

# **The Court's Charge**

**Nina Cortell  
Heather D. Bailey  
HAYNES AND BOONE, LLP  
901 Main Street  
Suite 3100  
Dallas, Texas 75202**

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## **I. DRAFTING THE CHARGE**

### **A. The Basics.**

#### **1. When Do You Draft?**

It is never too early to start drafting your charge. Knowledge of how your charge will look will assist with the pleading, discovery, and proof aspects of your case. Indeed, advance knowledge of your charge will ensure that you do not prove up the wrong case! The first big bad mistake of charge practice is waiting too long to draft the charge. A draft should be prepared at the outset of the case and updated throughout the pretrial process. You should avoid the temptation of waiting until the eve before charge conference! By that point, it may well be too late.

#### **2. How Do You Begin the Process?**

##### **a. Sources for Jury Charge Submissions.**

The best source for approved charge submissions is a Texas Supreme Court opinion approving the submission. In the absence of a case on point, lawyers often use the proposed submissions contained in the State Bar's Pattern Jury Charges. These pattern jury charges are well-established and are more likely to have been approved by the courts or even derived from a Supreme Court opinion. *See Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 22 (Tex. 1987) (approving Texas Pattern Jury Charge form of "misuse" applicable to products cases); *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.–Beaumont 1987, writ ref'd n.r.e.) (approving Texas Pattern Jury Charge form of questions and instructions related to product liability suits involving design defects).

Nevertheless, using the Texas Pattern Jury Charges is not without risk. For example, the Supreme Court case of *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989), established that proof of a defect is required in an action for breach of implied warranty of merchantability under TEX. BUS. & COM. CODE ANN. § 2.314(b)(3). The plaintiff in *Plas-Tex* used the Texas Pattern Jury Charge for his proposed submission on the implied warranty of merchantability claim. *See* 3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 71.07 (1982) (now PJC 71.7 (1998)). As a result of the holding in *Plas-Tex*, PJC 71.7 now reads as follows:

QUESTION 1: Was the [product] supplied by the [ABC Company] unfit for the ordinary purpose for which such [product] is used because of a defect?

"Defect means a condition of the goods that renders them unfit for the ordinary purposes for which they are used because of a lack of something necessary for adequacy."

3 COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 71.7 (1998).

In *Union Pacific R. Co. v. Williams*, the Texas Supreme Court revisited its earlier approval of the Fifth Circuit Court of Appeals' pattern instruction defining negligence in Federal Employers Liability Act claims. *See* 85 S.W.3d 162, 167-68 (Tex. June 6, 2002); *Mitchell v. Missouri-Kansas-Texas R.R. Co.*, 786 S.W.2d 659 (Tex. 1990) (approving of FIFTH CIRCUIT CIVIL JURY INSTRUCTIONS ¶ 5.1 (1999)). Although the Court reaffirmed some aspects of the pattern charge, it expressly overruled *Mitchell* to the extent that it rejected a foreseeability instruction when the evidence about the employer's duty was disputed. *Union Pacific*, at 168.

On the other hand, the Supreme Court has on occasion affirmed a submission derived from the Texas Pattern Jury Charges, though the Court acknowledged that the PJC incorrectly stated the law. *See, e.g., State v. Williams*, 940 S.W.2d 583, 585 (Tex. 1996) (although the jury instruction incorrectly stated the law, the error was harmless); *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996) (instead of rendering a judgment, the court remanded the case for a new trial based on a jury instruction that incorrectly stated the law).

### **b. Should You Draft Their Issues?**

It is advisable to draft an entire charge, including your questions as well as your opponent's. You want to have an idea of how the entire charge should look, irrespective of whether your client has the burden of proof. Armed with a draft of all questions, instructions, and definitions, you will be better prepared to make the required objections and tenders at the charge conference. However, as discussed below, you may decide not to include your opponent's questions in the charge that you initially file with the court.

### **3. When Do You File?**

Typically, pretrial orders and/or local rules will dictate the filing date of the charge you have prepared. In some instances, local practice may differ from the timing provided by the local rules. It is therefore wise to determine what the local practice is in the venue in which you are appearing. In the event that the court does not require an earlier filing date, then charge submissions should be filed and provided to the court during the informal and formal charge conferences.

### **4. What Do You File?**

Assuming that you are filing a charge in advance of the charge conference, the decision of what to file is often guided by tactical (as opposed to preservation) concerns. You may not want to educate the other side as to how you think their claims and/or defenses should be submitted. Accordingly, you may decide to only submit those questions upon which you have the burden of proof. Conversely, if you think the court is actively putting the charge together at an early stage, then it might behoove you to file a draft that includes all claims and defenses without regard to who has the burden.

## **B. Deciding What Questions, Definitions, and Instructions to Submit under Broad-form.**

### **1. What Is the Difference Between a Question, a Definition, and an Instruction?**

Deciding whether to submit an issue as a question, definition, or instruction is important not only for tactical reasons but also for proper preservation of error. Before addressing the differences between the three ways of submitting an issue, it is important to note that every issue, regardless of the manner of submission, must be raised by the written pleadings and evidence. TEX. R. CIV. P. 278.

#### **a. Questions**

Regarding questions, Rule 277 states the court shall, whenever feasible, submit the cause upon broad-form questions. TEX. R. CIV. P. 277. A correct jury question properly submits the disputed issue for the jury's determination. *Toennies v. Quantum Chemical Corp.*, 998 S.W.2d 374, 377 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1999), *aff'd*, 47 S.W.3d 473 (Tex. 2001). The trial court is required to submit only ultimate or controlling factual issues that are essential to a right of action. If a matter has been established as a matter of law, it is improper to submit a question on that matter. *See City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 241 (Tex. 2002); *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987). Moreover, if a trial court's charge fairly and fully presents all controlling questions to the jury, it is not error to refuse to submit additional issues or instructions which are mere

shades or variations of the questions already submitted. *Carr v. Weiss*, 984 S.W.2d 753, 766 (Tex. App.—Amarillo 1999, pet. denied); *see also Williams v. Vought*, 68 S.W.3d 102, 115 (Tex. App.—Dallas 2001, no pet.) (“A party cannot complain when the trial court submits an instruction substantially similar to one it requested.”).

Elements of recovery or a defense may be submitted in the form of a combined question or by way of an instruction. Affirmative defenses may also be submitted as an instruction rather than a question. Rule 277 provides further guidance. First, Rule 277 prohibits the submission of inferential rebuttal questions. (Examples of inferential rebuttals are unavoidable accident, act of God, sole proximate cause, and new and independent cause.) Instead, they must be submitted as instructions. TEX. R. CIV. P. 277; *Diamond Offshore Mgmt. Co. v. Guidry*, 84 S.W.3d 256, 263-64 (Tex. App.—Beaumont 2002, no pet.). Moreover, the placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question. TEX. R. CIV. P. 277.

Next, Rule 277 states that in any cause in which the jury is required to apportion the loss among the parties, the rule requires the court to submit a question or questions inquiring what percentage, if any, of the negligence or causation, as the case may be, that caused the occurrence or injury in question is attributable to each of the persons found to have been culpable. Moreover, the court shall instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured.

The court may submit a question disjunctively when it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. TEX. R. CIV. P. 277.

Once it is understood that the question needs to submit the ultimate fact issue to jury and it is determined that the question is allowable, then the inquiry turns to the proper form the question should take. The following sections of this paper analyze the propriety of submitting a question in broad-form, examples of proper broad-form questions, and considerations that will assist in drafting proper questions.

## **b. Instructions and Definitions**

Trial courts possess considerably more discretion in submitting instructions and definitions than they have in submitting questions. *First National Bank of Seminole v. Hooper*, 48 S.W.3d 802, 811 (Tex. App.—El Paso 2001, pet. granted); *Allen v. Allen*, 966 S.W.2d 658, 659 (Tex. App.—San Antonio 1998, pet. denied); *Wal-Mart Stores v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied); *see also H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998) citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974) (trial court is given wide latitude to determine the propriety of explanatory instructions and definitions).

Although the court has a lot of discretion, it must submit explanatory instructions and definitions that will assist the jury in rendering a verdict. TEX. R. CIV. P. 277; *Wichita County, Texas v. Hart*, 917 S.W.2d 779, 783-84 (Tex. 1996). Therefore, instructions and definitions should be submitted only if they are of some aid or assistance to the jury in answering the submitted issues. *Raiford v. May Dept. Stores Co.*, 2 S.W.3d 527, 533 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999, no pet.) (citing *Sappington v. Younger Transp., Inc.*, 758 S.W.2d 866, 867-868 (Tex. App.—Corpus Christi 1988, writ denied)); *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 663 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.).

A proper jury instruction assists the jury, accurately states the law, and finds support in the pleadings and evidence. *Union Pacific R. Co. v. Williams*, 85 S.W.3d 162, 168 (Tex. 2002) (requiring a foreseeability instruction in Federal Employers’ Liability Act cases when the evidence about foreseeability as it relates to the employer’s duty is disputed); *Whiteside v. Watson*, 12 S.W.3d 614, 621-23 (Tex. App.—Eastland 2000, pet. denied, order withdrawn, dismissed by agr.); *Middleton*, 982 S.W.2d at 470. All three requirements must be satisfied. *Id.* (citing *Riggs v. Sentry Ins.*, 821 S.W.2d 701, 704-05 (Tex. App.—Houston [14<sup>th</sup> Dist. ] 1991, writ denied)).

Moreover, the trial court's charge need not, and should not, burden the jury with surplus instructions. *Zwahr*, 35 S.W.3d at 715 citing *Acord v. General Motors, Corp.*, 669 S.W.2d 111, 116 (Tex. 1984); *Brookshire Bros., Inc. v. Lewis*, 997 S.W.2d 908, 921 (Tex. App.—Beaumont 1999, pet. denied) citing *Acord*, 669 S.W.2d at 116. This means that every correct statement of the law does not belong in the jury charge. *Zwahr*, 35 S.W.3d at 715 (citing *Maddox v. Denka Chemical Corp.*, 930 S.W.2d 668, 671 (Tex. App.—Houston [1st Dist.] 1996, no writ)); *Kansas City Southern Ry. Co. v. Stokes*, 20 S.W.3d 45, 49 (Tex. App.—Texarkana 2000, no pet.).

An instruction, while a correct statement of the law, may still be error if it is a comment on the weight of the evidence, but it is not error if it only incidentally constitutes a comment of the weight of the evidence and is otherwise a proper instruction. *See* TEX. R. CIV. P. 277; *In the interest of V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000) citing *Acord*, 669 S.W.2d at 116.

Knowing when to submit a definition is usually a bit easier than an instruction or a question because the law is more clear. The trial court is required to give definitions of legal and technical terms. *Brookshire Bros.*, 997 S.W.2d at 921 citing *Union Oil Co. of Cal. v. Richard*, 536 S.W.2d 955, 957 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.). The definitions must assist the jurors in answering questions and rendering a verdict. *Allen*, 966 S.W.2d at 660 citing *Harris v. Harris*, 765 S.W.2d 798, 801 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1989, writ denied). Ordinarily, the trial court is required to define or explain only those words or phrases given a distinctive meaning by law. *Allen*, 966 S.W.2d at 660. Words having no special legal or technical meaning apart from their ordinary usage need not be defined. *Id.* The test of propriety of a definition is “the reasonable clearness of the definition to enable jurors to understand the word.” *Id.* Anything else, however interesting or relevant to the case in general, that does not aid the jury in answering the issues, must be excluded. *Brookshire Bros.*, 997 S.W.2d at 921 citing *Union Oil Co. of Cal. v. Richard*, 536 S.W.2d 955, 957 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *Depriter v. Tom Thumb Stores, Inc.*, 931 S.W.2d 627, 629-30 (Tex. App.—Dallas 1996, writ denied).

## **2. How Broad Is Broad-form?**

Whenever feasible, the trial court must submit the case to the jury by broad-form questions, rather than by separate, granulated questions for each element of a cause of action. TEX. R. CIV. P. 277; *see also Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 149 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001) (pet. and briefing on the merits filed).

Rule 278 of the Texas Rules of Civil Procedure mandates that a party is entitled to a jury question if the issue is raised by the pleadings and evidence. TEX. R. CIV. P. 278. A question that omits conduct that supports a valid theory of liability pleaded by the plaintiff is harmful. *See Kajima Int'l., Inc. v. Formosa Plastics Corp.*, 15 S.W.3d 289, 294 (Tex. App.—Corpus Christi 2000 pet. denied). Thus, a broad form submission must, at a minimum, include all valid theories of liability supported by the pleadings and the evidence. *See Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995) (single question submitting “controlling issues” upheld).

Rule 277 requires the court to submit the cause upon broad-form questions “whenever feasible.” TEX. R. CIV. P. 277. “Whenever feasible” means in any or every instance in which it is capable of being accomplished. *Tex. Dept. of Human Res. v. E.B.*, 802 S.W.2d 647 (Tex. 1990). For example, in *Exxon Pipeline Co. v. Zwahr*, 35 S.W.3d 705, 714 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2000), *rev'd on other grounds*, No 01-0168, 2002 WL 1027003 (Tex. May 23, 2002), a condemnation case, the court of appeals held that the trial court failed to comply with Rule 277's broad-form mandate by submitting two separate damage questions on fair market value.

Whether broad-form can be accomplished is particularly tricky when a case involves multiple

issues or causes of action.<sup>1</sup> In *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661 (Tex. 1999), the Texas Supreme Court approved the submission of multiple causes of action in a single broad-form question where the controlling questions were identical. In *Hyundai*, the plaintiff asserted claims for both strict liability and breach of warranty. The court concluded that a single question on liability was appropriate because “the controlling issues regarding the existence of a defect for strict liability and breach of implied warranty were functionally identical in this case.” *Id.*; accord *Riddick v. Quail Harbor Condo. Ass’n, Inc.*, 7 S.W.3d 663, 673-74 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (approving submission of single broad-form question for breach of contract and breach of fiduciary duty claims). *But see In re C.H.*, 25 S.W.3d 38 (Tex. App.–El Paso 2000), *rev’d on other grounds*, 2002 WL 1903109 (Tex. July 3, 2002) (“Because multiple grounds for termination [for parental rights] were alleged . . . and the trial court submitted the issue using a broad form question, the jury’s findings should be upheld if any of the grounds for termination pleaded . . . support the jury’s findings.”).

Notably, the Court acknowledged in *Hyundai* that the causation standard for strict liability is producing cause, while the standard for breach of warranty is proximate cause, and noted that separate submissions would have been necessary for the two causation standards had the plaintiff’s “question and instruction correctly incorporated the element of proximate cause.” *Hyundai*, 995 S.W.2d at 667.

Nevertheless, the submission of multiple claims in a single issue may create certain risks for the plaintiff on appeal. In the now-famous *Casteel* decision, the Texas Supreme Court held that “when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories,” the error is reversible because “the appellate court is often unable to determine the effect of this error . . .” *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); *see also Kansas City Southern Railway Co. v. Stokes*, 20 S.W.3d 45, 51 (Tex. App.–Texarkana 2000, no pet.) (finding improper instruction to FELA action resulting in reversible error because “it is impossible for [the court] to determine that the jury’s answer was not based on this improperly submitted duty instruction.”) Moreover, broad-form submission may not be feasible when there are alternative liability standards and the governing law is unsettled or when the trial court is unsure whether it should submit a particular theory of liability. *Casteel*, 22 S.W.3d at 390; *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.–Amarillo 2001) *rev’d on other grounds*, 81 S.W.3d 817 (Tex. 2002). According to the Houston Court of Appeals, a mere possibility that the jury got it right despite the error is no longer a viable appellate analytical standard applicable to charge error involving improper theories of liability. *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 152-53 (Tex. App.–Houston [14<sup>th</sup> Dist.] 2001, pet. and briefing on the merits filed).

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<sup>1</sup>Due to the complexity of this issue, section B.7. of this paper analyzes this issue in more detail. Moreover, a distinct body of case law has developed in the context of parental rights termination cases regarding whether, after *Casteel*, the Supreme Court’s previous approval of broad-form submission in termination cases remains good law. *Texas Dept. of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990) (approving broad-form submission in termination cases). In a number of cases, courts of appeals (with Waco leading the way) have held that a broad-form disjunctive submission of the grounds for termination allows for the possibility of termination based on a statutory ground not found by the required ten jurors and violates *Casteel*. *In re J.M.M.* 80 S.W.3d 232, 246 (Tex. App.–Fort Worth, Jun. 13, 2002, pet. denied); *In re A.F.*, No. 10-00-284-CV, 2002 WL 31426677, \*2 (Tex. App.—Waco Oct. 30, 2002, n.p.h.); *In re A.V.*, 57 S.W.3d 51 (Tex. App.—Waco 2001, pet. granted); *In re M.C.M.*, 57 S.W.3d 27 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2001, pet. denied); *In re B.L.D.*, 56 S.W.3d 203 (Tex. App.—Waco 2001, no pet.); *In re J.F.C.*, 57 S.W.3d 66 (Tex. App.—Waco 2001, pet. granted); *but see Thornton v. Texas Dept. of Protective and Regulatory Servs.*, No. 03-01-00317-CV, 2002 WL 246408, \*3 (Tex. App.—Austin Feb. 22, 2002, rule 53.7 motion filed) (unpublished) (refusing to follow the Waco court of appeals and holding that *Casteel* did not overturn *E.B.*); *In re K.S.*, 76 S.W.3d 36, 42, 48-49 (Tex. App.—Amarillo 2002, no pet.) (holding that *Casteel* was not implicated because no ground submitted for termination was improper; broad-form submission was permitted by *E.B.*).

### 3. Examples of Broad Form Submissions.

Since 1973, the Supreme Court has encouraged broad form submission—especially in negligence cases. Historically, negligence cases dominated the Supreme Court’s consideration of issue submission. More recently, broad form submissions in commercial cases have been reviewed and approved or disapproved. Explanations and examples of broad submission practice since 1973, as well as sample issues from the Texas Pattern Jury Charges, are listed below:

#### a. Contract and Commercial Cases.

##### Breach Of Contract and *Island Recreational*.

A breach of contract claim requires a showing that there was (1) a valid contract, (2) the plaintiff performed or tendered performance, (3) the defendant breached the contract, and (4) the plaintiff was damaged as a result of that breach. See *Hussong v. Schwan’s Sales Enters., Inc.*, 896 S.W.2d 320, 326 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The PJC offers the following samples of breach of contract questions:

1) Did *Paul Payne* and *Don Davis* agree [*insert all disputed terms*]?  
[*Insert instructions, if appropriate.*]  
Answer: \_\_\_\_\_

2) Did *Don Davis* fail to comply with *the agreement*?  
[*Insert instructions, if appropriate.*]

Answer: \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 101.1, 101.2 (2000). The first question assumes a dispute as to the formation of a contract. The second question assumes that a contract exists and that the parties dispute whether a breach occurred. Common to both questions is the need for instructions to shape the particular circumstances of the dispute being decided.

The necessity and appropriateness of certain instructions have garnered much attention from the Texas Supreme Court. Despite this consideration, these issues remain somewhat unclear. Decided in 1986, *Island Recreational Development Corporation v. Republic of Texas Savings Association* involved the necessity and appropriateness of certain jury instructions for a breach of contract issue. 710 S.W.2d 551, 553 (Tex. 1986). In that case, *Island* sued *Republic* for its failure to fund a loan commitment. In its petition, *Island* specifically alleged that *Republic* waived a condition in the loan commitment and that *Island* performed completely under the contract. *Id.* In contrast, *Republic* argued that *Island* failed to perform a condition precedent of the contract. *Id.*

At trial, the court was presented with instructions and issues concerning waiver and estoppel, substantial performance, full and final completion, assignment, and others. However, the court rejected the parties’ issues and submitted one broad form question:

ISSUE: Do you find from a preponderance of the evidence that [*Island*] performed their obligations under the Commitment Letter in question?  
ANSWER: “We do.”

*Id.* at 554. The court submitted no instructions with this issue and neither party objected to the charge on this ground.

In its initial 5-4 opinion, the Texas Supreme Court reversed this broad form submission because

Island failed to secure a specific jury finding on waiver. On rehearing, however, the Court withdrew its prior opinion, approved the broad form submission, and affirmed the judgment in favor of Island. In so doing, the Court held that although the trial judge was following the policy concerning broad issue submissions, the trial judge should submit, when requested, appropriate accompanying instructions. *Id.* at 555.

The dissent suggested the following submission to resolve the waiver issue as an independent ground of defense:

ISSUE: “Do you find from a preponderance of the evidence that [plaintiff] performed all of the obligations under the commitment letter which [defendant] did not waive? You are instructed that waiver is defined as intentionally giving up a known right. You are instructed that performed means carrying out obligations as required by the contract.”

*Id.* at 557 n.1 (Spears, J. dissenting).

Fourteen years later, the Texas Supreme Court decided *Casteel*, which involved claims against an insurance company by policyholders and an insurance agent who sought recovery under article 21.21 of the Insurance Code and for DTPA-based violations. 22 S.W.3d at 381-82. After instructing the jury as to thirteen independent grounds of recovery, five of which included DTPA causes of action, the Court submitted only one question on liability. The jury then determined that the insurance company was liable to the agent — presumably under at least one of the thirteen causes of action on which they were instructed.

The Supreme Court determined that, although the agent had standing under the Texas Insurance Code to sue the insurance company, he had no standing to allege DTPA violations. Therefore, the trial court incorrectly included the five DTPA causes of action in the list of violations. Ultimately, the Court held that “submitting invalid theories of liability in a single broad form jury question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories.” *Id.* at 381. Concluding that the submission was harmful error, the Court stated that:

It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law. Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence could have supported the jury’s conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds. Accordingly, we hold that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.

*Id.* at 388 (citations omitted).

### **Breach of Insurance Policy.**

The Texas Pattern Jury Charges do not provide a breach of insurance policy question, *per se*. Instead, the breach of contract question is fashioned to the particular facts of the insurance case. Implementing this process, several Texas cases offer the examples of jury questions and instructions addressing such a claim. For example:

ISSUE 1: Did State Farm breach the insurance contract with Ioan and Liana Nicolau which breach was a proximate cause of damage, if any, to Ioan and Liana Nicolau?

ANSWER: “Yes”

*Nicolau v. State Farm Lloyds*, 869 S.W.2d 543, 549 (Tex. App.—Corpus Christi 1993), *aff’d in part, rev’d on other grounds*, 951 S.W.2d 444 (Tex. 1997). Another example is as follows:

Did Texas Pacific Indemnity Company breach the insurance contract with Amarco Petroleum, Inc.?

Texas Pacific Indemnity Company breached the contract only if it failed to pay for a covered loss.

A covered loss means a loss of money or property resulting directly from one or more fraudulent or dishonest acts committed by a covered employee of Amarco Petroleum, Inc., acting alone or in collusion with others.

A covered employee means any employee of Amarco Petroleum, Inc. except James Plante.

A covered loss does not include a loss due to any fraudulent or dishonest acts committed by Amarco Petroleum, Inc. for its own benefit, acting alone or in collusion with others.

Answer “Yes” or “No.”

Answer: Yes.

*Texas Pac. Indem. Co. v. Atlantic Richfield Co.*, 846 S.W.2d 580, 582-83 (Tex. App.—Houston [14th Dist.] 1993, writ denied). A third and final example is as follows:

ISSUE 1: Did a loss occur which was covered and payable under the policy?

ANSWER: Yes.

ISSUE 2: What was the amount of such loss, if any, payable under the policy?

ANSWER: \$10,000,000.00.

*National Fire Ins. Co. of Pittsburgh v. Valero Energy Corp.*, 777 S.W.2d 501, 506 (Tex. App.—Corpus Christi 1989, writ denied) (surviving the challenge that this submission had the effect of improperly asking the jury a question of law about the construction of the policy of insurance).

### **Contractual Performance.**

Because “a party to a contract who is himself in default cannot maintain a suit for its breach,” the question of contractual performance may be critical, depending on the particular facts of a case, may be a specific jury question. See *Gulf Pipe Line Co. v. Nearen*, 138 S.W.2d 1065, 1068 (Tex. Comm’n App. 1940, opin. adopted); *Kelly v. Webb*, 27 Tex. 368 (1864). Following *Island Recreation*, the Fourteenth Court of Appeals approved the following controlling question in a case alleging both breach of contract and breach of fiduciary duty:

Do you find the failure, if any, of Quail Harbor Condominium Association, Inc. to act reasonably and in good faith under duties of maintenance and repair required by the Condominium Declaration proximately caused damage [to] the property of W. M. Riddick?

*Riddick v. Quail Harbor Condominium Ass'n, Inc.*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no writ). Another example combines two disputed fact issues:

Do you find from a preponderance of the evidence that during the time in question Coulson and Associates Engineers, Inc. furnished the Lake LBJ Municipal Utility District with sufficient plans and specifications for construction of a water system, a sanitary sewer system and drainage for the needs of such District, and to secure approvals from appropriate governmental agencies, under the circumstances then existing?

ANSWER: “Yes”

*Bennett Coulson & CAE, Inc. v. Lake LBJ Mun. Util. Dist.*, 781 S.W.2d 594, 596 (Tex. 1989).

In *Bennett Coulson*, the court of appeals held that this submission erroneously commented on the weight of the evidence by combining an established fact (whether the plans and specification were sufficient to secure governmental approval) with a contested issue (whether the plans and specification were sufficient to meet the district’s needs). *Lake LBJ Mun. Util. Dist. v. Coulson & C.A.E., Inc.*, 771 S.W.2d 145 (Tex. App.—Austin 1988). The supreme court, however, saw no error in the conjunctive submission of the two disputed fact issues: “That one clause of the compound question might have been answered more easily than the other clause does not constitute reversible error . . . .” *Bennett Coulson*, 781 S.W.2d at 597.

### **Oil and Gas: Implied Covenant to Develop.**

Like the jury question for contractual performance, the Texas Pattern Jury Charges do not offer jury issues specific to oil and gas disputes. Instead, these questions, instructions and definitions are gleaned primarily from the cases. For example:

ISSUE: Do you find from a preponderance of the evidence that Sun has failed to reasonably develop the Jackson lease?

Answer: “Sun has failed”  
or “Sun has not failed.”

Answer: “Sun has not failed.”

In answering Special Issue No. 1, you are instructed that the term “to reasonably develop” means the development which a prudent operator would do with respect to any known producing formation of the lease.

In this context, reasonable development may include the drilling of additional wells into any such producing formation. A prudent operator will undertake to drill additional wells into such producing formation only if there is a reasonable expectation that the proceeds, if any, from the production obtained, if any, as a result of such drilling will exceed the cost of drilling and operating the well . . . [balance of the instruction not included].

*Sun Exploration & Prod. Co. v. Jackson*, 715 S.W.2d 199, 202-03 (Tex. App.—Houston [1st Dist.] 1986), *rev'd*, 783 S.W.2d 202, 204-05 (Tex. 1989) (approving jury charge).

**b. Statutory Liability.**

**Deceptive Trade Practices Act.**

The Texas Pattern Jury Charges offer no less than seventeen questions, instructions, and definitions for claims under the DTPA. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 102.1 - 102.13, 102.102.21, 102.23-102.24 (2000). For example, the question and instruction applying to a false, misleading, or deceptive act or practice in violation of DTPA section 17.46(b) is as follows:

Did *Don Davis* engage in any false, misleading, or deceptive act or practice that was a producing cause of damages to *Paul Payne*?

“Producing cause” means an efficient, exciting, or contributing cause that, in a natural sequence, produced the damages, if any. There may be more than one producing cause.

“False, misleading, or deceptive act or practice” means any of the following:  
[Insert appropriate instructions.]

Answer: \_\_\_\_\_

*Id.*, 102.1. In addition, the PJC provides several sample questions, instructions, and definitions for claims under the Texas Insurance Code 21.21 and bad faith insurance claims. *See id.*, 102.14, 102.16 - 102.19, 102.21 - 102.24, 103.1 - 103.3. For example, the PJC offers the following question for claim under Insurance Code section 21.21:

Did *Don Davis* engage in any unfair or deceptive act or practice that caused damages to *Paul Payne*?

“Unfair or deceptive act or practice” means any of the following:  
[Insert appropriate instructions.]

Answer: \_\_\_\_\_

*Id.*, 102.14.

Several Texas cases have approved variations of these questions and instructions that track the statutory language of the DTPA and Insurance Code. *Brown v. American Transfer and Storage Co.*, 601 S.W.2d 931, 937 (Tex.), *cert. denied*, 449 U.S. 1015 (1980); *see also City of Houston v. Leach*, 819 S.W.2d 185, 197 (Tex. App.—Houston [14th Dist.] 1991, no writ). For example, the DTPA jury charge in *Spencer v. Eagle Star Insurance Company of America*, 876 S.W.2d 154, 157 (Tex. 1994), disapproved because it failed the *Brown* test by not tracking the language of the statute as closely as possible. The charge in *Spencer* improperly allowed the jury to find an unfair insurance practice based upon any action by defendant that took advantage of the plaintiffs and resulted in any inequitable result. *Id.*

Resembling the Texas Pattern Jury Charge example and closely tracking the language of the DTPA statutes, the jury question in *Matthiessen v. Schaefer* was as follows:

“Did [the sellers] engage in any false, misleading, or deceptive act or practice that was a producing cause of damages to [Schaefer]?” [definitions of “Producing cause” and “False, misleading, or deceptive act or practice” as included.]

27 S.W.3d 25, 32 (Tex. App.—San Antonio 2000, *pet. denied*), citing 4 COMM. ON PATTERN JURY

CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PCJ 102.01, 102.3 (1993).

Despite properly tracking the language of the statutes, the jury charge may be incorrect if it encompasses parties that lack standing. In *Casteel*, 22 S.W.3d at 381-82 (holding that a single jury question submitting liability under both Article 21.21 and the DTPA was erroneous because the agent was not a consumer and thus had no cause of action under the DTPA). Although the Court in *Casteel* was addressing liability issues, there should be no distinction to be made in the problems connected with a broad form submission of a damage question. *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 749 (Tex. App.—San Antonio 1999, pet. denied).

### **Texas Commission on Human Rights Act.**

The Texas Commission on Human Rights Act prohibits an employer from discharging or otherwise discriminating against an employee in any way based on the employee's disability. See TEX. LAB. CODE § § 21 .051(a). In *Haggar Apparel Co. v. Leal*, No. 13-00-275-CV, 2002 WL 31478172, \*5 (Tex. App.—Corpus Christi Nov. 7, 2002, n.p.h.), the court of appeals approved a liability question that tracked the PJC governing unlawful employment practices. The question asked:

Was disability a motivating factor in HAGGAR APPAREL COMPANY'S decision to discharge or discriminate against MARIA O. LEAL?

*Haggar*, 2002 WL 3147812 at \*5 (citing COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., Texas Pattern Jury Charges - Business, Consumer, Employment 107.6 (2000)).

Citing *Casteel*, 22 S.W.3d at 388, *Haggar* argued that the trial court erred in submitting a broad form issue allowing for a finding of liability if *Haggar* either discharged *Leal* or discriminated against her. *Id.* The court rejected that argument, reasoning that *Casteel* did not apply because both termination and discrimination were legally valid theories regardless of the state of the evidence in the case. Thus, submission of termination and discrimination in a single question is proper. *Id.* (citing *Southwestern Bell Tel. Co. v. Garza*, 58 S.W.3d 214, 226 (Tex. App.—Corpus Christi 2001, no pet.)).

### **Retaliatory Discharge.**

Section 451.001 of the Texas Labor Code provides that an employer is prohibited from discharging or otherwise discriminating against an employee because he in good faith filed a workers' compensation claim. See TEX. LABOR CODE § 451.001. To prove a prima facie case under the antiretaliation statute, a plaintiff must establish (1) good faith filing of a workers' compensation claim, and (2) a causal link between the filing of the claim and the discharge or other discriminatory act. See *Dallas County v. Holmes*, 62 S.W.3d 326, 329 (Tex. App.—Dallas 2001, no pet.).

The Dallas Court of Appeals recently approved of the following question and instruction on retaliatory discharge, which were patterned after PJC 107.5 and which closely track LABOR CODE § 451.001:

Did Dallas County discharge Glen Holmes because he filed a worker's compensation claim in good faith?

There may be more than one cause for an employment decision. An employer does not discharge an employee for filing a worker's compensation claim in good faith if the employer would have discharged the employee when he did even if the employee had not filed a worker's compensation claim in good faith.

*Holmes*, 62 S.W.3d at 332 (citing COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., Tex. Pattern Jury Charges 107.5 (2000)).

The *Holmes* court rejected Dallas County's argument on appeal that the court should have submitted questions inquiring whether Holmes was released to return to work on April 2 and whether Dallas County's action was based on a legitimate business reason and did not violate the antiretaliation statute. The court reasoned that the requested questions were improper inferential rebuttal questions. *Id.* (citing TEX. R. CIV. P. 277). Further, the court found no abuse of discretion in the trial court's refusal to submit instructions on Dallas County's defenses of uniform enforcement of a reasonable absentee policy and business necessity, the "but for" causation standard, a reference to post-discharge acts by an employer to redress discriminatory conduct, or the correct measure of damages that included mitigation. *Id.* (stating that the jury need not and should not be burdened with surplus instructions, even if they are proper statements of the law.)

**c. Torts.**

**Fraud.**

The elements of fraud are: (1) a material misrepresentation was made; (2) it was false; (3) when the representation was made, the speaker knew it was false or the statement was recklessly asserted without any knowledge of its truth; (4) the speaker made the false representation with the intent that it be acted on by the other party; (5) the other party acted in reliance on the misrepresentation; and (6) the party suffered injury as a result. *Kajima Int'l, Inc. v. Formosa Plastics Corp., U.S.A.*, 15 S.W.3d 289, 292 (Tex. App.—Corpus Christi 2000, pet. denied) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990)). The fraud jury charge used in *Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983) is as follows:

ISSUE: "Do you find from a preponderance of the evidence that prior to the purchase of Greenhollow lots by Plaintiff Oxford (Trenholm), Raymond F. Ratcliff, Jr. made false representations, either one or more, to representatives of the Plaintiff as to material facts, with the intent of inducing the Plaintiff to purchase Greenhollow lots, which were relied upon by Plaintiff."

ANSWER: "We do."

*Trenholm*, 646 S.W.2d at 932; see also *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994) (the trial court's refusal, over objection, to include necessary element of "intent to mislead" in definition of "fraud" constituted reversible error).

In *Trenholm*, the Texas Supreme Court approved the above broad form submission and decided that the plaintiff did not need to obtain a finding as to reliance related to the purchase of each of eighteen lots (even though purchase of seven lots occurred after plaintiff's discovery of the misrepresentation) because plaintiff's reliance did not occur when he purchased the lots but rather when he entered into an agreement obligating him to build on the lots. *Trenholm*, 646 S.W.2d at 932; see also *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 438 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). However, where the plaintiff alleges that a single specific statement constituted fraud, a trial court may submit separate questions, the first to determine whether the statement was made, and the second, conditional question to determine whether the defendant committed fraud by making the statement. *Byrne v. Harris Adacom Network Servs.*, 11 S.W.3d 244, 253 (Tex. App.—Texarkana 1999, pet. denied).

Finally, in a case in which the plaintiff alleges several instances of fraud, a trial court commits reversible error if it refuses to submit a broad form question that encompasses all of the alleged instances of fraud on which evidence was introduced. See, e.g., *Kajima*, 15 S.W.3d at 292-94 (the trial court improperly limited the fraud question to whether Kajima entered into the contracts as a result of fraud by Formosa, thus preventing the jury from considering Formosa's acts of fraud in "stringing along" Kajima after the work was under way).

**Negligence - Lemos Overrules Muckleroy.**

A claim for negligence requires the following elements: (1) a duty owed to the plaintiff, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). To establish such a claim, the plaintiff must show the defendant's action or failure to act was a proximate cause of his damages. *Id.*; *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). Encompassing these elements, the Texas Pattern Jury Charges offer the following question for a negligence claim:

Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?

Answer "Yes" or "No" for each of the following:

- a. *Don Davis* \_\_\_\_\_
- b. *Paul Payne* \_\_\_\_\_
- c. *Sam Settlor* \_\_\_\_\_
- d. *Responsible Ray* \_\_\_\_\_
- e. *Connie Contributor* \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 4.1 (2000); *Diamond Offshore Management Co. v. Guidry*, 84 S.W.3d 256, 263 (Tex. App.—Beaumont, Jul. 25, 2002, pet. filed) (approving of a negligence question asking: "Did the negligence, if any, of [Diamond and Guidry] legally cause the injuries to Craig Guidry in question?"). The circumstances of the case will dictate the inclusion of the plaintiff and settling defendants in the charge.

The PJC sample question illustrates a streamlined approach that differs greatly from the "multiple choice" question approved over a quarter century ago in *Members Mutual Insurance Company v. Muckleroy*. In this case, the First Court of Appeals endorsed the following negligence question:

ISSUE: Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?

- (a) The defendant, Verdie Webber.
- (b) The plaintiff, Jasper Muckleroy.
- (c) Both.

ANSWER: "a"

*Muckleroy*, 523 S.W.2d 77, 79 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

Nearly ten years later in *Lemos v. Montez*, the Texas Supreme Court rejected the use of "both," "neither," or "no one" to the broad negligence / proximate cause special issue. 680 S.W.2d 798, 800 (Tex. 1984). In this car wreck case, the Court believed that the "multiple choice" charge effectively submitted special issues on unavoidable accident, and since unavoidable accident is an inferential rebuttal issue, the submission was erroneous. According to the Court, the correct way to submit an issue when there is evidence that neither party proximately caused the accident is to set forth the correct definition of "unavoidable accident" and ask:

ISSUE: Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision of December 27, 1979 made the basis of this suit?

- |     |                       | Yes | No  |
|-----|-----------------------|-----|-----|
| (a) | Alfred R. Montez      | ___ | ___ |
| (b) | Ignacio Nat Arrellano | ___ | ___ |

*Lemos*, 680 S.W.2d at 800. This submission also incorporates the checklist format used in *Pate v. Tellepsen Const. Co.*, 596 S.W.2d 548, 550 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.), but without the use of “neither,” “no one,” or “both” disapproved in *Lemos*.

Finally, in the context of a “negligent undertaking” claim, the Texas Supreme Court recently held that the jury charge should include instructions that:

- (1) the defendant gratuitously or for compensation undertook to perform services that it knew or should have known were necessary for the plaintiff’s protection,
- (2) the defendant failed to exercise reasonable care in performing those services, and
- (3) either the plaintiff relied on the defendant’s performance, or the defendant’s performance increased the plaintiff’s risk of harm.

*Torrington Co. v. Stutzman*, 46 S.W.3d 829, 836-37 (Tex. 2000).

**Tortious Interference With Contract.**

The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) willful and intentional interference; (3) interference that proximately caused damage; and (4) actual damage or loss. *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 218 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456 (Tex. 1998)); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). Reflecting these elements, the PJC provides the following sample question and instruction for an intentional interference with an existing contract claim:

Did *Don Davis* intentionally interfere with [*identify contract*]?

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

Answer: \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 106.1 (2000).

Resolving an issue that may be a precursor to claim of tortious interference, the Houston Court of Appeals approved the following jury charge that determined the controlling issue of whether the parties to the underlying contract intended to be bound:

ISSUE 1. Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

- a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive \$110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least \$5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths-4/7ths basis.

Answer: "We do" or "We do not."

The following instructions accompanied Special Issue No. 1:

1. An agreement may be oral, it may be written or it may be partly written and partly oral. Where an agreement is fully or partially in writing, the law provides that persons may bind themselves to that agreement even though they do not sign it, where their assent is otherwise indicated.

2. In answering Issue No. 1, you should look to the intent of Pennzoil and the Getty entities as outwardly or objectively demonstrated to each other by their words and deeds. The question is not determined by the parties' secret, inward, or subjective intentions.

3. Persons may intend to be bound to an agreement even though they plan to sign a more formal and detailed document at a later time. On the other hand, parties may intend not to be bound until such a document is signed.

4. There is no legal requirement that parties agree on all the matters incidental to their agreement before they can intend to be bound. Thus, even if certain matters were left for future negotiations, those matters may not have been regarded by Pennzoil and the Getty entities as essential to their agreement, if any, on January 3. On the other hand, you may find that the parties did not intend to be bound until each and every term of their transaction was resolved.

5. Every binding agreement carries with it a duty of good faith performance. If Pennzoil and the Getty entities intended to be bound at the end of the Getty Oil board meeting of January 3, they were obligated to negotiate in good faith the terms of the definitive merger agreement and to carry out the transaction.

6. Modification or discussions to modify an agreement may not defeat or nullify a prior intention to be bound. Parties may always, by mutual consent and understanding, add new provisions spelling out additional terms that were not included in their original agreement.

ISSUE 2: Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Answer: "We do" or "We do not."

The following Instructions accompanied Special Issue No. 2:

Knowledge of a fact can be shown either by direct evidence of what it knew or what it was told, or by indirect or circumstantial evidence. A fact may be established by indirect or circumstantial evidence when the fact is fairly and reasonably inferred from other facts

proven in the case.

In order to find that Texaco interfered with the agreement, if any, inquired about above, it must be shown by a preponderance of the evidence that Texaco wanted to cause the breach, or to prevent the performance of this agreement, or that Texaco knew that a breach or failure to perform would occur as a result of its actions.

*Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 812-13, 826 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988).

**Tortious Interference With Prospective Business Relations.**

For a claim involving the intentional interference with prospective contractual relations, the PJC offers the following sample question and instruction:

Did *Don Davis* wrongfully interfere with [*describe Paul Payne's prospective contractual relations*]?

Wrongful interference occurred if—

a. there was a reasonable probability that *Paul Payne* would have entered into the contractual relations and

b. *Don Davis* intentionally prevented the contractual relations from occurring with the purpose of harming *Paul Payne*.

Answer: \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 106.2 (2000). The PJC offers the following sample question on the defense of legal justification:

If your answer to Question \_\_\_\_\_ [*106.1 or 106.2*] is “Yes,” then answer the following question.

Otherwise, do not answer the following question.

QUESTION \_\_\_\_\_

Did *Don Davis* interfere because he had a good-faith belief that he had a right to do so?

Answer: \_\_\_\_\_

*Id.*, 106.3.

In a decision that sought to eliminate the confusion surrounding the particular conduct qualifying as “tortious interference,” the Texas Supreme Court recently revamped the elements of this claim and effectively made PJC 106.2 obsolete. Specifically, the Court held that:

to recover for tortious interference with a prospective business relation a plaintiff must prove that the defendant’s conduct was independently tortious or wrongful. By independently tortious we do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove that the defendant’s conduct would be actionable under a recognized tort . . . . [A] plaintiff could recover for

tortious interference by showing an illegal boycott, although a plaintiff could not recover against a defendant whose persuasion of others not to deal with the plaintiff was lawful. Conduct that is merely “sharp” or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations, and we disapprove of cases that suggest the contrary.

*Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001). Specifically, regarding the third element, the Court held:

The concepts of justification and privilege are subsumed in the plaintiff’s proof, except insofar as they may be defenses to the wrongfulness of the alleged conduct. For example, a statement made against the plaintiff, though defamatory, may be protected by a complete or qualified privilege. Justification and privilege are defenses in a claim for tortious interference with prospective relations only to the extent that they are defenses to the independent tortiousness of the defendant’s conduct. Otherwise, the plaintiff need not prove that the defendant’s conduct was not justified or privileged, nor can a defendant assert such defenses.

*Id.* at 726-27. In so holding, the Court rejected the following jury charge—which tracked the language of PJC 106.2—as an incorrect statement of the law:

ISSUE 1: Did Wal-Mart wrongfully interfere with Plaintiffs’ prospective contractual agreement to lease the property to Fleming?

Wrongful interference occurred if (a) there was a reasonable probability that Plaintiffs would have entered into the contractual relation, and (b) Wal-Mart intentionally prevented the contractual relation from occurring with the purpose of harming Plaintiffs.

*Id.* at 715. As a result of this decision, the sample question and instruction for tortious interference with prospective business relationship are no longer correct. Beyond this statement there lies great uncertainty as to what should replace the old PJC model. The *Sturges* opinion raises as many questions as it answers. How is the malice element to be treated? Does the jury need to independently find an “independent tort”? Is justification gone forever? The authors suggest that, at a minimum, the following elements may be required:

- (1) a reasonable probability that the parties would have entered into a contractual relationship;
- (2) an “independently tortious or unlawful” act by the defendant that prevented the relationship from occurring;
- (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or he knew that the interference was certain or substantially certain to occur as a result of his conduct; and
- (4) the plaintiff suffered actual harm or damage as a result of the defendant’s interference.

*Id.* at 726-27.

### **Medical Malpractice.**

In a professional malpractice case, the plaintiff must prove: (1) a duty by the professional to act according to a standard; (2) a breach of the applicable standard of care; (3) an injury; and (4) a causal

connection between the breach of care and the injury. *Bradford v. Alexander*, 886 S.W.2d 394, 396 (Tex. App.—Houston [1st Dist.] 1994, no writ). In a medical malpractice case, breach of the standard of care and proximate cause must be established through expert testimony. *Onwuteaka v. Gill*, 908 S.W.2d 276, 281 (Tex. App.—Houston [1st Dist.] 1995, no writ).

In the recent medical malpractice case styled *Ocomen v. Rubio*, the court of appeals upheld the following jury charge:

Did the negligence, if any, of Pedro A. Rubio proximately cause the occurrence in question?

**“Negligence,”** with reference to the conduct of Pedro A. Rubio, means the failure to use ordinary care; that is, failing to do that which a general surgeon of ordinary prudence would have done under the same or similar circumstances or doing that which a general surgeon of ordinary prudence would not have done under the same or similar circumstances.

**“Ordinary Care,”** with reference to the conduct of Pedro A. Rubio, means that degree of care which a general surgeon of ordinary prudence possessing and exercising a reasonable degree of skill and learning would use under the same or similar circumstances.

**“Proximate Cause,”** with reference to the conduct of Pedro A. Rubio, means that cause, which in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a general surgeon using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Answer “Yes” or “No”

Answer:     NO    

24 S.W.3d 461, 466 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (emphasis in original).

In addition, alleged misrepresentations during the physician’s disclosure of the risks and hazards of a medical procedure must be submitted to the jury as an issue of alleged failure to obtain informed consent. TEX. REV. CIV. STAT. ANN. art. 4590i, §§ 6.01-.07; *Marks-Brown v. Rogg*, 928 S.W.2d 304, 306 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Even though a separate action for fraud may be maintained under certain facts, article 4590i is the only valid theory of recovery for allegations of misrepresenting the risks and hazards of surgery. *Crundell v. Becker*, 981 S.W.2d 880, 883-84 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (concluding that “the issue of whether [plaintiff] would have agreed to the surgery had she not believed she had cancer is separate and distinct from the issue of whether she was fully informed of the risks attendant to having surgery”).

Medical malpractice cases do not warrant an exception to the rule requiring broad form submission, no matter how many specific acts of negligence are alleged. *Crundell*, 981 S.W.2d at 884; *Winkle v. Tullios*, 917 S.W.2d 304, 312 (Tex. App.—Houston [14th Dist.] 1995, writ denied). However, the issue of informed consent may be submitted as a separate question. *See, e.g., Ocomen* at 468. The question of informed consent is whether a reasonable person could have been influenced in making a decision whether to give or withhold consent to the procedure had he or she known of the risk. *Barclay v. Campbell*, 704 S.W.2d 8, 10 (Tex. 1986). A sample issue on informed consent is as follows:

Did Pedro A. Rubio fail to disclose to Judy C. Ocomen such risks and hazards inherent in

the resection (of the ileocecal valve, of the cecum, and/or of the terminal ileum) that he performed that could have influenced a reasonable person in making a decision to give or withhold consent to such treatment?

Answer “Yes” or “No”

Answer: NO

*Ocomen* at 468.

In *St. Joseph Hospital v. Wolff*, 2002 WL 31466 (Tex. 2002), a plurality of the Supreme Court addressed the issue of whether a teaching hospital that sponsors a medical residency program is vicariously liable for a resident’s negligent treatment of a patient. The hospital complained that the trial court’s submission of the joint enterprise theory of vicarious liability was erroneous. The plurality agreed, holding that the elements of joint enterprise are:

- (1) an agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose, among the members; and
- (4) an equal right to a voice in the direction of the enterprise, which gives an equal right to control.

*Id.* (citing *Shoemaker v. Estate of Whistler*, 513 S.W.2d 10 (Tex. 1974) and RESTATEMENT 2D OF TORTS § 491 (1965)). On the third element, the jury had been instructed to find “a common business or pecuniary interest.” The plurality held that the charge’s language did not have the same meaning as “a community of pecuniary interest in [the common] purpose, among the members [of the group].” Moreover, the charge’s disjunctive wording improperly permitted the jury to find that the third element of the joint enterprise test was met after finding either a “common business interest” or a “common pecuniary interest.” *Id.*

### **Civil Conspiracy.**

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Civil conspiracy requires specific intent; in other words, the parties must be aware of the harm or wrongdoing at the inception of the combination or agreement. *Id.* Therefore, merely proving a joint “intent to engage in the conduct that resulted in the injury” is insufficient to establish a cause of action for civil conspiracy. *Id.*; *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

The PJC provides the following conspiracy issue:

*[Conditioned on findings of a tort or statutory violation that proximately caused damages.]*

Was *Connie Conspirator* part of a conspiracy that damaged *Paul Payne*?

To be part of a conspiracy, *Connie Conspirator* and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to *Paul Payne*. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

Answer: \_\_\_\_\_

(2000).

Unlike the pattern charge, the jury in *Hill v. Robinson* received the following conspiracy question requiring proof by a preponderance of the evidence:

ISSUE: Do you find from a preponderance of the evidence whether a conspiracy existed between two or more persons, the purpose of which was to take the life of Dr. John R. Hill?

You are instructed that a conspiracy is defined as a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. You are further instructed that in order to find a conspiracy, you must find from a preponderance of the evidence each and every one of the following: (1) there was a combination of two or more persons, (2) there was an agreement or meeting of the minds among these persons, (3) on a common purpose, (4) that each of those persons had knowledge of the purpose, (5) that each of those persons intended to participate therein, and (6) one or more overt acts done in pursuance of the conspiracy.

JURY ANSWER: “We do not.”

*Hill*, 592 S.W.2d 376, 382-83 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.). See *Operation Rescue - Nat’l v. Planned Parenthood of Houston and Southeast Tex., Inc.*, 975 S.W.2d 546, 554 (Tex. 1998) (holding that trial court’s failure to instruct the jury that the act found to be in furtherance of the conspiracy must be overt and unlawful was not harmful).

### **False Imprisonment.**

The essential elements of false imprisonment are (1) a willful detention, (2) without consent, and (3) without authority of law. *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985) (per curiam); *H.E. Butt Grocery Co. v. Saldivar*, 752 S.W.2d 701, 702 (Tex. App.—Corpus Christi 1988, no writ). Encapsulating these elements, the Texas Pattern Jury Charge for false imprisonment is as follows:

Did *Don Davis* falsely imprison *Paul Payne*?

“Falsely imprison” means to willfully detain another without legal justification, against his consent, whether such detention be effected by violence, by threat, or by any other means that restrains a person from moving from one place to another.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 6.1 (2000). In addition, the PJC offers the following instructions on the unlawful detention by threat and the privilege of investigating a theft, which should be added to the charge if properly pled and some proof of each is offered during trial:

“Detention by threat, violence, or other means” requires proof that the threat was such as would inspire in an ordinary person just fear of injury to his person, reputation, or property.

When a person reasonably believes that another has stolen or is attempting to steal property, that person has legal justification to detain the other in a reasonable manner and for a reasonable time to investigate ownership of the property.

*Id.*, PJC 6.2, 6.3. See *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 645 (Tex. 1995) (mandating the detention instruction if the case involves a question about the existence of a detention); *Castillo*, 693 S.W.2d at 375 (mandating the affirmative defense instruction on theft investigation if the case involves a detention related to investigating the ownership of property).

A final example of a false imprisonment jury question comes from *Castillo*:

ISSUE: From a preponderance of the evidence, do you find that the plaintiff was falsely imprisoned by the defendant?

Answer "She was" or "She was not"

Answer: She was not.

*Castillo*, 693 S.W.2d at 375. In reversing the court of appeals decision, the Supreme Court held that the trial court correctly submitted the false imprisonment claim broadly, with the appropriate instructions, and within the court's discretion under Rule 277.

### **Premises Liability - Invitee.**

An invitee must prove that: (1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition that was reasonably discoverable; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner's failure was a proximate cause of injury to the invitee. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97 (Tex. 2000); *Meeks v. Rosa*, 988 S.W.2d 216, 217 (Tex. 1999) (per curiam); *Dallas Market Dev. Co. v. Liedeker*, 958 S.W.2d 382, 385 (Tex. 1997) (per curiam); *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). In slip-and-fall cases, the notice element requires proof of actual or constructive notice, and can be shown by evidence that: (1) the defendant placed the substance on the floor, (2) the defendant actually knew that the substance was on the floor, or (3) it is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it. *Wal-Mart v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002).

In *Liedeker*, the Supreme Court held that the jury charge should track each element of an invitee's premises liability claim so as to avoid holding the premises owner to an incorrect — and in this case, higher — standard. *Liedeker*, 958 S.W.2d at 352. The trial court's charge in *Liedeker* inquired about the third and fourth elements, except that it asked about a failure to exercise a high degree of care rather than a failure to exercise ordinary care, which was clearly wrong. *Id.*

In section 66.3 of the Texas Pattern Jury Charges, the proposed issue for invitee premises liability is set forth as follows:

Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?

With respect to the condition of the premises, *Don Davis* was negligent if—

- a. *the condition* posed an unreasonable risk of harm, and
- b. *Don Davis* knew or reasonably should have known of the danger, and
- c. *Don Davis* failed to exercise ordinary care to protect *Paul Payne* from the danger, by both failing to adequately warn *Paul Payne* of *the condition* and failing to make that condition reasonably safe.

“Ordinary care,” when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No” for each of the following:

- a. *Don Davis* \_\_\_\_\_
- b. *Paul Payne* \_\_\_\_\_
- c. *Sam Settlor* \_\_\_\_\_
- d. *Responsible Ray* \_\_\_\_\_
- e. *Connie Contributor* \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGE PJC 66.3 (2000).

The Supreme Court also recommends that the following definitions accompany the jury question:

“Negligence,” when used with respect to an owner or occupier of a premises, means failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier knows about or in the exercise of ordinary care should know about.

“Ordinary care,” when used with respect to an owner or occupier of a premises, means that degree of care which would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

*Keetch v. Kroger*, 845 S.W.2d 262, 267 (Tex. 1992); *see* PJC 65.1. Moreover, in *McReynolds v. First Office Management*, 948 S.W.2d 342 (Tex. App.—Dallas 1997, no writ), the Dallas Court of Appeals upheld this instruction in a case involving an elevator accident, and rejected the argument that Texas law requires elevator owners to use the “utmost human care” in operating the elevator. *Id.*

### **Premises Liability - Licensee.**

The primary differences between the elements a licensee must establish and those an invitee must prove are that an invitee need only show that the landowner reasonably should have known of the defect (versus actual knowledge) and the invitee’s knowledge of the defect is immaterial. *See State v. Williams*, 940 S.W.2d 583, 584-85 (Tex. 1996). In other words, a plaintiff who is a licensee must establish the following in a premises defect case: (1) that a condition of the premises posed an unreasonable risk of harm to her; (2) the owner had actual knowledge of the defective condition; (3) the licensee had no knowledge of the defective condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; and (5) such failure was a proximate cause of injury to the licensee. *State Dep’t of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992), citing *State v. Tennison*, 509 S.W.2d 560, 561 (Tex. 1974). *Accord City of Grapevine v. Roberts*, 946 S.W.2d 841, 843 (Tex. 1997).

The PJC offers the following sample of a licensee jury issue:

Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?

With respect to the condition of the premises, *Don Davis* was negligent if—

- a. *the condition* posed an unreasonable risk of harm, and
- b. *Don Davis* had actual knowledge of the danger, and
- c. *Paul Payne* did not have actual knowledge of the danger, and

- d. *Don Davis* failed to exercise ordinary care to protect *Paul Payne* from danger, by both failing to adequately warn *Paul Payne* of the condition and failing to make that condition reasonably safe.

“Ordinary care,” when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

Answer “Yes” or “No” for each of the following:

- a. *Don Davis* \_\_\_\_\_  
b. *Paul Payne* \_\_\_\_\_  
c. *Sam Settlor* \_\_\_\_\_  
d. *Responsible Ray* \_\_\_\_\_  
e. *Connie Contributor* \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGE PJC 66.4 (2000).

**Gross Negligence.**

In *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 19 (Tex. 1994), the Supreme Court “examin[ed its] traditional definition of gross negligence and identif[ied] its basic elements.” In so doing, the Court defined gross negligence as “such an entire want of care as to establish that the act or omission was the result of actual conscious indifference to the rights, safety, or welfare of the person affected.” *Id.* at 21 (citing TEX. CIV. PRAC. & REM. CODE § 41.001(5) (Vernon Supp. 1994)). The Court also summarized the definition of gross negligence as including the following two elements:

- (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and
- (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.

*Id.* at 23. Since the time that *Moriel* was decided, the Supreme Court has confirmed this two-prong test. See, e.g., *Louisiana Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246 (Tex. 1999).

Nevertheless, for causes of action accruing on or after September 1, 1995, the test for gross negligence within the realm of the jury charge is “malice”:

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means:

- (a) a specific intent by *Dora Dotson* to cause substantial injury to *Paul Payne*; or
- (b) an act or omission by *Dora Dotson*,

(i) which, when viewed objectively from the standpoint of *Dora Dotson* at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which *Dora Dotson* had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: \_\_\_\_\_

COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGE PJC 61.5B (2000).

**d. Defenses.**

**Spoliation.**

In *Wal-Mart v. Johnson*, 39 S.W.3d 729, 731-32 (Tex. 2001), the Supreme Court held that the trial court did not abuse its discretion in submitting a spoliation instruction to the jury, despite the fact that Wal-Mart employees testified about the substance of the missing evidence. The instruction (which was not challenged on appeal) stated:

You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will become evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at a time it knew or should have known they would be evidence in this controversy, then there is a presumption that the reindeer, if produced, would be unfavorable to Wal-Mart.

*Id.* at 729 n.1.

**4. Submitting Actual Damages.**

Generally, with regard to the submission of a single cause of action, it is only necessary to submit a single question on damages with an instruction on the various measures of damages available in the case. PJC 110.2 suggests the following question for contract damages:

What sum of money, if any, if now paid in cash, would fairly and reasonably compensate Paul Payne for his damages, if any, that resulted from such failure to comply?

See PJC § 110.2-4. The phrase “resulting from,” which was originally derived from *Jackson v. Fontaine’s Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973), was recently upheld in *Toles v. Toles*, 45 S.W.3d 252 (Tex. App.–Dallas 2001, pet. denied). The trial court submitted a damages question patterned closely after PJC 110.2 along with a “proximate cause” definition and an instruction that “[a]ctual damages, if any, in a claim for intentional infliction of emotional distress may be awarded for the past and future value of reasonable compensation for the harm from such severe emotional distress proximately caused by such intentional infliction.” *Id.* After properly objecting at trial, the appellant argued on appeal that the damages question erroneously used the phrase “resulting from” rather than “proximate cause.” The Dallas court concluded that, considering the charge in its entirety, the trial court did not abuse of discretion in failing to use the term “proximate cause” in the damages question.

**a. Casteel Applied to Elements of Damages?**

In *Harris Co. v. Smith*, 96 S.W.3d 230 (Tex. 2002), the Texas Supreme Court applied *Casteel*'s presumed harm standard when a trial court erroneously submitted elements of loss of earning capacity for one plaintiff and physical impairment for another where there was no evidence to support submission of either element). See also *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149 (Tex. App.—Amarillo 2000, no pet.) (applying *Casteel* analysis where the trial court erroneously submitted lost profits as an element of damages in its broad-form damages question, and there was no evidence of lost profits); *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 152-53 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2001, pet. and briefing on the merits filed) (applying *Casteel* where the trial court erroneously submitted future medical care as an element of damages, and there was no evidence of that element); see also *Texas Industries, Inc. v. Vaughan*, 919 S.W.2d 798, 804 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996, writ denied) (pre-*Casteel*, remanding the case on all damages because the jury charge did not segregate the elements of damage and require a finding as to each one, and one of the elements had no supporting evidence).

Whether *Casteel* applies to the submission of damages elements will not remain an unanswered question much longer. The Texas Supreme Court granted the petition for review in *Smith*, and will hear oral argument on September 11, 2002. And in *Redding*, the parties have filed briefing on the merits at the Court's request, and the petition for review remains pending. See also discussion at Section I.B.7.

#### **b. Damage Questions Must Relate to Cause of Action.**

When multiple causes of action are asserted, plaintiff should be careful to relate each cause of action to a particular damage question and to request an instruction that the jury consider each damage question separately, without speculating as to the party's ultimate recovery. See Comment PJC 110.2.

The failure to relate damages questions to each cause of action was fatal in *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361 (Tex. 1987). *Birchfield* was a medical malpractice action brought by the parents of a blind premature infant against three physicians and the hospital. Plaintiffs alleged negligence against all of four defendants and a DTPA action against the hospital. The jury found that the physicians were negligent and that the hospital was negligent, grossly negligent and had violated the DTPA. The plaintiffs sought to recover both treble and exemplary damages awarded by the jury against the hospital.

The Texas Supreme Court held that plaintiffs could not recover both treble damages and punitive damages because they only submitted a single damage issue requesting compensation for the damages proximately resulting from the occurrence in question. *Id.* at 367. The Court stated that, "In the absence of separate and distinct findings of actual damages on both the acts of negligence and the deceptive acts or practices, an award of exemplary damages and statutory treble damages would be necessarily predicated upon the same findings of actual damages and would amount to a double recovery of punitive damages." *Id.* The Court thus denied the request for both exemplary and treble damages, finding that such an award "would be necessarily predicated upon the same findings of actual damages and would amount to a double recovery of punitive damages." *Id.*

On the other hand, in a case alleging that a bank's acts of altering and paying a check constituted both breach of contract and negligence, it was not error to submit a single causation question inquiring whether the bank's "conduct" caused damages. *Benjamin Franklin Sav. Ass'n v. Kotrla*, 751 S.W.2d 218, 222 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1988, no writ).

In addition, the defendant should also be careful to make proper objections for failure to relate specific damage questions to applicable causes of action. See *American Nat'l Petroleum Co. v. Transcontinental Gas Pipeline Corp.*, 798 S.W.2d 274, (Tex. 1990). For example, in *Aero Energy Inc. v. Circle C Drilling Company*, 699 S.W.2d 821, (Tex. 1985), the defendant did not object to the broad issue submission that allowed consideration of attorney fees for two separate causes. Because there was no objection to the failure of the trial court to segregate the fees between the claims, the party waived the

point. *Id.*

**c. Is it Necessary to Submit Separate Questions on Special Damages?**

Under the rules of broad-form submission, it should not be necessary to submit a separate question on consequential damages. But in *Odom v. Meraz*, 810 S.W.2d 241, 244 (Tex. App.–El Paso 1991), writ denied per curiam, 835 S.W.2d 626 (Tex. 1992), the the El Paso Court of Appeals held that “consequential damages are classed as special damages and MUST BE PLEADED AND PROVED SEPARATELY. THEREFORE NECESSITATING SUBMISSION OF JURY QUESTIONS SEPARATELY.” *Id.* at 244 (emphasis in original). In *Odom*, the plaintiff submitted a global question on actual damages relating to his DTPA claim instead of separately submitting a question on consequential damages. Further, no limiting instructions on damages were given by the trial court. *Id.* at 245. The Supreme Court reversed the judgment of the trial court without either approving or disapproving of the Court of Appeals’ disposition of the DTPA damages. *Odom v. Meraz*, 810 S.W.2d 241, 244 (Tex. App.–El Paso 1991), writ denied per curiam, 835 S.W.2d 626 (Tex. 1992).

Expressly disagreeing with *Odom*, the appellate court in *Insurance Company of North America v. Morris*, 928 S.W.2d 133, 151 (Tex. App.–Houston [14th Dist.] 1996), *aff’d in part, rev’d on other grounds*, 981 S.W.2d 667 (Tex. 1998), rejected the appellant’s argument to impose a requirement for separate submission of consequential or special damages. In the words of the court, “We instead believe that such a practice is contrary to the broad form submission mandated by our rules of procedure.” *Id.* (citing TEX. R. CIV. P. 277). Thus, submission of a single damage question accompanied by an instruction that “total loss sustained” includes “economic loss, and consequential losses, including reasonable expenses, damages for impairment of credit, and damages for mental anguish,” with an additional instruction defining mental anguish was not an abuse of the trial court’s discretion. *Id.* at 151-52; *see also English v. Fischer*, 649 S.W.2d 83, 90 (Tex. App.–Corpus Christi 1982), *rev’d on other grounds*, 660 S.W.2d 521 (Tex. 1983) (finding no error in a general damage question that allowed a jury to award consequential damages on causes of action submitted for fraud, breach of warranty and the DTPA).

Lost profits are recoverable in a breach of contract cause of action as an element of consequential damages. *See Naegeli Transp. v. Gulf Electroquip, Inc.*, 853 S.W.2d 737, 739 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1993, no writ). If the trial court submits a question on lost profits, it might also submit an instruction on the foreseeability of the lost profits. *See Winkle Chevy-Olds-Pontiac v. Condon*, 830 S.W.2d 740 (Tex. App.–Corpus Christi 1992, writ dism’d). Lost profits are not recoverable as a matter of law and should not be submitted in a damage question if the evidence of lost profits is speculative. It is questionable, however, whether it is necessary to submit an additional instruction on the quality and amount of evidence necessary to support a lost profit award once the “no evidence” hurdle is overcome. *See comment PJC 110.4.*

Finally, if a trial court submits a single answer blank for damages, the court must ignore any marginal notes made by the jury concerning each damage element. *Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995).

**d. Is it Necessary to Separate Past and Future Losses?**

In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 507, 555-56 (Tex. 1985), the Texas Supreme Court held that prejudgment interest could not be recovered on future damages. Accordingly, to recover prejudgment interest on accrued damages under *Cavnar*, the plaintiff has to segregate accrued damages from future damages. *Id.* at 556; *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 636 (Tex. 1986) (plaintiffs were not entitled to prejudgment interest on wrongful death claims because they failed to segregate past damages from future, unaccrued damages such as loss of inheritance); *Benavidez v. Isles Const. Co.*, 726 S.W.2d 23, 24-25 (Tex. 1987) (although jury awarded lump sum combining past and future damages, stipulation on past medical expenses and separate finding on property damage

sufficiently segregated past and future damages to allow prejudgment interest on past damages); *Loyd Elec. Co., Inc. v. Millett*, 767 S.W.2d 476, 484 (Tex. App.--San Antonio 1989, no writ) (court correctly calculated prejudgment interest on damages accruing before trial).

In *C&H Nationwide*, 903 S.W.2d at 324, the Supreme Court held that article 5069-1.05, § 6 [the predecessor to Sections 304.101-304.108 of the Texas Finance Code] modified *Cavnar* in cases to which the statute applied (*i.e.*, cases involving wrongful death claims, personal injury claims, and property damage claims) and allowed recovery of prejudgment interest in such cases not only on past damages, but also on future damages included in the judgment. The court reasoned that the phrase “amount of the judgment” in article 5069-1.05, § 6(a) made no distinction between past and future damages and thus entitled the plaintiffs to prejudgment interest on the entire judgment. *Id*; see also *Jamar v. Patterson*, 910 S.W.2d 118, 124 (Tex. App.--Houston [14<sup>th</sup> Dist.] 1995, writ denied); *C&D Robotics, Inc., v. Mann*, 47 S.W.3d 194, 201 (Tex. 2001). Accordingly, in cases covered by the prejudgment interest statute, there is no need to ask the jury to segregate past from future damages in order to preserve a claim for prejudgment interest on all damages awarded.

Based upon the foregoing, the PJC advises that segregation of past and future damages is required in non-statutory cases and is not required in statutory cases. See PJC 110.20. HOWEVER, that analysis is not necessarily correct as the Texas Supreme Court in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 597 (Tex. 1998) extended the statutory prejudgment interest approach (at least as to accrual date and rate and perhaps even more) to *all* claims for equitable prejudgment interest. If the *Kenneco* decision is read to mean that the entirety of the statutory approach is adopted in non-statutory cases, then the “no segregation rule” of the statute would apply across the board.

Also note: a recent DTPA amendment prohibits prejudgment interest on future damages in DTPA cases which accrued after August 31, 1995, or which were final after August 31, 1996, regardless of accrual date. TEX. BUS. & COM. CODE § 17.50(f)(1). Thus, segregation of past and future damages would be required in such cases.

## **5. Exemplary Damages.**

### **a. The Exemplary Damages Statute.**

Before 1987, exemplary damages submissions were governed by common law. In the era of tort reform, the Texas legislature added chapter 41 to the Texas Civil Practice and Remedies Code, which generally applies to non-DTPA, Insurance Code, and workers’ compensation cases. Besides placing a cap on exemplary damages, *id.* §§ 41.008, the statutory provisions contained in chapter 41 made several changes and clarifications that affect the proper submission of exemplary damages questions to the jury. Indeed, section 41.012 mandates that the jury be instructed with regard to the definition and purposes of exemplary damages, §§ 41.001, .010, the harm the claimant must prove to be entitled to exemplary damages, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003, and the factors it must consider in determining the amount of exemplary damages. *Id.* §§ 41.011, 41.012.

After the statute was enacted, the supreme court addressed the issues of bifurcation and submission of instructions on defendant’s net worth. In *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), the supreme court held that a “defendant’s ability to pay bears directly on the question of adequate punishment and deterrence.” And in 1994, the supreme court decided in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994), that a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues and that the jury should consider evidence of a defendant’s net worth during the second phase of a bifurcated trial. See also *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 & n.28 (1993) (approving of the use of wealth as a consideration in determining the amount of punitive damages). The legislature codified *Moriel* (and made some other changes) by amending Chapter 41 effective September 1, 1995.

Accordingly, the proper exemplary damages question, instruction, and definition depends on the date the cause of action accrued. For causes of action occurring before September 1, 1995, exemplary damages must be conditioned on an affirmative finding on a question of gross negligence (or another finding justifying the award), the “Exemplary damages” definition is slightly different than the current definition, and there is no requirement that the jury consider net worth in determining the amount of exemplary damages to award. PJC 8.6A, 110.33, 110.34 Comment. For those causes of action arising after September 1, 1995, exemplary damages must be conditioned on an affirmative finding on a question of malice or fraud, the “Exemplary damages” definition is different, and the jury should consider the defendant’s net worth in determining the amount of exemplary damages. PJC 8.6B, 110.33, 110.34 Comment.

**b. Inclusion of the *Kraus* Factors (and Others) in Jury Instructions Accompanying Questions on Exemplary Damages.**

In *Alamo Nat’l Bank v. Kraus*, 616 S.W.2d 908, 916 (Tex. 1981), the Supreme Court listed several factors to be considered by an appellate court in evaluating whether a jury award of exemplary damages is excessive: (1) the nature of the wrong; (2) the character of the conduct; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which such conduct offends a public sense of justice and propriety. The *Kraus* factors formed the basis for the instruction mandated in TEX. CIV. PRAC. & REM. CODE ANN. § 41.011, .012, and the 1995 amendments required the additional instruction on the defendant’s net worth. Therefore, it is clear that, at a minimum, the jury must consider the statutory factors in determining the amount of punitive damages to award. But are any other factors appropriate to submit?

Recently, in *Owens-Corning Fiberglas Corp. v. Malone* (a toxic tort case), the supreme court held that the jury should be able to consider mitigating evidence about the defendant’s ability to pay punitive damages. See 972 S.W.2d 35, 40 (Tex. 1998) (citing *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 329 (Tex. 1993) (Gonzalez, J., concurring)). Specifically, the court held that “evidence about the profitability of a defendant’s misconduct and about any settlement amounts for punitive damages or prior punitive damages awards that the defendant has actually paid for the same course of conduct” is admissible during the second phase of a bifurcated trial. *Id.* at 40-41. The court rejected plaintiff’s argument that evidence mitigating punitive damages is a legal question, stating “we believe that the fact finder will better perform its role as the community’s conscience in determining the proper punitive damages award by considering such evidence.” *Id.* at 42. The court cautioned, however, that it would be improper for the jury to consider evidence of the actual dollar amounts paid by settlements or by judgments, the number of pending or anticipated claims filed against the defendant for the same conduct, insurance coverage, or unpaid or future anticipated punitive damages awards for the same conduct. *Id.* at 41. What effect, if any, this holding has upon the jury charge is unclear.

Besides the *Kraus* factors and the mitigating factors suggested in *Owens-Corning*, Texas courts have considered the following additional factors in reviewing the propriety of exemplary damages awards: (1) compensation for inconvenience and attorney’s fees,<sup>2</sup> *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984); *King v. Acker*, 725 S.W.2d 750, 757 (Tex. App.–Houston [1<sup>st</sup> Dist.] 1987, no writ); (2) the frequency of the wrongs committed, *State Farm Mutual Automobile Ins. Co. v. Zubiate*, 808 S.W.2d 590, 604 (Tex. App.–El Paso 1991, writ denied); *Moriel*, 879 S.W.2d at 27, n.22; and (3) the size of the award needed to deter similar wrongs in the future. *Zubiate*, 808 S.W.2d at 604; *Moriel*, 879 S.W.2d at 27, n.22; see also Comment to PJC 8.6A.

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<sup>2</sup>If attorney’s fees are sought under another theory of recovery, however, they should not be included in the “factors to consider” instruction because of the potential of a double recovery. See PJC 8.6A Comment at 109 (2000).

**c. BMW v. Gore Factors.**

Even if an assessment of punitive damages is not deemed excessive under governing state law, it may violate a party's substantive due process right to protection from "grossly excessive" punitive damages awards under the United States Constitution. As an ultimate check for exorbitancy of punitive damages, the United States Supreme Court formulated a test for determining whether exemplary damages are excessive. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996). When properly preserved, appellate courts must analyze three factors: (1) the degree of reprehensibility of the wrongful conduct, (2) the ratio of punitive to actual damages; and (3) sanctions imposed for comparable misconduct. But these factors should not be submitted to the jury in the form of instructions. Rather, *BMW's* analysis is one for the courts to apply after the jury determines how much to award. See *Owens-Corning*, 972 S.W.2d at 40.

Texas courts have generally found that the procedural safeguards already in place protect against due process challenges. See TEX. CIV. PRAC. & REM. CODE §§ 41.013 (requiring court of appeals articulation of relevant evidence when affirming (rather than just when reversing) a factual sufficiency challenge to a punitive damages award); *Owens-Corning*, 972 S.W.3d at 43 (holding that the bifurcation procedure and the requirement for careful appellate review of punitive damages awards provide a substantial check on juries' awards); *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 922-25 (Tex. 1993) (declining to address whether the punitive damage award was unconstitutionally excessive because it was reduced by operation of the Texas statutory limit on punitive damages).

**6. Corporate Liability for Exemplary Damages.**

Exemplary damages may only be recovered against a corporation when it is clear that the act giving rise to punitive damages was the act of "the corporation itself." See *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex. 1997). Acts that are solely attributable to agents or employees must be distinguished from acts that are directly attributable to the corporation; respondeat superior liability is not enough to hold a corporation liable in punitive damages.

PJC 110.35 suggests that the following instruction be given to hold corporations liable for the acts of their servants:

Exemplary damages can be assessed against [Don Davis] [ABC Corporation] as principal because of an act by an agent, but only if,

- a. the principal authorized the doing and the manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
- d. the employer or a manager of the employer's ratified or approved the act.

TEXAS PATTERN JURY CHARGES 110.35. This instruction is based on the RESTATEMENT (FIRST) OF TORTS § 909 (1938), which the Texas Supreme Court embraced in *King v. McGuff*, 234 S.W.2d 403, 405 (1950) and approved of in *Hammerly Oaks*, 958 S.W.2d at 391, *Purvis v. Prattco, Inc.*, 595 S.W.2d 103, 104 (Tex. 1980) (ratification and approval), and *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex. 1967).

A corporation can also be held liable if it commits gross negligence through the actions or inactions of a vice principle. See *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1988). "Vice principals" include: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of non-delegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or division of the business. See *id.*; see also *Bradford v. Vento*, 997 S.W.2d 713, 740-41 (Tex. App.-Corpus Christi 1999, no pet.) (holding that manager of a mall was a "vice principal" for purposes of corporate

liability for punitive damages); *Missouri Pacific R. Co. v. Lemon*, 861 S.W.2d 501, 521 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1993, writ dismissed by agreement) (finding that railroad crew members were “vice principals” because they were performing non-delegable duties).

The question and accompanying instructions for corporate liability for punitive damages belongs in the liability phase of the trial. It is reversible error to instruct the jury concerning the master’s liability for exemplary damages during the second phase of the trial because it deprives plaintiff of its right to have a bifurcated trial. See *Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 142 (Tex. App.–Fort Worth 2001), *rev’d on other grounds*, 80 S.W.3d 573, 579 (Tex. 2002).

The burden of requesting corporate liability elements for punitives instruction seems to lie with the plaintiff. See *Missouri Pacific R. Co. v. Lemon*, 861 S.W.2d 501, 517-18 (Tex. App. –Houston [14<sup>th</sup> Dist.] 1993, writ dismissed by agreement). Moreover, because each of the grounds listed in PJC 110.35 and the vice principal definition are stated in the alternative, a particular ground should not be submitted if there is no evidence of it. However, as the plaintiffs learned in *Hammerly Oaks*, practitioners should be weary before omitting particular grounds from the instructions.

In *Hammerly Oaks*, the court instructed the jury that “in order for Hammerly Oaks, Inc. to be grossly negligent, you must find that Rose Britton, Frank Smotek, Marilyn Montgomery, Roman Gonzales, and/or Gabriel Gonzalez were acting in their capacities as vice-principal of Hammerly Oaks, Inc.” Vice principal was defined to include those with hiring power and managers. The vice principal instruction did not include an instruction that a vice principal includes a person engaged in the performance of a nondelegable duty, nor did the plaintiff object. See *id.* at 393. On appeal, the court held that punitive damages were improperly awarded to the corporation because one employee listed (although a manager) did not commit the complained-of acts, other listed employees did not have the authority to hire, and plaintiff waived any argument that another employee was a vice principal based on his performance or nonperformance of a nondelegable duty by failing to object or request a definition of “vice principal” that included the concept of nondelegable duties. See *id.* at 393.

## **7. Broad Submissions: Do They Submit Questions of Law?**

The Supreme Court’s decision in *Texas Department of Human Resources v. E.B.*, 802 S.W.2d 647 (Tex. 1990), implicitly answers concerns that broad form submissions allow juries to decide questions of law rather than controlling facts that determine the application of law. Indeed, this family law case confirms that the court was not concerned that the jury applied the facts to the law in determining if the parent-child relationship should be terminated. *E.B.*, 802 S.W.2d at 649. This apparent lack of concern is consistent with the Court’s opinions in *Island Recreational*, 710 S.W.2d at 551 and *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1987). Recall the single issue submitted in *Island Recreational* stated, “Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question.” 710 S.W.2d at 553. The single issue in *Castleberry* stated, “Do you find . . . that Texas Transfer, Inc. was the alter ego of the defendant?” 721 S.W.2d at 275.

In any event, the line dividing the roles of judges and juries is presently unclear. In *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 25 (Tex. 1998), the plurality opinion of the Supreme Court was highlighted by the spirited concurrence of former Justice Gonzalez, who argued that the time had come to directly advise juries of the effect of their answers. In addition, Justice Hecht’s dissent argued that juries should not be permitted to apply or ignore the law by deciding which party should win. *Id.* at 28 (Hecht, J., dissenting).

## **8. Multi-theory Submissions After *Casteel*.**

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the Texas Supreme Court held that when both valid and invalid theories of liability were included in a single broad-form question, thus

making it impossible to determine which the jury based its finding on, the error was harmful. *See id.* at 387-90. The charge in *Casteel* included a single liability question that could have been based on any of thirteen independent grounds— the first five of which were taken from the DTPA’s section 17.46(b) “laundry list.” *See id.* at 387. The plaintiff, Crown Life, did not have the requisite consumer status for four of those “laundry list” grounds. *See id.* at 389. The liability question called for a single answer, which the jury answered affirmatively. *See id.* The Court ruled that, as a result, the jury could have based its affirmative answer solely on one or more the erroneously submitted theories. *Id.* at 387-88. The Court concluded that “when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.” *Id.* at 388.<sup>3</sup>

Most courts of appeals apply *Casteel* only when the error leaves the court unsure whether the jury based its finding on a valid legal theory. *See, e.g., Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.); *Stevenson*, 27 S.W.3d at 202 (although not citing *Casteel*, holding that instructing jury that it could terminate parental rights under either of two grounds, one of which was improperly submitted, caused harmful error when court could not determine whether jury relied on proper theory); *Kansas City Southern Ry. Co. v. Stokes*, 20 S.W.3d 45, 51 (Tex. App.—Texarkana 2000, no pet.). However, in recent cases, the Courts of Appeal have begun exploring the limits of *Casteel*.

#### **a. The Limits of *Casteel*.**

At least one court has held that *Casteel* applies to affirmative defenses as well as to theories of liability. *See Pantaze v. Welton*, No. 05-96-00509-CV, 1999 WL 673448 (Tex. App.—Dallas 1999, no pet.) (unpublished). In that case, one broad-form excuse question, with a single answer, allowed the jury to base its answer properly on equitable estoppel, or improperly on waiver. *See id.* at \*6. The court ruled that, because it could not determine which theory the jury based its verdict on, the inclusion of the improper defense was reversible error. *See id.* (“We can see no reason why [*Casteel*] is not applicable to affirmative defenses as well as to theories of liability”).

Courts have held that *Casteel* does not apply in a case where multiple liability questions, one of which was invalid, were tied to single damage question—so long as the measure of damages for both causes of action are the same.<sup>4</sup> *See Durban v. Guajardo*, 79 S.W.3d 198, 206 (Tex. App.—Dallas 2002, no pet.) (“*Casteel* is not applicable when, as in this case, the damages from two causes of action, one valid, the other arguably invalid, are the same.”); *Custom Residential Paint Contracting, Inc. v. Klein*, 2001 WL 1318420 (Tex. App.—Dallas Oct. 29, 2001), judgment vacated and modified by supplemental opinion, 2002 WL 660200, \*1 (Tex. App.—Dallas Apr. 23, 2002, pet. filed) (broad-form damages question based on affirmative finding of liability under either DTPA or contract; court found that the erroneous DTPA submission was harmful, but allowed appellees to cure the error by filing a voluntary remittitur of the difference in damages between their DTPA and breach of contract claims); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.) (even though several of

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<sup>3</sup>If, on the other hand, other findings can support the jury’s verdict or the court’s judgment, the error may be harmless.

<sup>4</sup>Prior to *Casteel*, courts generally upheld a single damage finding even if one or more of the multiple liability findings on which it was predicated failed. *See Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993) (actual damages based on contract and statutory claim would stand upon reversal of contract recovery and affirmance of statutory claim); *Automobile Ins. Co. v. Davila*, 805 S.W.2d 897, 903 (Tex. App.—Corpus Christi 1991, writ denied) (single damage question stands if any one liability question can support it). *But cf Putter v. Anderson*, 601 S.W.2d 73, 78 (Tex. Civ. App.—Dallas 1980, writ ref d n.r.e.) (pre-broad-form mandate case holding that failure of two of three libel counts resulted in remand when plaintiff secured only one unapportioned damage question).

questions on different theories of liability failed, remaining question also tied to same damage question did not leave the court wondering whether jury based its award on valid theory); *see also Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.–Corpus Christi 2000, no pet.) (*Casteel* error in one question to which single damage question tied rendered harmless in light of survival of other liability question tied to same damage question).

The Texas Supreme Court has yet to say if the holding of *Casteel* applies to the failure of part of a broad-form question on evidentiary grounds. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (“The City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether our decision in [*Casteel*], should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question before us.”); *In re J.M.M.* 80 S.W.3d 232, 248 n.6 (Tex. App.–Fort Worth, Jun. 13, 2002, pet. denied) (“We have found no court of appeals case extending *Crown Life* to error in submission of a liability theory supported by no evidence.”).

In *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.–Amarillo 2001), *rev’d on other grounds*, 81 S.W.3d 817 (Tex. Mar. 27, 2002), the court of appeals held that *Casteel* did not require separate liability questions for each injury suffered by the plaintiff. The defendant, Excel, had argued that the damage issues submitted to the jury were global and did not specify the damages that were being awarded for any specific injury. The court, however, held that the wording of the liability and damage questions asked the jury to “award damages only for the injuries they found were caused by Excel. There is nothing to indicate that the wording of this question resulted in confusion for the jury.” *Id.* at 700.

Courts disagree whether *Casteel* applies to lump sum damage questions where one measure of damage is invalid.<sup>5</sup> One court of appeals found *Casteel* applicable to a damage question that submitted two measures of damage, one of which had no support in the evidence. *See Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149 (Tex. App.–Amarillo 2000, no pet.). The court reasoned that:

It is improper [under *Casteel*] to allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds. It is no less improper to allow assessment of damages against a defendant without a judicial determination that a factfinder actually found an amount assessed as damages on proper, legal grounds.

*Id.* at 156-57 (internal citation omitted). However, another court of appeals came to the opposite conclusion. *See Harris County v. Smith*, 66 S.W.3d 326 (Tex. App.–Houston [1<sup>st</sup> Dist.] 2001, pet. granted).<sup>6</sup> That court explicitly refused to extend the rule in *Casteel* to broad-form damages question, instead applying traditional harm analysis, for three reasons. *Firstly*, the court reasoned that *Casteel* is

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<sup>5</sup>Prior to *Casteel*, courts regularly upheld damages question with a broad, lump-sum answer, if the evidence supported that amount for any sub-part (or element) of the damages. *See Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995); *Provident Am. Ins. Co. v. Castaneda*, 914 S.W.2d 273, 276-77 (Tex. App.–El Paso 1996) (“so long as the aggregate evidence for all elements of damage supports the entire award, [court] must uphold the verdict”), *rev’d on other grounds*, 988 S.W.2d 189 (Tex. 1998); *Dodge v. Watts*, 876 S.W.2d 542, 545 (Tex. App.–Amarillo 1994, no writ) (evidence of pain, mental anguish, and other elements supported aggregate award); *Baylor Medical Plaza Servs. Corp. v. Kidd*, 834 S.W.2d 69, 79 (Tex. App.–Texarkana 1992, writ denied) (mental anguish could support finding by jury even in absence of evidence of other elements); *see also Wal-Mart Stores, Inc. v. Garcia*, 974 S.W.2d 83, 87-88 (Tex. App.–San Antonio 1998, no pet.) (without attack of sufficiency of evidence as to entire amount, no point raised for review).

<sup>6</sup>The Supreme Court heard oral argument in *Smith* on September 11, 2002.

primarily concerned with the “key issue” of liability, and was intended to “preclude[] even the possibility that a party might be found liable on a completely invalid theory.” A damage question, however, could not present such, possibly constitutional, issues because the “key, primary, and ultimate issue of liability” was already answered. *Secondly*, the court reasoned that challenging the validity of only one of the elements of damage would be the equivalent of challenging the sufficiency of the evidence for only one element of damage— when, under *Thomas v. Oldham*, 895 S.W.2d 352, 354, 359 (Tex. 1995), the evidence must be considered as a whole. The court held that a party “should not be permitted to accomplish, by challenging the jury charge, what it cannot accomplish by challenging the legal sufficiency of the evidence.” The court added that “[i]n neither case should we presume error based on the possibility of error.” *Thirdly*, the court adopted the reasoning of Professor Dorsaneo, who was also relied upon, in part, by the Texas Supreme Court in *Casteel*, that “‘there is a principled and sensible basis for concluding there is no reversible error’ when it is reasonable to presume that the jury awarded damages for elements that had support in the evidence, rather than those that lacked evidentiary support” (citing William V. Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 630 (1992)). The court reasoned that this approach represented the “well-settled” rule of harmless error. *See also* discussion at Section I.B.4.a.

#### **b. Practical Concerns.**

Whether the form of the broad form question creates a risk of reversal depends upon how many theories of liability and defense a single question combines, how the jury answered the question, and what part of the question fails on what grounds on appeal. For example, except perhaps for omission of a theory of liability, the risk of reversal (or harmful error) generally arises with a question that submits multiple liability or defensive theories in a single question only when the jury returns an *affirmative* finding to any question that contains multiple liability or defensive theories. When one of the multiple theories in a single question fails, a reviewing court cannot determine on what part of the question the jury relied to return an affirmative finding allowing recovery (liability) or on what part the jury relied to disallow recovery (defenses). On the other hand, a *negative* finding to those same questions would not have the same effect. In that situation, the jury relied upon none of the theories. The form of the question itself caused no error; no question exists as to which part of multi-theory question the jury relied upon to reach its finding. And practical considerations, or matters of strategy, may dictate the requested form of submission. The variations for a multi-theory case are too numerous to outline. Indeed, the combinations will vary depending upon, among other things, (1) how many plaintiffs and defendants the charge will submit,<sup>7</sup> (2) how many theories of liability and/or defense the charge will submit, (3) the strengths and weaknesses of a case—on evidentiary, legal and jury appeal grounds, (4) what relief or combinations of relief a party will seek in formation of the judgment,<sup>8</sup> and (5) the risk of reversal that a party can tolerate to achieve a “winning” verdict. These various influences will affect the ultimate submission choices.<sup>9</sup>

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<sup>7</sup>Joint and several liability (or several liability only) for actual or punitive damages also presents an array of issues in submission of a multi-party charge. Those issues are beyond the scope of this paper.

<sup>8</sup>Some damage-related issues to consider in how broadly a court can combine theories include (1) whether claims have different measures of damages, (2) whether a party seeks tort based damages for recovery of punitive damages, (3) whether a party can seek both punitive and trebled damages, (4) whether attorneys’ fees are at issue on a particular claim, and (5) the type of relief sought for various claims or conduct (*e.g.*, forfeiture of different property, etc.).

<sup>9</sup>For example, a plaintiff might prefer that the trial court not submit multiple defenses in separate questions because (1) the jury receives more than one opportunity to thwart the plaintiff’s recovery, (2) the opportunity for multiple defensive answers might create an overall perception against liability, (3) the possibility of conflicts increases with the number of questions submitted, and (4) a defendant can more easily challenge the evidentiary support of the jury’s findings. On the other hand, if the jury answers a multi-theory question adverse to the plaintiff, the plaintiff will face a difficult task in attacking the jury’s

But you cannot wait to see what the jury answers to raise your objection on the effect of the form of the question or the underlying reasons it will fail. Instead, assuming you decide after consideration of strategic points to raise *Casteel*, the “broad form” error must have been preserved. *Molina v. Moore*, 33 S.W.3d 323, 328 (Tex. App.–Amarillo 2000, no pet.) (even if *Casteel* extended to require separate answers to elements of damage, party waived error by failing to object to the form). *But cf. Iron Mountain*, 42 S.W.3d at 156-57 (despite lack of objection on broad form format, court found objection as to lack of evidentiary support sufficient to preserve *Casteel* error).<sup>10</sup>

## **II. HANDLING THE INFORMAL CHARGE CONFERENCE.**

### **A. On the Record or Off?**

Hard to say. Some judges will make it clear that they do not want a record and, if so, it can be difficult to procure a record. However, if you want to rely upon rulings made during the informal conference for appellate purposes, then obviously you need to request a record. But be aware that the record may ultimately hurt as well as help your cause later in the proceedings.

### **B. Are You Preserving Error?**

Certainly, the general rule is that the informal charge conference does not preserve charge error. However, under *State Dept. of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992), practitioners are given some leeway in referring to all aspects of the charge process in arguing preservation of charge error. *See* discussion at Section II.C.7.

## **III. PRESERVING ERROR AT THE FORMAL CHARGE CONFERENCE.<sup>11</sup>**

Requests and objections are not interchangeable methods of preserving charge error. The Texas Rules of Civil Procedure set forth these, seemingly simple, rules of preservation. In order to preserve error, a party must:

- *Object* to preserve complaints about questions, instructions or definitions actually submitted in the charge.
- *Request* to preserve complaints about the court’s failure to submit an instruction or definition.
- *Request* to preserve complaints about the court’s failure to submit a question for which you have the burden.

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finding.

<sup>10</sup>Moreover, as *Casteel* recognized, the existence of one broad form error does not necessarily result in reversal. For example, other findings may support the judgment. *See Valdez*, 30 S.W.3d at 518-19 (although DTPA question defectively included improper theories and created harm under *Casteel*, Insurance Code question tied to same damage question supported judgment and rendered DTPA error harmless).

<sup>11</sup>The issue of deemed findings under TEX. R. CIV. P. 279 is beyond the scope of this paper. For a recent Supreme Court decision applying Rule 279, see *Gulf States Util. Co. v. Low*, 79 S.W.3d 561, 565 (Tex. May 30, 2002).

- *Object* to preserve complaints about the court’s failure to submit a question for which your opponent has the burden.
- *Remain silent*, and enjoy, if your opponent fails to submit an entire cause of action, or affirmative defense, for which it has the burden.

See TEX. R. CIV. P. 274, 278, 279; *Lyles v. TEIA*, 405 S.W.2d 725, 727 (Tex. Civ. App.–Waco 1966, writ ref’d n.r.e.) (explaining requirements of rules). Some recent cases attempt to apply these principles in a broad-form context. See *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 481 (Tex. 2001) (holding that “[i]t is the defendant’s burden to plead and request instructions on an affirmative defense”); *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 384 (Tex. 1997) (holding that an objection was sufficient to preserve error as to a defective instruction), *overruled on other grounds, Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 n.9 (Tex. 2000); *In re T.J.S.*, 71 S.W.3d 452, 457 (Tex. App.—Waco 2002) (“Because the controlling issues were submitted to the jury, any defect in the submission must be raised by an objection to the charge.”); *Aboud v. Schlichtemeier*, 6 S.W.3d 742, 750 (Tex. App.—San Antonio 1999, pet. denied) (noting that a party’s failure to object to an allegedly defective definition would waive any error).

Some courts, however, have held that the Rules require that in certain situations a party must both request and object to preserve error concerning *omitted* material. In other words, these courts have held that the Rule 278 requirement that a proper request is necessary to preserve error as to omitted material, is in addition to the Rule 274 requirement for proper objections. See, e.g., *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (party who would benefit from addition of limiting instruction to damage question must object to deficiency as submitted and request limiting instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, writ denied) (party who requests question, definition or instruction on which that party relies must also object); *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.*, 865 S.W.2d 68 (Tex. App.—Corpus Christi 1993, writ denied) (holding that, when the trial court failed to include instructions on the proper measure of damages, the complaining party had a “burden both to object to the charge and to tender such instructions in substantially correct form”); *National Fire Ins. v. Valero Energy*, 777 S.W.2d 501, 508 (Tex. App.—Corpus Christi 1989, writ denied); *Texas Cookie Co. v. Hendricks & Peralta, Inc.*, 747 S.W.2d 873, 878 (Tex. App.—Corpus Christi 1988, writ denied) (saying that “where the court has failed to include a limiting instruction, it is the complaining party’s responsibility both to object to the charge and to tender written instructions on the proper measure of damages in substantially correct form”).

In *Howe*, for example, the plaintiff submitted the following damage question: “What sum of money, if any, does Jim Howe Homes, Inc. owe Jodi Rogers?” *Howe*, 818 S.W.2d at 902. The defendant timely objected that the plaintiff’s damage question provided insufficient guidance for the jury, and did not give the jury “any definition of what they are to consider in determining what sum of money should be awarded in the event they reach that question.” *Id.* The Austin Court of Appeals noted that, in most instances, an objection would have been all that was required to preserve error concerning an allegedly faulty question. See *id.* at 903. However, with the change to broad form questions mandated by Rule 277, the Austin Court reasoned that “the party who stands to benefit from the limiting instruction now has the burden of requesting such an instruction” as well as objecting to the deficiencies of the question submitted. *Howe*, 818 S.W.2d at 903.

Those courts generally rely on, or combine, different parts of Rule 274, which provides that “[a]ny complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections;” and Rule 278, which requires a party relying on a question to submit a request. See, e.g., *Howe*, 818 S.W.2d at 903; *Wright Way*, 799 S.W.2d at 419 (both citing to TEX. R. CIV. P. 274, 278). Moreover, when a party will benefit from a question, instruction or definition, courts want the relying or benefitting party to make the trial court aware of the complaint by an articulated objection to avoid building error in the record with unexplained requests. See

*Wright Way*, 799 S.W.2d at 419.

Consequently, the prudent practice when the court fails to submit desired material, unless the material is a question relied on by the opposing party, is to both object to the omission and submit a proper request for the material.

## **A. Rules About Requests.**

### **1. Make Requests Separate from Objections.**

“A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge.” TEX. R. CIV. P. 273; *see Woods v. Crane Carrier Co.*, 693 S.W.2d 379-80 (Tex. 1985) (request dictated into record during objections did not preserve complaint); *see also Templeton v. Unigard*, 550 S.W.2d 267, 269 (Tex. 1976) (the failure to submit requests separately from objections may waive any right to appeal the trial court’s refusal to submit the requested material). This rule only requires that the written request be “plainly separate” from the oral objection. *Alaniz*, 907 S.W.2d at 451; *Smith-Hamm, Inc. v. Equip. Connection*, 946 S.W.2d 458, 464 (Tex. App.–Houston[14<sup>th</sup> Dist] 1997, no writ). However, as a practical matter, “to expect a judge, after hearing oral and lengthy requests just once, to weigh their merits for inclusion in a charge ignores realities.” *Woods v. Crane Carrier Co., Inc.*, 693 S.W.2d 377 (Tex. 1985).

### **2. Tendered to the Court in Writing.**

Because the rules provide that dictating to the court reporter in the presence of the court and opposing counsel is sufficient to register an objection, it is a common mistake to assume that, likewise, a request can be dictated to the court reporter. *See* TEX. R. CIV. P. 272, 273. All requests, however, must be tendered to the court in writing. *See* TEX. R. CIV. P. 273, 278; *James v. Hill*, 753 S.W.2d 839, 840 (Tex. 1988); *Woods*, 693 S.W.2d at 379-80 (request dictated into record did not preserve complaint).

### **3. Substantially Correct Wording.**

All written requests must be tendered to the trial court in substantially correct wording. *See* TEX. R. CIV. P. 278; *Union Pacific R. Co. v. Williams*, 85 S.W.3d 162, 169 (Tex. June 6, 2002). Substantially correct has been defined as follows:

Substantially correct . . . does not mean that it must be absolutely correct, nor does it mean one that is merely sufficient to call the matter to the attention of the court will suffice. It means one that in substance and in the main is correct, *and that is not affirmatively incorrect.*

*Palencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (quoting *Modica v. Howard*, 161 S.W.2d 1093, 1094 (Tex. Civ. App.–Beaumont 1942, no writ)). For example, in a case involving tortious interference with contract, a requested instruction that “interference with contractual relations is privileged where it results from the exercise of a party’s own rights or where the party possesses an equal or superior interest to that of the plaintiff in the subject matter”<sup>12</sup> was found to be substantially correct even though it did not include a requirement “that the exercise of one’s own rights must be bona fide.” *Southwestern Bell v. John Carlo Texas*, 843 S.W.2d 470, 472 (Tex. 1992).

If the requested question, instruction, or definition is affirmatively incorrect, courts often find that any error was waived. *See Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182 (Tex. App.–Corpus

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<sup>12</sup>The court does not give the instruction’s precise wording, noting instead that it “tracked” this language. *See Southwestern Bell*, 843 S.W.2d at 472.

Christi 1992, writ denied); *Saenz v. David & David Constr. Co.*, 52 S.W.3d 807, 812-14 (Tex. App.–San Antonio 2001, pet. denied). “Questions, instructions, and definitions are *not* in substantially correct wording *unless* they state the law accurately, properly place the burden of proof, avoid comment by the court, and generally meet the other requirements for proper broadform questions or for proper instructions and definitions” WILLIAM V. DORSANEO, III ET AL., TEXAS LITIGATION GUIDE: TRIAL PROCEDURE § 122.03 (3)(b) (2001) (emphasis added). In *Placencio*, for example, the Texas Supreme Court ruled that a tendered issue was affirmatively incorrect because it assumed the truth of material controverted facts and would have constituted a comment on the weight of the evidence. See *Palencio*, 724 S.W.2d at 21. The court went on to note that, had the issue included conditioning language suggested by the *Texas Pattern Jury Charges*, it would have been substantially correct.<sup>13</sup> See *id.* at 22. Similarly, the court in *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182 (Tex. App.–Corpus Christi 1992, writ denied) found a requested instruction to be affirmatively incorrect primarily because did not adequately inform the jury of the shifting burden of proof.<sup>14</sup> The instruction sought to have the trial court instruct a verdict that the plaintiff had made a prima facie case of age discrimination when, because the facts supporting that conclusion had been contested, she had not. See *id.* at 188. A request will not be substantially correct if it is too vague or contains a term that requires a definition but the party fails to tender the definition. See *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 493 (Tex. App.–San Antonio 1994, writ denied).

At least one court, relying on *Payne*, has given more latitude as to how correct a *request* must be. See *Matthiessen v. Schaefer*, 900 S.W.2d 792, 797 (Tex. App.–San Antonio 1995, pet denied) (holding that the requested question, though incorrect, was nonetheless sufficient because it made the trial court aware of the complaint and suggested language necessary to correct the question that was submitted).

Finally, determining whether a requested, but refused, question is substantially correct should be contrasted with deciding whether a submitted charge contained harmful error. The appellate courts, on the ground that the requested material was not worded substantially correctly, have often left standing a trial court’s refusal to submit the material. If the trial court submits material, on the other hand, the appellate courts must apply the harmless error rule, again most frequently with the result that the trial court action is left standing. Compare *Placencio v. Allied Indus. Intern., Inc.*, 724 S.W.2d 20, 21-22 (Tex. 1987) with *Alvarez v. Missouri-Kansas-Texas R. Co.*, 683 S.W.2d 375, 378 (Tex. 1984).

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<sup>13</sup>This approach appears to have some inconsistency, *i.e.*, if the problem is a missing limiting instruction, then only a request should be necessary. However, the problem can also be seen as a problem with the question– it is incomplete, in a way, without the proper instructions. This is best illustrated by Professor Dorsaneo, in an article stressing the need to substantially revise the rules governing the trial court’s charge to the jury, when he writes that

With the adoption of broad-form submission, it is very common for a definition or an instruction to perform the function of submitting the component elements of claims and defenses inquired about more generally in broad-form jury questions. Accordingly, under broad-form submission practice, it makes sense for a party to object to a question because the charge does not include an appropriate accompanying instruction.

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Of course, [cases such as *Howe*] show that the objection/request methodology and its accoutrements are no longer sensible because the required behavior is dictated as a matter of form rather than by a principled concern for the respective roles of questions, accompanying definitions and instructions.

William V. Dorsaneo, III, *Revision and Recodification of the Texas Rules of Civil Procedure Concerning the Jury Charge*, 41 S. TEX. L. REV. 675, 693-94 (2000).

<sup>14</sup>The instruction also contained a factual error– the age of the plaintiff’s replacement. However the court found the error in the burden of proof to be the primary reason the instruction was affirmatively incorrect. See *Adams*, 848 S.W.2d at 187.

#### 4. Not Obscured or Concealed with Minute Differentiations and Numerous Unnecessary Requests.

“When the complaining party’s . . . requested question, definition, or instruction is, in the opinion of the appellate court, obscured or concealed by . . . minute differentiations or numerous unnecessary requests, such . . . request shall be untenable.” TEX. R. CIV. P. 274. In other words, do not hide your complaints. Make sure the record is clear that the court knew of your complaints, but refused to modify the charge to accommodate them (which is another reason to object and request). In fact, the most prudent practice is to submit a complete charge— with each requested instruction or question on a separate page that can be tendered to the court for inclusion or refusal.

A trial judge is not required to search through the requested issues and submit those which are proper and refuse those which are improper. *See Demler v. Demler*, 836 S.W.2d 696, 698 (Tex. App.—Dallas 1992, no writ); *see also Gutierrez v. County of Zapata*, 951 S.W.2d 831, 843 n.14 (Tex. App.—San Antonio 1997, no writ). If one or more of the requested matters in a so-called “en masse” submission is improper, the court may refuse all of them. *See Crisp v. Southwest Bancshares Leasing Co.*, 586 S.W.2d 610, 616 (Tex. Civ. App.—Amarillo 1979, writ ref. n.r.e.); *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S.W.2d 93, 100-101 (Tex. Civ. App.—Amarillo 1971, writ ref. n.r.e.). Some cases suggest that an entire “en masse” request may properly be rejected even if individual requests are, in fact, proper. *See Armellini Exp. Lines of Florida v. Ansley*, 605 S.W.2d 297, 307 (Tex. Civ. App.—Corpus Christi 1980, ref. n.r.e.); *Hoover v. Barker*, 507 S.W.2d 299 (Tex. Civ. App.—Austin 1974, writ ref. n.r.e.) (“An examination of the transcript shows that appellant tendered fifty-four requested special issues En masse, all of which were refused by the trial court. When issues are tendered in such manner, the trial court is not required to search through the tendered issues and submit those which are proper and refuse those which are improper.”).

Requests may be obscured by the so called “stock” objections— *i.e.*: i) no pleading to support submission of the issue; ii) no evidence to support submission of the issue; iii) insufficient evidence to support submission of the issue; and iv) that an affirmative finding would be against the great weight and preponderance of the evidence. These objections are often made, not based on the facts and circumstances of an individual case, but as a matter of course. This adds unnecessary volume. The authors of the PJC went out of their way to dissuade practicing attorneys from continuing this needless and erroneous practice. Only the first, “no pleading,” must be made to preserve error— that is, it will be considered waived if it is not made prior to submission of the charge to the jury.<sup>15</sup>

Relying upon *Payne*’s preservation test, the supreme court held that even a pre-trial submission of a complete charge did not necessarily “obscure” a request but could instead suffice to preserve error. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995). The court, however, had submitted part of the proposed charge, which the court said made clear the court was aware of the plaintiff’s request for a finding on future lost profits. The plaintiff also objected to the omission. *Id.* Cf. *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston[14<sup>th</sup> Dist.] 1999, no pet.) (submitting entire charge not sufficient to preserve error under *Alaniz* or *Liedeker* when record did not show court ruled in writing, orally, or was otherwise brought the proposed requests to the trial court’s attention).

#### 5. Signed as Refused.

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<sup>15</sup>The “insufficient evidence” or “against the great weight” objections are not only unnecessary, but approach the absurd because by their very definitions they presuppose that there is some evidence, and if there is any evidence of any probative value then the trial judge has no discretion and must submit the issue. *See Barnhouse Motors, Inc. v. Godfrey*, 577 S.W.2d 378 (Tex. Civ. App.— El Paso 1979, no writ).

To preserve error, a judge should endorse requests as “Refused” or “Modified as follows:” and sign the same officially. TEX. R. CIV. P. 276. Some courts have held that endorsement is the exclusive means by which to preserve error based on a refusal of the request. *See, e.g., Southwest Airlines Co. v. Jaeger*, 867 S.W.2d 824, 832 (Tex. App.—El Paso 1993, writ denied). The supreme court, though, held that endorsement is not the only means of preserving error for refusing a request. *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386-87 (Tex. 1997) (finding that trial court’s statement on the record that he would note his refusal on the requests preserved error despite the fact that the court never endorsed and signed the requests). Again, another reason to object and request—even if the requests somehow end up unsigned, you may still have the error preserved on the record.

## **B. Rules about Objections.**

### **1. Object in Writing or on the Record.**

“[O]bjections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury.” TEX. R. CIV. P. 272. Otherwise, any objection is waived. *See Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 187 (Tex. App.—Dallas 1996, no writ).

One caveat for the careful practitioner. At least one court has implied that the parties and the court may agree to “relax the rules of civil procedure” with respect to the making of objections and tendering of requests. *See Dayton Hudson Corp. v. Altus*, 715 S.W.2d 670 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.), *cert. dismiss’d*, 481 U.S. 1073 (1987). The implication is incorrect. In *Dayton*, the court stated:

Unless there is an agreement between the parties and the court to relax the Rules of Civil Procedure, the proper time to make objections to the court’s charge is before the court has submitted the charge to the jury.

*Id.* at 674. This stray language might indicate that the parties can agree to make objections to the charge after the charge has been read. There is no authority in support of such a procedure, and the cases in fact explicitly hold that objections and requests must be presented and ruled upon before the charge is read. *See, e.g., Egan v. Egan*, 8 S.W.3d 1, 2 (Tex. App.—San Antonio 1999, pet. denied); *Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 93 (Tex. App.—Austin 1995, no writ); *Tubb v. Bartlett*, 862 S.W.2d 740, 748 (Tex. App.—El Paso 1993, writ denied); *Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 885 (Tex. App.—Dallas 1991, writ denied). Moreover, the court in *Methodist Hospitals* held that “[a]n agreement of the parties, even with the consent and approval of the court, that calls for a party to present objections after the court reads the charge to the jury violates the rule, defeats one of its main purposes, and results in a waiver of the late objection.” *Methodist Hosps. of Dallas*, 806 S.W.2d at 885.

### **2. Distinctly Point out the Ground(s) of Your Objection.**

A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. TEX. R. CIV. P. 274. That is, identify *what* part of the question, instruction, or definition is objectionable. *See Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986) (“An objection that does not meet both requirements is properly overruled and does not preserve error on appeal.”). The failure to make an objection specifically enough to identify clearly the defect for the court constitutes waiver. *See Universal Servs. Co., Inc. v. Ung*, 904 S.W.2d 638, 640 (Tex. 1995); *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985) (holding an objection waived “because the objection did not distinctly point out” the ground); *Brown v. American Transfer & Storage*, 601 S.W.2d 931, 938 (Tex.), *cert. denied*, 449 U.S. 1015 (1980); *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978); *Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 132-33 (Tex. App.—Corpus Christi 2001, pet. and

briefing on the merits filed). Objections that do not clearly state the grounds asserted on appeal are insufficient because they do not afford the trial court an opportunity to correct any mistake. *Holubec v. Brandenburger*, 58 S.W.3d 201, 209 (Tex. App.—Austin 2001, pet. granted); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156 (Tex. App.—Amarillo 2000, no pet.); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 675 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

General objections do not suffice. *See, e.g., City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.—Austin 1997, writ denied) (objection that definition “not the law in Texas” insufficient); *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (objection that “no pleadings to support the submission” is so broad as to be meaningless). Also, objections on grounds that an instruction “may confuse the jury” or “prejudice the defendant” are too general because they do not explain why the instruction is legally incorrect or how it would confuse the jury or prejudice the objecting parties. *Castleberry*, 721 S.W.2d at 276.

Moreover, you do not get to change your mind on the grounds later! Indeed, if the complaint on appeal does not match the complaint at trial, most courts find waiver. *See, e.g., Weidner v. Sanchez*, 14 S.W.3d 353, 368-69 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (asserted error not preserved when grounds for objection at trial did not correlate to objection made on appeal); *Lyondell Petrochemical Co. v. Kirkland*, 1999 WL 1208506 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (unpublished) (objection at trial that instruction improperly commented on weight of evidence did not preserve error on whether instruction informed jury of the legal effect of its answer); *Bracewell v. Bracewell*, 31 S.W.3d 610, 616 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (objection at trial that charge omitted elements of contract formation did not preserve error on whether court should have submitted a broad-form question asking whether the son performed his obligations under the agreements).

Additionally, make sure you follow through with your objection and object to each question that contains the error complained of. Otherwise, the Court might find that any error in the objected-to question is harmless. *See Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778, 787-87 (Tex. 2001).

However, a litigant is not required to make full appellate arguments during preparation of the charge. Such a requirement would run afoul of Rule 274’s policy of minimizing verbose, prolix objections. *Ahlschlager v. Remington Arms Co., Inc.*, 750 S.W.2d 832 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (an objection that the instructions were a comment on the weight of the evidence was sufficient to complain of their placement in the charge and of their combined effect); *see also Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.—Beaumont 1987, writ ref’d n.r.e.). An objection that does not mention controlling authority by name but identifies substantive defects of the submission is sufficient. *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 386 (Tex. 1998).

### **3. No Adoption of Objections by Reference.**

“No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.” TEX. R. CIV. P. 274; *see also Minnesota Min. & Mfg. v. Nishika, Ltd.*, 885 S.W.2d 603, 616 (Tex. App.—Beaumont 1994), *rev’d on other grounds*, 953 S.W.2d 733 (Tex. 1997); *C.T.W. v. B.C.G.*, 809 S.W.2d 788, 793 (Tex. App.—Beaumont 1991, no writ). You must specifically identify what is objectionable and why for each question, instruction, or definition.

### **4. Objection after Modification.**

Where the trial court modifies or amends a jury question based on a party’s objection, the complaining party must assert a new objection to the amended or modified question in order to preserve the issue for appellate review. *See Acord*, 669 S.W.2d at 114 (Tex. 1984); *Hart v. Moore*, 952 S.W.2d 90, 94 (Tex. App.—Amarillo 1997, pet. denied); *Baptist Memorial Hosp. Sys. v. Smith*, 822 S.W.2d 67, 74 (Tex. App.—San Antonio 1991, writ denied). A charge amendment requiring reiteration of objections

does not occur when a jury asks the judge a question regarding the charge and the judge merely instructs the jury to read the original charge. *Toennies*, 998 S.W.2d at 377.

#### **5. Not Obscured or Concealed with Voluminous or Unfounded Objections.**

The rules specifically warn that when an objection is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, the objection or request shall be untenable. TEX. R. CIV. P. 274; *see also Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (“a party violates Rule 274 by making voluminous objections which obscure or conceal the objection”); *Borden, Inc. v. Rios*, 850 S.W.2d 821, 827 (Tex. App.—Corpus Christi 1993), *pet. granted, jdgm’t vacated w.r.m.* 859 S.W.2d 70 (Tex. 1993). The test for voluminous objections is whether the trial court was deprived of a real opportunity to correct errors in the charge. *Northcutt v. Jarrett*, 585 S.W.2d 874 (Tex. Civ. App.—Amarillo 1979), *writ ref’d n.r.e. per curiam*, 592 S.W.2d 930 (Tex. 1979).

#### **6. Ruled upon by the Court.**

The judge must announce his rulings on the objections that have been properly presented and shall (1) endorse his rulings on the objections if written, or (2) dictate the same to the court reporter in the presence of counsel if the objections have been dictated to the court reporter. TEX. R. CIV. P. 272.

Formerly, implied rulings were insufficient and an attorney’s failure to obtain the court’s express ruling on the objection waived the objection, even if the court specifically denied the requested issues. *Hernandez v. Montgomery Ward & Co.*, 652 S.W.2d 923 (Tex. 1983); *See also Cogburn v. Harbour*, 657 S.W.2d 432, 433 (Tex. 1983). However, in *Acord v. General Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984) the Texas Supreme Court overruled *Hernandez* regarding what constitutes a ruling on an objection. The Court said that “[w]e interpret the presumptive provision of Rule 272 to mean that if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled.” *Acord*, 669 S.W.2d at 114; *see also Redding*, 56 S.W.3d at 150; *Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 937 S.W.2d 60, 70 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1996), *aff’d as modified*, 975 S.W.2d 546 (Tex. 1998); *Baptist Memorial Hosp. System v. Smith*, 822 S.W.2d 67, 74 (Tex. App.—San Antonio 1991, writ denied); *Borden*, 850 S.W.2d at 834. The safest route is to get a ruling on the record, but if not, look to *Acord*. *See also* TEX.R.APP.R. 33.1.

#### **7. Simplifying the Charge Objection: The Payne Rule.**

In *State Dep’t of Highways v. Payne*, 838 S.W.2d 235 (Tex. 1992), the Supreme Court announced:

There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

*Id.* at 241. This language created a quandary as aptly described in a footnote by Justice Hinojosa:

Since this passage is cast as advice rather than as an order (“There *should* be but one test”), we are uncertain whether this language represents the present state of the law or a yet to be reached ideal. On the one hand, the Texas Supreme Court tells us that Payne does not change any rules; yet, on the other hand, *Payne* reverses and renders on charge error which was not raised by objection.

*Borden v. Rios*, 850 S.W.2d 822.

The quandary was resolved by the Supreme Court's per curiam opinion in *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450 (Tex. 1995). In *Alaniz*, the court of appeals acknowledged that Alaniz may have preserved his objection on appeal under the decision in *Payne*. However, the court of appeals declined to follow *Payne* holding instead that Alaniz did not meet the requirements of Rule 273. In reversing the court of appeals' decision, the Texas Supreme Court reaffirmed the *Payne* rule, saying:

[t]he court of appeals also erred in concluding that *Payne* conflicts with Rule 273. In *Payne* we held that a party has preserved error in the jury charge when he has made the trial court reasonably aware of the complaint, timely and plainly, and obtained a ruling. 838 S.W.2d at 241. While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them. Under the reading of Rule 273 *Payne* requires, Alaniz preserved his jury charge complaint.

*Alaniz*, 907 S.W.2d at 451-52; see also *Galveston County Fair & Rodeo, Inc. v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996)(per curiam); *Lester v. Logan*, 907 S.W.2d 452 (Tex. 1995); cf. *Dallas Mkt. Ctr. Dev't Co. v. Liedeker*, 958 S.W.2d 382, 386 (Tex. 1997); *Redding*, 56 S.W.3d at 150; *In re Stevenson*, 27 S.W.3d 195, 201 (Tex. App.—San Antonio 2000, pet. denied). Applying *Payne*, the Supreme Court in *Spencer v. Eagle Star Ins. Co. of America*, held that Eagle Star's objection was sufficient to preserve error regarding a defective instruction despite the lack of a written request. 876 S.W.2d 154 (Tex. 1994).

The "common sense" approach of *Payne* and its progeny has not been clearly delineated. The extent to which the courts of appeals are willing to relax the rules of civil procedure and give meaning to *Payne* are not clear. As a result, merely relying on *Payne's* "common sense approach" could result in waiver under the rules. Therefore, the safest bet is to preserve error by making the appropriate objection and/or request under the rules and attempt to find solace in *Payne* if you later find out that you made the wrong choice under the rules. Hopefully, a new rule will be passed by the Supreme Court that will clear up this confusion.

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