the court to enter the first judgment, and, in the alternative, asked the court to enter the second judgment if it would not enter the first.[17] The court entered the second judgment, and the party challenged it on appeal.[18] The First Court held that asking for entry in the alternative was enough of a reservation that the party had not waived its appeal.[19] But it said that the party's "reservation of its right to appeal the judgment would have been clearer had it followed the language in *Fojtik*."[20]

It is important to remember that the rule about requesting a judgment is separate from the rule about approving a judgment as to form.[21] While a party does not waive his appeal by approving the judgment as to form, he does waive it if he unreservedly asks the trial court to enter that judgment.[22]

Conclusion

Requesting a judgment that a party intends to appeal is one of the most dangerous actions in the trial court. The failure to include magic words in the right place can result in a waiver of an appeal. But there is no choice if both sides want to appeal—someone has to request the judgment to get the ball rolling. The lawyer in that situation should make sure

that her request for judgment contains the statement that she agrees only to the form of the judgment and that she disagrees with the judgment's content and result.[23] And she must make sure that she puts that statement in the motion for judgment itself, and not in a brief supporting the motion.[24]

A lawyer can feel safe signing the proposed judgment "approved as to form," but should never sign an order that she might appeal "approved as to form and substance."

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Endnotes

1. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 861 (Tex. 2005) ("As a general rule, the doctrine of estoppel precludes a litigant from requesting a ruling from a court and then complaining that the court committed error in giving it to him."); *Northeast Tex. Motor Lines, Inc. v. Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (Tex. 1942); *Tex. Portland Cement & Lime Co. v. Lee*, 98 Tex. 236, 82 S.W. 1025, 1025 (1904). **2.** *See First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989); *Litton Indus. Prod., Inc. v. Gammage*, 668 S.W.2d 319, 322-23 (Tex. 1984). **3.** *Oryx Energy Co. v. Union Nat'l Bank of Tex.*, 895 S.W.2d 409, 419 (Tex. App.—San Antonio 1995, writ denied); *see also Bonner v. Texas Children's Hosp.*, No. 13-03-228-CV, 2006 WL 349510, at *2 (Tex. App.—Corpus Christi Feb. 16, 2006, pet. denied) (mem. op.) (collecting cases). **4.** *See In re D.C.*, 180 S.W.3d 647, 649 (Tex. App.—Waco 2005, no pet.) (discussing split). **5.** *Johnson v. Rancho Guadalupe, Inc.*, 789 S.W.2d 596, 603 (Tex. App.—Texarkana 1990, no writ); *Cisneros v. Cisneros*, 787 S.W.2d 550, 552 (Tex. App.—El Paso 1990, no writ); *Bexar County Criminal Dist. Attorney's Office v. Mayo*, 773 S.W.2d 642, 644 (Tex. App.—San Antonio 1989, no writ); *Allied First Nat'l Bank of Mesquite v. Jones*, 766 S.W.2d 800, 801 (Tex. App.—Dallas 1988, no writ). **6.** *In re Broussard*, 112 S.W.3d 827, 832 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding); *Oryx Energy Co. v. Union Nat'l Bank of Tex.*, 895 S.W.2d 409, 419 (Tex. App.—San Antonio 1995, writ denied); *First Am. Title Ins. Co. v. Adams*, 829 S.W.2d 356, 364 (Tex. App.—Corpus Christi 1992, writ denied). **7.** *Cf.* FED. R. CIV. P. 58(b) (judgment entered in federal court without parties needing to request it). **8.** *Fojtik*, 775 S.W.2d at 633 ("There must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms."). **9.** *Id.*; *Litton Indus.*, 668 S.W.2d at 322-23. **10.** *See Litton Indus.*, 668 S.W.2d at 322-23. **11.** *Fojtik*, 775 S.W.2d at 633. **12.** *Litton Indus.*, 668 S.W.2d at 322-23. **13.** *Litton Indus.*, 668 S.W.2d at 322-23; *Casu v. Marathon Refining Co.*, 896 S.W.2d 388, 390 (Tex. App.—Houston [1st Dist.] 1995, writ denied) ("To preserve the right to complain about a judgment on appeal, a movant for judgment should state in its motion to enter judgment that it agrees only with the form of the judgment, and note its disagreement with the content and result of the judgment."). **14.** *Fojtik*, 775 S.W.2d at 633 (finding no waiver when the motion requesting judgment said: "While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result."). **15.** *Beal Bank SSB v. Biggers*, 227 S.W.3d 187, 191 (Tex. App.—Houston [1st Dist.] 2007, no pet.). **16.** *Id.* at 190-91. **17.** *Id.* **18.** *Id* **19.** *Id.* at 191. **20.** *Id* **21.** *Bonner*, 2006 WL 349510, at *2. **22.** *Id.* ("Here, our decision is based not on appellant's signature on the order granting appellees' motion for summary judgment, but on appellant's motion, which unqualifiedly requested that the trial court grant appellees' motion for summary judgment."). **23.** *Fojtik*, 775 S.W.2d at 633; *Casu*, 896 S.W.2d at 390. **24.** *Litton Indus.*, 668 S.W.2d at 322-23