# TEXAS PATTERN JURY CHARGES—2012 CHANGES

*Panelists*
**HONORABLE TRACY CHRISTOPHER**
14th Court of Appeals

**BROCK C. AKERS**
Phillips & Akers, PC

**MICHAEL W. EADY**
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*Moderator & Author*
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Davidson Troilo Ream & Garza, PC

State Bar of Texas
**27TH ANNUAL**
**ADVANCED CIVIL APPELLATE PRACTICE COURSE**
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Austin

**CHAPTER 2**

Tracy Christopher
Justice, 14th Court of Appeals
301 Fannin, Room 245
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Tracy Christopher was appointed to the Fourteenth Court of Appeals in December 2009. Prior to her appointment, Justice Christopher was the judge of the 295th District Court for 15 years, and was highly rated as a trial judge. She was honored as Trial Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists in 2001. She was honored as Appellate Justice of the Year by the Texas Association of Civil Trial and Appellate Specialists for 2012. She is also the recipient of the 2013 Texas Bar Foundation Samuel Pessarra Outstanding Jurist Award, an award to a jurist with at least ten years of experience who "exhibits an exceptionally outstanding reputation for competency, efficiency and integrity."

Prior to becoming a judge, she practiced law for 13 years with the law firms of Susman Godfrey (1986-1994) and Vinson & Elkins (1981-1986). She is board certified by the Texas Board of Legal Specialization in Civil Trial Law and Personal Injury Trial Law. Justice Christopher attended the University of Texas School of Law, graduating with honors in 1981, and the University of Notre Dame, graduating with honors in 1978.

She is currently a member of the Supreme Court Advisory Committee. The members are appointed by the Texas Supreme Court and the committee studies the Rules of Civil Procedure, the Rules of Evidence and the Rules of Appellate Procedure and proposes changes to improve them. She is currently the chair of the Pattern Jury Charge Oversight Committee. The chair is appointed by the President of the State Bar of Texas and the committee studies the instructions given to a jury in trial. In September 2011, she was nominated by Chief Justice Wallace Jefferson to serve with other state and federal judges on a Multi-Jurisdiction Litigation Project. This project recently culminated in a website that contains helpful information for state and federal judges to help the judges handle cases that span multiple jurisdictions.

Justice Christopher had been an active volunteer with both Boy Scouts and Girl Scouts and with Texas Children's Hospital. She currently volunteers with the Houston Bar Association's charitable programs, including acting in Night Court, a musical review that raises money for charity. She is married to Vance Christopher and they have three adult children and one grandchild.

# Curriculum Vitae of Brock C. Akers

**Brock C. Akers,** born Milwaukee, Wisconsin, October 30, 1956; admitted to bar, 1981, Texas; also admitted to U.S. District Court, Southern, Eastern and Western Districts of Texas; U.S. District Court Arizona; U.S. Court of Appeals, Fifth Circuit; U.S. Supreme Court.

**Preparatory and Legal Education:**

- Texas Christian University (B.A, 1978)(*cum laude,* journalism, political science)
- University of Texas (J.D., 1981)
    - Order of the Barristers
    - Board of Advocates
    - National Mock Trial Team
    - Review of Litigation

**Certifications:**

- Board Certified in Personal Injury by the Texas Board of Legal Specialization
- Board Certified in Civil Trial Law by the Texas Board of Legal Specialization
- Board Certified in Civil Trial Law by the National Board of Trial Advocacy
- Board Certified in Civil Pretrial Practice by the National Board of Trial Advocacy
- Elected to the American Board of Trial Advocates, holding the distinction of Diplomat.
- Litigation Counsel of America, Fellow

**Professional Memberships and Other Honors:**

- State Bar of Texas
- Houston Bar Association
- Defense Research Institute
- International Association of Defense Counsel
- Texas Association of Defense Counsel (Vice-President, Board of Directors 1987-98)
- Chairman of Deceptive Trade Practices Act Legislative Committee 1988-90
- Chairman of 1990 TADC Trial Academy
- Chairman of Houston Rookie Seminar, 1990-95
- State Bar Pattern Jury Charge III Committee, 1991-94
- State Bar Pattern Jury Charge I Committee, 1994-present
    - Vice-Chairman, 2000-2006, Chairman, 2006-present
- Special Disciplinary Counsel
- Houston Bar Foundation (Fellow)
- Texas Bar Foundation (Fellow)

Mr. Akers' law practice started at Vinson & Elkins, one of the nation's largest firms, before he joined Phillips & Akers as a Shareholder. He has tried to verdict over 350 lawsuits, including a wide range of subject areas: products liability, premises liability, retailer liability, construction, railroad, truck and

automotive, and many and various business related matters. Few lawyers in the country have been as active and successful at the courthouse as Mr. Akers.

He has been listed in each edition of The Best Lawyers in America® since 1999, where those listed are nominated by and have received a consensus support from their peers. Mr. Akers is listed in the area of personal injury. Other publications, including the Texas Lawyer and Houston City Magazine have regularly included Mr. Akers among their various lists of "Super Lawyers."

Mr. Akers is the current chairman of the State Bar of Texas' Pattern Jury Charge Committee, which is responsible for providing current and reliable guidance to judges and practitioners as to the manner of jury charge submission. He has served on pattern jury charge committees since 1991.

In addition to his regular practice, Mr. Akers speaks and writes frequently at many and various continuing legal education seminars on a variety of subjects including trial tactics, premises liability, Deceptive Trade Practices Act and other matters. He is the principle author of The Trial Lawyer Series of books published by Knowles Publishing.

In 1995, Mr. Akers served on a select committee with the Texas Legislature charged with revising and reforming the Deceptive Trade Practices Act, and has several times been asked to speak and counsel legislative committees in this area.

In 1996, the Texas Association of Defense Counsel honored Mr. Akers with its President's Award for his service to that organization through his legislative activities.

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**Austin, Texas 78701**
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*Board Certified – Civil Appellate Law*
*Texas Board of Legal Specialization* 1995, 2000, 2005, 2010

## BIOGRAPHICAL INFORMATION

### EDUCATION

B.A. in Psychology, Summa Cum Laude, Texas Tech University
J.D., Texas Tech School of Law

### PROFESSIONAL ACTIVITIES

Partner, Thompson, Coe, Cousins & Irons, L.L.P., Mass Tort & Product Liability group and the Appellate Law practice group
Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
Member, Texas Association of Defense Counsel, Amicus Committee
2005-present Committee on Pattern Jury Charge (Malpractice, Premise, Products)

### LAW RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

*Preservation of Error: What Every Trial Lawyer Should Know*, Brown Bag CLE Series, June 25, 2013
*Preservation of Error: Pre-Trial and Trial*, State Bar of Texas, Nuts and Bolts of Appellate Practice, September 9, 2009 (co-author)
*Federal Pretrial Practice*, State Bar of Texas, Pre-Trial Practice, May 15, 2009, Dallas, Texas
*Preservation of Error: Appellate Considerations for Trial Lawyers*, 30th Annual Page Keeton Civil Litigation Conference, October 23-27 2006
State Bar Litigation Report, The Advocate, Vol. 27, Summer 2004, *A Practitioner's Guide for the Use of Protective Orders and Confidentiality Agreements*
2004 Texas Association of Defense Counsel, *One Year After State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003)

# DYLAN O. DRUMMOND

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**Austin, TX 78701**
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**dodrummond@gmail.com**

## PROFESSIONAL BACKGROUND

**Attorney at Law:** **DAVIDSON TROILO REAM & GARZA, PC**

**Associate:** **GODWIN PAPPAS LANGLEY RONQUILLO, LLP**

**Associate:** **WINSTEAD SECHREST MINICK, PC**

**Briefing Attorney:** **SUPREME COURT OF TEXAS;** Hon. Nathan L. Hecht, Senior Associate Justice

## EDUCATION

**Texas Tech University School of Law; J.D. (2003)**
Editor in Chief: *Texas Tech Administrative Law Journal*
CALI Award Recipient: Public Land Law (awarded for highest grade earned in course)

**Texas Tech University Jerry S. Rawls College of Business Administration; M.B.A. (2003)**

**Texas Tech University College of Agricultural Sciences and Natural Resources; B.S. (1999)**
**Wildlife and Fisheries Management, *Summa Cum Laude***
Highest Ranking Graduate: College of Agricultural Sciences and Natural Resources
Outstanding Student: College of Agricultural Sciences and Natural Resources
President: Texas Tech University Chapter, The Wildlife Society

## LICENSES & CERTIFICATIONS

**Licenses**
Texas (Nov. 2003); U.S. Supreme Court (May 2010); Fifth Circuit Court of Appeals (May 2007); U.S. District Court for the Western District of Texas (Jan. 2011); U.S. District Court for the Eastern District of Texas (Jan. 2011); U.S. District Court for the Southern District of Texas (Mar. 2009); U.S. District Court for the Northern District of Texas (Feb. 2007)

**Certifications**
Associate Wildlife Biologist (Dec. 1999-2009)

## PROFESSIONAL RECOGNITION

**Supreme Court of Texas**
Cited in *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 n.47 (Tex. 2012)
Featured in the Court's 2004–05 clerkship brochure

**Super Lawyers® Rising Star (appellate practice)**
*Texas Monthly*, *Law & Politics* & Thomson Reuters (2009, 2010, 2011, 2012, 2013) (top 2.5% of Texas attorneys under 40)

**Martindale-Hubbell®**
AV Peer-Review™ rated (2012 to present)

**Superb Rating (10 out of 10)**
Avvo (2009 to present)

***Texas Bar Journal***
Featured: *Weblinks*, 71 TEX. B.J. 364 (May 2008) (alongside Mani Walia)

***Clerkship Notification Blog*** (http://lawschoolclerkship.blogspot.com/)
Editor in Chief (2008–09, 2009–10, and 2010–11 clerkship seasons) (original clerkship information clearinghouse annually generating half a million page views; named to the *ABA Journal*'s 2008 Blawg 100 List)

***Supreme Court of Texas Blog***
Featured: Don Cruse, *On Dissents from the Denial of Review*, SUPREME COURT OF TEXAS BLOG, n.2 (Feb. 27, 2009), http://j.mp/ZJzAn0 (referring the reader to Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006)

***Texas Appellate Law Blog***
Featured: D. Todd Smith, *Texas Supreme Court Orders & Opinion 5/11/07*, TEXAS APPELLATE LAW BLOG (May 11, 2007), http://j.mp/ZJzgVI (discussing the Texas Supreme Court's opinion in *F.F.P. Operating Partners, L.P. v. Dueñez*, 237 S.W.3d 680 (Tex. 2007))

***Tex Parte Blog* (online blog of the *Texas Lawyer*)**
Featured: *In 140 characters or less, would you choose law school again?*, TEX PARTE BLOG (May 29, 2012 http://j.mp/ZJy2td (discussing whether, "if you had it to do over again, would you go to law school?")
Featured: Mary Alice Robbins, *Can-do record at CCA*, TEX PARTE BLOG (Nov. 18, 2008), http://j.mp/ZJxxz6 (discussing the bitter canned-food drive rivalry between the clerkship ranks of the Texas Supreme Court and Court of Criminal Appeals)

## PROFESSIONAL LEADERSHIP

**State Bar of Texas**

**College of the State Bar of Texas**
Board Member (2013–15); Member (2005 to present)

**Standing Committee on Pattern Jury Charges—Business, Consumer, Insurance & Employment**
Member (2011–14); Assisted in drafting the "Preservation of Charge Error" comment at PJC 116.1 (included in all 2012 volumes); Co-Chair, Misappropriation of Trade Secrets Charge Drafting Subcommittee

**Appellate Section**

Council member (2013–15); *Appellate Advocate*, Co-Editor (2009–12; Vols. 22–24); Assistant Editor (2006–09; Vols. 19–21)

Pro Bono Pilot Program—represented two clients in the Dallas and Fort Worth Courts of Appeals

**Administrative & Public Law Section**

Secretary (2007–08); Treasurer (2006–07); Council member (2004–05); Advanced Administrative Law Course Planning Committee (2012, 2004–05); Advanced Texas Administrative Law Seminar Planning Committee (2006–10); Mack Kidd Administrative Law Moot Court Competition—Bench Brief Author (2006); Bench Brief Judge (2006–08)

**Texas Bar Foundation**

Fellow (2012 to present) (top 1/3 of 1% of Texas attorneys invited to join annually)

**Texas Supreme Court Historical Society**

Trustee (2012–14); Deputy Executive Editor, *Journal of the Texas Supreme Court Historical Society* (2011 to present)

## SELECTED PUBLICATIONS AND PRESENTATIONS

***The Appellate Advocate***

Lead Author: Dylan O. Drummond & LaDawn H. Conway, *Preservation of Charge Error: The Pattern Jury Charge Committee Wades into the Fray*, 25 APP. ADVOC. 11 (Fall 2012)

Lead Author: Dylan O. Drummond & Lisa Bowlin Hobbs, *In Defense of Confidential Votes on Petitions for Review at the Texas Supreme Court*, 23 APP. ADVOC. 34 (Fall 2010)

Author: Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89 (Winter 2007), *cited in Gonzalez v. Texas*, No. 13-07-00270-CR, 2009 Tex. App. LEXIS 5860 at *12 n.2 (Tex. App.—Corpus Christi July 30, 2009, no pet.) (mem. op.); *Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 239 n.8 (Tex. App.—Corpus Christi 2008, no pet.); Andrew T. Solomon, *Practitioners Beware: Under Amended Trap 47, "Unpublished" Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 40 ST. MARY'S L.J. 693, 702 n.34 (2009)

Author: Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 8 (recommended by former Texas Supreme Court Chief Justice Joe Greenhill to the Texas Supreme Court Historical Society), *cited in* Supreme Court of Texas Blog, On Dissents from the Denial of Review, http://www.scotxblog.com/practice-notes/on-dissents-from-the-denial-of-review/, at n.2 (last visited July 1, 2009)

***Journal of the Texas Supreme Court Historical Society***

Author: Dylan O. Drummond, *George W. Paschal: Justice, Court Reporter, and Iconoclast*, J. TEX. SUP. CT. HIST. SOC'Y, Summer 2013, at 7

Author: Dylan O. Drummond, *Dallam's Digest and the Unofficial First Reporter of the Supreme Court of Texas*, J. TEX. SUP. CT. HIST. SOC'Y, Spring 2013, at 8

**2012 NALP Annual Education Conference & Resource Center Exhibition**

Panelist: *We Want You (In Our Network)*

**State Bar of Texas CLE Programs**

Author & Speaker: Dylan O. Drummond, *Texas Groundwater Rights and Immunities: From East to Day and Beyond*, *in* State Bar of Tex. Prof. Dev. Program, History of Texas Supreme Court Jurisprudence Course, ch. 11 (2013)

Author & Speaker: Dylan O. Drummond, *Texas Citation Writ Large: "Tyranny of the Inconsequential" or Essential Persuasive Tool?*, *in* State Bar of Tex. Prof. Dev. Program, Exceptional Legal Writing Course, ch. 5 (2013)

Author & Speaker: Dylan O. Drummond, *Catch-2260: Suits Against the State Under Government Code Chapter 2260*, *in* State Bar of Tex. Prof. Dev. Program, 24th Annual Advanced Administrative Law Course, ch. 10 (2012)

Lead Author: Dylan O. Drummond & Larry Temple, *Traps for the Unwary Administrative Lawyer*, *in* State Bar of Tex. Prof. Dev. Program, 17th Annual Advanced Administrative Law Course, ch. 11 (2005)

***Texas Bar Journal***

Contributor: *Party Talk 2011*, 74 TEX. B.J. 998, 1000 (December 2011)

***Texas Lawyer***

Author: Dylan O. Drummond, *Workers' Comp. Whirlwind*, TEX. LAW. Dec. 19, 2005, at 36

***115th Texas State Historical Association Annual Meeting***

Author & Speaker: Dylan O. Drummond, *Texas Groundwater Rights and Immunities: From East to Sipriano and Beyond*, *in* 115th Tex. St. Hist. Ass'n Ann. Meeting (2011) (Joint Session with the Texas Supreme Court Historical Society, presented alongside Texas Supreme Court Senior Associate Justice Nathan L. Hecht and Professor Megan Benson)

***Texas Tech Administrative Law Journal***

Author: Dylan O. Drummond, *Catch-2260: Suits Against the State Under Government Code Chapter 2260*, 14 TEX. TECH ADMIN. L.J. 93 (Fall 2012)

Author: Dylan O. Drummond, Comment, *Texas Groundwater Law in the 21st Century: A Compendium of Historical Approaches, Current Problems, and Future Solutions Focusing on the High Plains Aquifer and the Panhandle*, 4 TEX. TECH ADMIN. L.J. 173 (Summer 2003), *cited in* the *St. Mary's* and *Duke Law Journals*, and the *Arkansas* and *Texas Law Reviews*

***Texas Tech Law Review***

Lead Author: Dylan O. Drummond, Lynn Ray Sherman, and Edmond J. McCarthy, Jr., *The Rule of Capture—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (Winter 2004) (awarded the outstanding lead article in volume 37, *see Laurels*, 68 Tex. B.J. 873, 873 (Oct. 2005), *cited in Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 n.47 (Tex. 2012); also cited in briefing to the Texas Supreme Court in *Edwards Aquifer Auth. v. Day*, No. 08-0964, three times in *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0755, and four times in *Guitar Holding Co., L.P. v. Hudspeth County Underground Water Conservation Dist. No. 1*, No. 06-0904, 263 S.W.3d 910 (Tex. 2008); the *Baylor*, *Houston*, *Louisiana*, *Vermont* and *West Virginia Law Reviews*, the *Southwestern Historical Quarterly*, and the *St. Mary's Law Journal*)

**University of Texas CLE Programs**

Author & Speaker: Dylan O. Drummond, *Groundwater Ownership in Place: Fact or Fiction?*, *in* UTCLE, Texas Water Law Institute (2008) (cited in briefing to the Texas Supreme Court in Amicus Curiae Brief of Texas Landowners Council at 8, 9, *Edwards Aquifer Auth. v. Day*, No. 08-0964 (received Feb. 12, 2010); Respondent's Brief on the Merits at ii, *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, No. 08-0755 (filed June 30, 2009))

## CIVIC INVOLVEMENT

**Legal Aid Volunteer**

FEMA Bastrop Disaster Relief Center (Sept. 2011)

**Red Cross Dorm Floor Manager**

Austin Convention Center Shelter for Hurricane Katrina Evacuees (Aug.-Sept. 2005)

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# APPENDIX

# Texas Pattern Jury Charges—2012 Changes

## I. Introduction

As former Texas Supreme Court Justice Scott Brister recently remarked at the TexasBarCLE's *History of Texas Supreme Court Jurisprudence* course this past spring, "Thank God for the PJC!" Hon. Scott A. Brister, Remarks at *Jury Charge: The Swinging Pendulum of Broad Form Submission*, *in* State Bar of Tex. Prof. Dev. Program, The History of Texas Supreme Court Jurisprudence, ch. 12 (2013). We intrepid members of four of the Texas State Bar's (the "State Bar") pattern jury charge ("PJC") committees wholeheartedly and humbly agree with Justice Brister's eternally sage remarks. And with the publication of the 2012 editions of the *Texas Pattern Jury Charges*, we trust that gratitude for the PJC committees' charge recommendations will only increase.

The 2012 editions of the *Texas Pattern Jury Charges* for the *Business, Consumer, Insurance & Employment* (the "Blue Volume"); *General Negligence & Intentional Personal Torts* (the "Green Volume"); and *Malpractice, Premises & Products* (the "Red Volume") books introduced several changes with which practitioners should familiarize themselves.[1]

This article will discuss not only the specific changes made to each volume in the 2012 editions, but the global changes made across all volumes of the *Texas Pattern Jury Charges* as well.

All material quoted from the *Texas Pattern Jury Charges* is copyrighted by the State Bar and used herein with the State Bar's Permission.

## II. Brief History of the *Texas Pattern Jury Charges*

A recounting of the full history of the *Texas Pattern Jury Charges* is beyond the scope of this article, but a brief examination of the history of the three volumes examined herein is, if not appropriate, at least tolerable.

In 1968, the State Bar appointed the first PJC committee for the express purpose of "improving the manner of submitting special issues." Walter E. Jordan, *An Aid to Jury Trial: Pattern Jury Charges*, 32 Tex. B.J. 582, 583 (Sept. 1969). The resulting published volumes were initially designated merely by order of publication rather than by subject matter as they are currently ("*Volume 1*" versus "*General Negligence & Intentional Personal Torts*," etc.). *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts*, at iv; Preface, at xvii (2012) [hereinafter *Negligence PJC*]; Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products*, at iv; Preface, at xxiii (2012) [hereinafter *Malpractice PJC*]; Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment*, at iv; Preface, at xxv (2012) [hereinafter *Business PJC*].

The following year in 1969, the first volume of the *Texas Pattern Jury Charges* was published, simply entitled, "*Volume 1*." *See Negligence PJC*, at iv. This book would later become the Green Volume addressing general negligence and

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[1] Of note, there are four civil *Texas Pattern Jury Charges* volumes published by the State Bar of Texas (the "State Bar") including the three volumes reviewed here (the Blue, Green, and Red Volumes), as well as the yellow *Family & Probate* volume. *See* Texas Bar Books, Books: Texas Pattern Jury Charges, http://texasbarbooks.net/books/ (last visited July 24, 2013).

Four criminal *Texas Pattern Jury Charges* volumes are published by the State Bar as well, including the *Defenses, Intoxication and Controlled Substances*, *Crimes Against Persons*, and *Property Crimes* books. *See id.*

Also of interest, the State Bar's Oil, Gas & Energy Resource Law Section has devised pattern jury charges of its own specific to oil & gas cases, which may be found at: http://www.oilgas.org/Content/PDFs/PatternJuryCharges_20090707.pdf (last visited July 24, 2013). The State Bar Board of Directors has also recently approved the creation of a fifth civil *Texas Pattern Jury Charge* volume for use in oil and gas practice, and the members of the newly established volume have been appointed (the "Oil & Gas PJC Committee"). The Oil & Gas PJC Committee is expected to begin work on the new book later this year.

intentional personal torts. *See id.* Starting in 1984, the State Bar began to formally organize the PJC committees by volume, fittingly beginning with Volume 1's committee (the "Negligence PJC Committee"). *See id.*, Committee on Pattern Jury Charges: General Negligence & Intentional Personal Torts, at ix; Preface, at xvii. The 2012 issue of the Green Volume marks its 15th edition. *See id.*, at iv

The Red Volume followed in 1982—tertiarily entitled, "*Volume 3*"[2]—which focused on "medical malpractice, non-medical (professional) malpractice, products liability, and premises and damages."[3] Volume 3's committee (the "Malpractice PJC Committee") was first constituted the year before in 1981. *Negligence PJC*, Preface, at xxiii. The 2012 issue of the Red Volume is its 15th edition as well. *See id.* at iv.

The youngest of the PJC books reviewed in this article is the Blue Volume, whose initial drafting committee was formed in 1985 (the "Business PJC Committee"). *Business PJC*, Preface, at xxv; *see* Thomas Phillips, *State Bar Committee Reports: Pattern Jury Volume IV*, 50 TEX. B.J. 772, 785 (July 1987). The first edition was published in 1990 and the 2012 issue is the 12th edition in the series. *Business PJC*, Preface, at iv.

## III. Organization of Pattern Jury Charge Committees

Today, each of the *Texas Pattern Jury Charges* volumes continues to be edited by a PJC committee appointed by the President of the State Bar. These committees are charged with substantively reviewing and updating the content of their respective volumes to ensure the PJCs comport with changes in Texas common law and statutes made during the intervening biennium.

In part due to the fierce independence of each of the individual volumes' PJC committees, a committee charged with oversight of these committees (the "Oversight PJC Committee") has also been established by the State Bar. The Oversight PJC Committee serves to supervise the publication of all the *Texas Pattern Jury Charges* volumes, ensure that each is understandable, and eliminate any inconsistencies between them.

The co-authors of this article each serve on one of the above-mentioned PJC Committees—Justice Tracy Christopher serves as Chair of the Oversight PJC Committee, Brock Akers is Chair of the Negligence PJC Committee, Mike Eady serves on the Malpractice PJC Committee, and Dylan Drummond serves on the Business PJC Committee.

## IV. Precedential Import of the *Texas Pattern Jury Charges*

As of the date of the writing of this article, the various volumes of the *Texas Pattern Jury Charges* have been cited in some 720 Texas cases (84 times by the Texas Supreme Court, 32 times by the Texas Court of Criminal Appeals, and 604 times by the intermediate Texas courts of appeals). With the PJCs being cited so frequently, just what exactly is the precedential import the PJCs command?

While "trial courts routinely rely on the Pattern Jury Charges in submitting cases to juries," and the Texas Supreme Court admittedly "rarely disapprove[s] of these charges," the PJCs are not mandatory authority in Texas courts. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45 (Tex. 2007). Instead they are merely persuasive authority. *Melissinos v. Phamanivong*, 823 S.W.2d 339, 343 (Tex. App.—Texarkana 1991, writ denied) ("Although the Texas Pattern Jury Charges is not mandatory on trial courts, the suggested charges are persuasive."). *But see Ledesma*, 242 S.W.3d at 41 ("The trial court submitted the pattern jury charge's definition …. We agree …, however, that the model charge is erroneous.").

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2 *Malpractice PJC*, at iv; Preface, at xxiii.

3 Hon. Peter S. Solito, *Annual Reports/Committees: Pattern Jury Charges*, 47 TEX. B.J. 944, 944–45 (July 1982); *see* Charles N. Cartwright, *Annual Reports/Committees: Continuing Legal Education—Books and Systems*, 47 TEX. B.J. 932, 933 (July 1982).

Indeed, the express purpose of the PJCs are to "assist the bench and bar in preparing the court's charge in jury cases," and are meant to operate as "suggestions and guides to be used by a trial court if they are applicable and proper in a specific case." *See*, *e.g.*, *Negligence PJC*, Introduction, at xxiii; *Malpractice PJC*, Introduction, at xxix; *Business PJC*, Introduction, at xxxiii. To this end, the PJCs endeavor to formulate pattern charges based upon what the respective PJC committees "perceive[] the present law to be," and avoid "recommending changes in the law." *See*, *e.g.*, *Negligence PJC*, at xxiii; *Malpractice PJC*, at xxix; *Business PJC*, at xxxiii.

## V. Changes to the 2012 *Texas Pattern Jury Charges*

### A. Oversight Changes to All Volumes

Two overarching changes made across all 2012 volumes by the Oversight PJC Committee were changes in the admonitory instructions given to jurors, and the inclusion of a preservation-of-charge-error comment briefly addressing the mechanics of preservation, waiver, and broad-form issues. *See Negligence PJC*, PJC 1.1–.7, 1.10–.11, 19.1; *Malpractice PJC*, PJC 40.1–.7, 40.10–.11, 86.1; *Business PJC*, PJC 100.1–.7, 100.10–.12, 116.1.

Specifically, the changes in the admonitory instructions in these PJC sections—apart from general reorganizing and renumbering—include revising: **(1)** the instructions given to jury panel before voir dire examination and the comment regarding same (PJCs 1.1, 40.1, 100.1); **(2)** the instruction given to the jury after it is selected (PJCs 1.2, 40.2, 100.2); **(3)** the charge of the court and the comment regarding same (PJCs 1.3, 40.3, 100.3); **(4)** additional instructions on bifurcated trial and the comment regarding same (PJCs 1.4, 40.4, 100.4); **(5)** the instructions given to the jury after a verdict is reached and the comment regarding same (PJCs 1.5, 40.5, 100.5); **(6)** the instructions given to the jury regarding outside communications if the jury is permitted to separate, as well as the comment concerning same (1.6, 40.6, 100.6); **(7)** the instructions given to the jury if it disagrees regarding testimony (1.7, 40.7, 100.7); and **(8)** the instructions given to the jury regarding the prohibition against drawing an adverse inference from the claim of privilege (PJCs 1.10, 40.10, 100.10). *See Negligence PJC*, PJC 1.1–.7, 1.10–.11; *Malpractice PJC*, PJC 40.1–.7, 40.10–.11; *Business PJC*, PJC 100.1–.7, 100.10–.12.

The preservation-of-charge-error comment now included in all volumes is an entirely new addition that builds upon a previous version of the comment that was present only in the *Family & Probate* volume. Its purpose is to generally inform practitioners of the basic tenets of preserving for appellate review complaints regarding a given charge. *See Negligence PJC*, PJC 19.1; *Malpractice PJC*, PJC 86.1; *Business PJC*, PJC 116.1.

Specifically, the comment lays out the basic rules for preserving charge error as to: **(1)** a defective question, definition, or instruction; **(2)** an omitted definition or instruction; **(3)** an omitted question—both when the burden falls on the party or on the opponent; and **(4)** when uncertainty may exist whether the error constitutes an omission or a defect. *See Negligence PJC*, PJC 19.1; *Malpractice PJC*, PJC 86.1; *Business PJC*, PJC 116.1. The comment also describes the timing and form such objections and requests must take. *See Negligence PJC*, PJC 19.1; *Malpractice PJC*, PJC 86.1; *Business PJC*, PJC 116.1. Next, common mistakes that may result in waiver of charge error are also discussed. *See Negligence PJC*, PJC 19.1; *Malpractice PJC*, PJC 86.1; *Business PJC*, PJC 116.1. Finally, the comment very briefly examines some of the pivotal Texas Supreme Court cases that have defined modern jury practice concerning preservation and broad-form issues. *See Negligence PJC*, PJC 19.1; *Malpractice PJC*, PJC 86.1; *Business PJC*, PJC 116.1.

### B. Changes to the Green Volume

The Negligence PJC Committee promulgated several changes specific to its volume, including: **(1)** revising the comment regarding when broad-form jury questions are not feasible (PJC 4.1); **(2)** revising the comment

concerning when gross negligence is imputed to a corporation (PJC 10.14); **(3)** adding an entirely new chapter regarding nuisance (PJCs 12.1–.5); **(4)** revising the comments concerning medical care (PJCs 15.3, 15.5); and **(5)** revising the comment regarding loss of household services (PJC 15.4). *Negligence PJC*, Changes in the 2012 Edition, at xxi.

The major revision to the 2012 Green Volume has been the inclusion of Chapter 12 regarding nuisance claims. Chapter 12 is a brand-new addition to the Green Volume, having been previously reserved for expansion. PJC 12.1 provides a comprehensive comment addressing nuisance actions generally. *Negligence PJC*, PJC 12.1. PJCs 12.2A, .2B, and .2C provide questions, instructions, and comments concerning *private* nuisances arising from intentional conduct, negligent conduct, and abnormal and out-of-place conduct, respectively. *Negligence PJC*, PJC 12.2A, .2B, .2C. In turn, PJCs 12.3A, .3B, and .3C recommend questions, instructions, and comments regarding the same types of conduct, but addresses *public* nuisances. *Negligence PJC*, PJC 12.3A, .3B, .3C. PJC 12.4 provides a question, instructions, and comment concerning the nature of the nuisance and whether it is permanent or temporary. *Negligence PJC*, PJC 12.4. Finally, PJC 12.5 recommends a damage question, instructions, and comment for nuisance actions. *Negligence PJC*, PJC 12.5.

### C. Changes to the Red Volume

The Malpractice PJC Committee made several significant revisions to the Red Volume in 2012. In addition to renumbering some sections, these changes include: **(1)** replacing "event" with alternate language in the definitions provided for both "proximate cause" and "sole proximate cause," as well as in the instruction regarding substantial change in condition or subsequent alteration by affirmative conduct (PJCs 50.1–.5, 60.1–.3, 65.4–.6, 70.2, 70.6, 71.7); **(2)** adding new comments regarding hospital liability (PJC 50.2); **(3)** removing a caveat concerning the corporate practice of medicine in the question and instruction on ostensible agency (PJC 52.4); **(4)** removing a comment regarding an accountant's negligent misrepresentation to a third party in the nonmedical professional degree-of-care instruction (PJC 60.1); **(5)** adding an entirely new chapter concerning certain Penal Code violations serving as grounds for the imposition of joint and several liability (PJCs 72.1–.15); **(6)** removing "incurred" from both the basic and minor-child personal injury damage question and comments (PJCs 80.3, .5); **(7)** adding a new instruction for economic damages arising from accounting malpractice (PJC 84.5); and **(8)** revising the comments to the questions regarding imputing gross negligence to a corporation (PJCs 85.2).

The key accomplishment of the 2012 Red Volume is the inclusion of Chapter 72 dealing with joint and several liability arising from violations of the Penal Code. PJC 72.1 comments on the general application of the chapter, and explains its provisions originate from Civil Practices and Remedies Code section 33.013(b)(2), which ties joint and several liability to conduct described in certain provisions of the Penal Code. *Malpractice PJC*, PJC 72.1; *compare* TEX. CIV. PRAC. & REM. CODE §§ 33.013(b)(2)(A)–(N), *with* PENAL CODE §§ 19.02–.04, 20.04, 21.02, 22.02, 22.04, 22.011, 22.021, 32.21, 32.43, 32.45–.47. PJCs 72.2 through .15 provide the questions, instructions, and comments for each of these tie-in offenses, which range from kidnapping to assaults, forgery, bribery, misapplication of fiduciary property, and murder. *See Malpractice PJC*, PJCs 72.2–.15.

PJC 84.5 is also a new addition to the 2012 Red Volume, which provides sample instructions for economic damages arising from accounting malpractice. *Id.* at PJC 84.5. These instructions include sample descriptions of IRS penalties, taxes, undiscovered malfeasance or fraud, additional accounting fees incurred, value of services, and damage to business. *Id.*

### D. Changes to the Blue Volume

The Business PJC Committee enacted a litany of needed revisions to the 2012

Blue Volume, including changes to the chapters on: **(1)** contracts (ch. 101); **(2)** DTPA (ch. 102); **(3)** good faith and fair dealing (ch. 103); **(4)** fiduciary duty (ch. 104); **(5)** fraud and negligent misrepresentation (ch. 105); **(6)** employment (ch. 107); **(7)** defamation, business disparagement, and invasion of privacy (ch. 110); and **(8)** damages (ch. 115). *Business PJC*, Changes in the 2012 Edition, at xxix–xxxi.

Chief among these revisions are several that bear discussion here. First, in response to the Texas Supreme Court's 2012 decision in *Texas Mutual Insurance Co. v. Ruttiger*, the comment to PJC 103.1 was revised to clarify that an injured employee may not assert a common-law claim for breach of the duty of good faith and fair dealing against a workers' compensation carrier. *Compare Ruttiger*, 381 S.W.3d 430, 433, 447, 450–51 (Tex. 2012), *with Business PJC*, PJC 103.1.

Next, the fiduciary-duty question and instruction were expanded. *See Business PJC*, PJC 104.4–.5. Where the 2010 edition of the Blue Volume contained only one question and instruction on breaches of fiduciary duty when the burden is on the fiduciary (2010 PJC 104.2) or on the beneficiary (2010 PJC 104.3), the 2012 edition revises PJCs 104.2 and 104.3 to clarify they address only a fiduciary duty defined by *common law*. *Compare* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 104.2, .3 (2010), *with Business PJC*, PJC 104.2, .3. In addition, questions and instructions have been added at PJCs 104.4 and 104.5 to address breaches of fiduciary duty defined by *statute or contract* when the burden is on the fiduciary (PJC 104.4), or on the beneficiary (PJC 104.5). *Business PJC*, PJC 104.4, .5.

The comment to PJC 105.2 concerning reliance was also revised in the 2012 Blue Volume to clarify exactly what type of reliance must be shown in fraud cases. *See Business PJC*, PJC 105.2. This change was prompted by the Texas Supreme Court's 2010 decision in *Grant Thornton LLP v. Prospect High Income Fund*, which explained that "fraud … require[s] that the plaintiff show actual and justifiable reliance." *Compare Grant Thornton*, 314 S.W.3d 913, 923–24 (Tex. 2010), *with Business PJC*, PJC 105.2.

Finally, PJCs 110.16–.19 and 115.35 were added to include questions and instructions on invasion of privacy. *Business PJC*, PJC 110.16–.19, 115.35. Structurally, PJCs 110.16 through .18 now provide questions and instructions on intrusion, publication of private facts, and privacy by misappropriation, respectively. *Business PJC*, PJC 110.16–.18. PJC 110.19 adds a comment explaining that false light invasion of privacy is not recognized in Texas. *Business PJC*, PJC 110.19. In turn, PJC 115.35 was added to provide a question and instructions for damages arising from invasion of privacy. *Business PJC*, PJC 115.35.

## VI. Potential Forthcoming Changes to the 2014 *Texas Pattern Jury Charges*

There are several issues that the individual PJC volume committees as well as the Oversight PJC Committee are currently working on for possible inclusion in the 2014 editions of the *Texas Pattern Jury Charges*.

After discovering a conflict regarding the definition of "vice-principal" between some of the individual volumes, the Oversight PJC Committee has voted to standardize a definition that will be included in all 2014 editions. In addition, the Oversight PJC Committee is also examining the potential inclusion of spoliation instructions throughout all the 2014 civil PJC volumes.

The Green Volume is weighing adding workers' compensation questions, instructions, and comments. The Red Volume is determining whether to add a new chapter on fiduciary duty. And the Blue Volume is examining whether to include questions and instructions regarding various construction causes of action and misappropriation-of-trade-secret claims.

## VII. Conclusion

After perusing this article and its appendices, the co-authors trust that—if not quite moved to

divine gratitude—our readers might at least have found the overview provided of the changes present in the 2012 editions of the *Texas Pattern Jury Charges* helpful to their practice.

While this article hopefully serves as a general introduction to the 2012 revisions, civil litigants and their counsel are advised to refer to the individual PJC volumes themselves for the specifically amended language recommended for use in charging the jury.

# APPENDIX

# TAB A

## PJC 116.1 Preservation of Charge Error (Comment)[4]

The purpose of this comment is to make practitioners aware of the need to preserve their complaints about the jury charge for appellate review and to inform them of general considerations when attempting to perfect those complaints. It is not intended as an in-depth analysis of the topic.

**Basic rules for preserving charge error.**

*Objections and requests*. Errors in the charge consist of (1) defective questions, instructions, and definitions actually submitted(that is, definitions, instructions, and questions that, while included in the charge, are nevertheless incorrectly submitted); and (2) questions, instructions, and definitions that are omitted entirely. Objections are required to preserve error as to any defect in the charge. In addition, a written request for a substantially correct question, instruction or definition is required to preserve error for certain omissions.

- Defective question, definition, or instruction: *Objection*

  Affirmative errors in the jury charge must be preserved by objection, regardless of which party has the burden of proof for the submission. Tex. R. Civ. P. 274. Therefore, if the jury charge contains a *defective* question, definition, or instruction, an objection pointing out the error will preserve error for review.

- Omitted definition or instruction: *Objection and request*

  If the omission concerns a definition or an instruction, error must be preserved by an objection and a request for a substantially correct definition or instruction. Tex. R. Civ. P. 274, 278. For this type of omission, it does not matter which party has the burden of proof. Therefore, a request must be tendered even if the erroneously omitted definition or instruction is in the opponent's claim or defense.

- Omitted question, Party's burden: *Objection and request*;
  Opponent's burden: *Objection*

  If the omission concerns a question relied on by the party complaining of the judgment, error must be preserved by an objection and a request for a substantially correct question. Tex. R. Civ. P. 274, 278. If the omission concerns a question relied on by the opponent, an objection alone will preserve error for review. Tex. R. Civ. P. 278. To determine whether error preservation is required for an opponent's omission, consider that, if no element of an independent ground of recovery or defense is submitted in the charge or is requested, the ground is waived. Tex. R. CIV. P. 279.

- Uncertainty about whether the error constitutes an omission or a defect:
  *Objection and request*

  If there is uncertainty whether an error in the charge constitutes an affirmative error or an omission, the practitioner should both request and object to ensure the error is preserved. *See State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 239–40 (Tex. 1992).

*Timing and form of objections and requests.*

- Objections, requests, and rulings must be made before the charge is read to the jury. Tex. R. Civ. P. 272.
- Objections must—
  1. be made in writing or dictated to the court reporter in the presence of the court and opposing counsel, Tex. R. Civ. P. 272; and
  2. specifically point out the error and the grounds of complaint, Tex. R. Civ. P. 274.
- Requests must—
  1. be made separate and apart from any objections to the charge, Tex. R. Civ. P. 273;

[4] This comment is reproduced verbatim from the Blue Volume, but is identical to PJC 19.1 in the Green Volume and PJC 86.1 in the Red Volume.

2. be in writing and tendered to the court, Tex. R. Civ. P. 278; and
3. be in substantially correct wording, Tex. R. Civ. P. 278, which "does not mean that [the request] 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.*" *Placencio v. Allied Industrial International, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

*Rulings on objections and requests.*

- Rulings on objections may be oral or in writing. Tex. R. Civ. P. 272.
- Rulings on requests must be in writing and must indicate whether the court refused, granted, or granted but modified the request. Tex. R. Civ. P. 276.

**Common mistakes that may result in waiver of charge error.**

- Failing to submit requests in writing (oral or dictated requests will not preserve error).
- Failing to make requests separately from objections to the charge (generally it is safe to present a party's requests at the beginning of the formal charge conference, but separate from a party's objections).
- Offering requests "en masse," that is, tendering a complete charge or obscuring a proper request among unfounded or meritless requests (submit each question, definition, or instruction separately, and submit only those important to the outcome of the trial).
- Failing to file with the clerk all requests that the court has marked "refused" (a prudent practice is to also keep a copy for one's own file).
- Failing to make objections to the court's charge on the record before it is read to the jury (agreements to put objections on the record while the jury is deliberating, even with court approval, will not preserve error).
- Adopting by reference objections to other portions of the court's charge.
- Dictating objections to the court reporter in the judge's absence (the judge and opposing counsel should be present).
- Relying on or adopting another party's objections to the court's charge without obtaining court approval to do so beforehand (as a general rule, each party must make its own objections).
- Relying on a pretrial ruling that is the subject of a question, definition, or instruction to preserve charge error.
- Failing to assert at trial the same grounds for charge error urged on appeal; grounds not distinctly pointed out to the trial court cannot be raised for the first time on appeal.
- Failing to obtain a ruling on an objection or request.

**Preservation of charge error post-*Payne*.** In its 1992 opinion in *State Department of Highways & Public Transportation v. Payne*, the supreme court declined to revise the rules governing the jury charge but stated:

> 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.

*Payne*, 838 S.W.2d at 241. The goal after *Payne* is to apply the charge rules "in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 452 (Tex. 1995) (per curiam). However, in practice, *Payne* generated what amounts to an ad hoc system wherein courts decide preservation issues relating to charge error on a case-by-case basis. The keys to error preservation post-*Payne* now seem to be (1) when in doubt about how to preserve, do both (object and request); and (2) in either case, clarity is essential: make your arguments timely and plainly enough that the trial court knows how to cure the claimed error, and get a ruling on the record. *See, e.g., Wackenhut Corrections Corp. v. de la Rosa*, 305 S.W.3d 594, 610–18 & 611 n.16 (Tex. App.—Corpus Christi 2009, no pet.).

**Broad-form issues.** In *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the supreme court held that inclusion of a legally invalid theory in a broad-form liability question taints the question and requires a new trial. *Casteel*, 22 S.W.3d at 388. The court has since extended this rule to legal sufficiency challenges to an element of a broad-form damages question, *see Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), and to complaints about inclusion of an invalid liability theory in a comparative responsibility finding, *see Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005).

When a broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would cure the alleged charge defect, a specific objection to the broad-form nature of the charge question is necessary to preserve error. *Thota v. Young*, 366 S.W.3d 678, 690-91 (Tex. 2012) (citing *In re A.V.*, 113 S.W.3d 355, 363 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 349–50 (Tex. 2003)). But when broad-form submission is infeasible under the *Casteel* doctrine and a granulated submission would still be erroneous because there is no evidence to support the submission of a separate question, a specific and timely no-evidence objection is sufficient to preserve error without a further objection to the broad-form nature of the charge. *Thota*, 366 S.W.3d at 690-91.

# TAB B

## PJC 4.1 Broad Form—Joint Submission of Negligence and Proximate Cause

QUESTION _____

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:

1. *Don Davis* _____
2. *Paul Payne* _____
3. *Sam Settlor* _____
4. *Responsible Ray* _____
5. *Connie Contributor* _____

### COMMENT

**When to use.** PJC 4.1 is a broad-form question that should be appropriate in most negligence cases.

**Broad form to be used when feasible.** Rule 277 of the Texas Rules of Civil Procedure provides that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277. In *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990), the supreme court interpreted the phrase "whenever feasible" as mandating broad-form submission "in any or every instance in which it is capable of being accomplished." The court has described the reasons for broad-form questions as follows: "Broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer." *E.B.*, 802 S.W.2d at 649; *see also Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). The court further stated, "The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad-form questions." *E.B.*, 802 S.W.2d at 649.

**When broad-form questions not feasible.** Broad-form questions must be used unless extraordinary circumstances exist making such questions not feasible. The term "extraordinary circumstances" would seem to contemplate only a situation in which the policies underlying broad-form questions would not be served. *See E.B.*, 802 S.W.2d at 649; *Lemos*, 680 S.W.2d at 801. More recent cases on proportionate responsibility, damages, and liability, however, indicate that broad-form submission may not be feasible in a variety of circumstances depending on the law, the theories, and the evidence in a given case. *See Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005) (single broad-form proportionate responsibility question may not be feasible if one theory is legally invalid or not supported by sufficient evidence); *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) (broad-form submission of multiple elements of damage may cause harmful error if one or more of the elements is not supported by sufficient evidence); *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) (broad-form submission combining valid and invalid theories of liability was cause of harmful error). As a result, although some modifications to the pattern jury charges have been made where a lack of feasibility appears to be the rule rather than the exception, the court and parties should evaluate all submissions to determine whether broad-form submission is feasible. When broad-form submission is feasible a harmless error analysis typically applies. *See Thota v. Young*, 366 S.W.3d 678, 693 (Tex. 2012) (applying harmless error analysis to broad-form question with separate answer blanks for plaintiff and defendant offered in single-theory-of-liability case).

**Accompanying definitions and instructions.** The broad-form questions required by rule 277 contemplate the use of appropriate accompanying instructions "as shall be proper to enable the jury to render a verdict." In *E.B.*, 802 S.W.2d at 648, for example, the broad-form question was accompanied by instructions tracking the statutory grounds for the relief sought. See also chapter 2 in this volume, "Basic Definitions in Negligence Actions."

**Plaintiff's negligence.** If the plaintiff's negligence is not in issue, the plaintiff's name (*Paul Payne*) should not be included in the above question. In a case in which the plaintiff's negligence is in issue, or in any case including more than one defendant, a proportionate responsibility question should follow PJC 4.1. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 4.3 and 4.4.

**Use of "occurrence" or "injury."** The use of "occurrence" or "injury" in this question, as well as in PJC 4.3, could affect a case in which there is evidence of the plaintiff's negligence that is "injury-causing" or "injury-enhancing" but not "occurrence-causing": for example, carrying gasoline in an unprotected container, which exploded in the crash, greatly increasing the plaintiff's injuries (preaccident negligence), or failing to follow doctor's orders during recovery, thereby aggravating the injuries (postaccident negligence). In such a case the jury should not consider this negligence in answering PJC 4.1 and 4.3 if "occurrence" is used, while it should consider the negligence if "injury" is used. In a case involving a death, the word "death" may be used instead of "injury."

The passage of the proportionate responsibility statute (Tex. Civ. Prac. & Rem. Code ch. 33) in 1987 further complicated the issue. For suits filed after September 1, 1987, section 33.003 requires a finding of "percentage of responsibility" in pure negligence cases as well as in "mixed" cases involving claims of negligence and strict liability and/or warranty. "Percentage of responsibility" is defined in terms of "causing or contributing to cause in any way . . . the personal *injury*, property damage, death, or other harm for which recovery of damages is sought." Tex. Civ. Prac. & Rem. Code § 33.011(4) (emphasis added). The definition does not use the term "occurrence"; however, nothing in the legislative history indicates that the "occurrence/injury" issue was being addressed in the choice of words used in the definition.

The above distinctions between the plaintiff's injury-causing negligence (whether preaccident or postaccident) and occurrence-causing negligence affect the decision of whether such conduct should be submitted as part of the question on the plaintiff's contributory negligence or as an exclusionary instruction to the damages questions.

The Committee is unable to determine whether the legislature, by using "injury" in section 33.011(4), intended to abolish the distinction between "occurrence-causing" and "injury-causing" contributory negligence and mandate the use of "injury" to the preclusion, at any time, of "occurrence." Thus the alternatives *occurrence*, *injury*, and *occurrence or injury* appear in brackets to indicate that if evidence of the plaintiff's nonoccurrence-producing negligence makes the choice important, the decision is to be made by the court in light of the precedents discussed above and other relevant law.

**When not to submit exclusionary instruction.** If PJC 4.1 is submitted with the term *injury*, the exclusionary instruction in PJC 15.8, 15.9, or 15.10 should not be submitted.

**Settling person.** If the case includes a settling person (*Sam Settlor*), that person's responsibility should be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, the settling person's name must be included in the basic liability question as well as in the proportionate responsibility question. See PJC 4.3. Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

**Responsible third parties—causes of action accruing on or after September 1, 1995, and causes of action accruing before September 1, 1995, on which suit is filed on or after September 1, 1996, and before July 1, 2003.** A "responsible third party" (*Responsible Ray*) should be included in the basic liability question only if joined under former Tex. Civ. Prac. & Rem. Code § 33.004 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). A "responsible third party" is defined in former Tex. Civ. Prac. & Rem. Code § 33.011(6) (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). If submitted in the basic liability question, a responsible third party should also be submitted in the proportionate responsibility question. Former Tex. Civ. Prac. & Rem. Code § 33.003 (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995). See PJC 4.3.

**Responsible third parties—actions filed on or after July 1, 2003.** In 2003 the legislature changed responsible third party practice from one of joinder to one of designation. Tex. Civ. Prac. & Rem. Code § 33.004. At least one Texas court has held that it is "only upon the trial court's granting of a motion for leave to designate a person as a responsible third party that the designation becomes effective." *Valverde v. Biela's Glass & Aluminum Products, Inc.*, 293 S.W.3d 751, 754–55 (Tex. App.—San Antonio 2009, pet. denied); *see also Ruiz v. Guerra*, 293 S.W.3d 706, 714–15 (Tex. App.—San Antonio 2009, no pet.). The legislature also expanded the category of responsible third parties.

Tex. Civ. Prac. & Rem. Code §§ 33.004, 33.011(6). "'Responsible third party' means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." Tex. Civ. Prac. & Rem. Code § 33.011(6). Section 33.003(b) provides that a question regarding conduct by any person may not be submitted to the jury without evidence to support the submission. Tex. Civ. Prac. & Rem. Code § 33.003(b).

**Contribution defendant.** If there is a contribution defendant (*Connie Contributor*), that person's name should be included in the basic liability question. *See* Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. "Contribution defendant" is defined in Tex. Civ. Prac. & Rem. Code § 33.016. However, a pure contribution defendant—that is, one not otherwise joined or designated a responsible third party under the applicable version of Tex. Civ. Prac. & Rem. Code § 33.004—must not be included in the main proportionate responsibility question (PJC 4.3), but instead requires a separate question comparing the contribution defendant's percentage of responsibility with the responsibility of the defendant. See PJC 4.4.

**Employer immunity under Workers' Compensation Act—actions filed before July 1, 2003.** Because of the immunity from common-law claims for actual damages of the employer of an injured employee under the Workers' Compensation Act, Tex. Lab. Code § 408.001, the conduct of an employer should not be submitted in the questions pertaining to negligence (PJC 4.1) and loss allocation (PJC 4.3). *Varela v. American Petrofina Co. of Texas*, 658 S.W.2d 561 (Tex. 1983); *Teakell v. Perma Stone Co.*, 658 S.W.2d 563 (Tex. 1983); *see also Magro v. Ragsdale Bros.*, 721 S.W.2d 832 (Tex. 1986) (coemployee liability).

**Employer immunity under Workers' Compensation Act—actions filed on or after July 1, 2003.** Changes in the law of proportionate responsibility affecting cases filed on or after July 1, 2003, may require that the negligence of an employer, even one covered by worker's compensation insurance, be submitted to the jury for its consideration. *See* Tex. Civ. Prac. & Rem. Code § 33.011.

**Exceptions to the limitations on joint and several liability.** The limitations on joint and several liability set forth in chapter 33 of the Civil Practice and Remedies Code do not apply in certain instances:

*Actions filed before July 1, 2003. See* former Tex. Civ. Prac. & Rem. Code §§ 33.002, 33.013(c)(1), (2) (Acts 1995, 74th Leg., R.S., ch. 136, § 1 (S.B. 28), eff. Sept. 1, 1995).

*Actions filed on or after July 1, 2003. See* Tex. Civ. Prac. & Rem. Code § 33.013. See also chapter 72 in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Malpractice, Premises & Products.*

# TAB C

## PJC 60.1 Nonmedical Professional's Degree of Care; Proximate Cause

"Negligence," when used with respect to the conduct of *Dora Dotson*, means failure to use ordinary care, that is, failing to do that which *an accountant* of ordinary prudence would have done under the same or similar circumstances or doing that which *an accountant* of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of *Dora Dotson*, means that degree of care that *an accountant of ordinary prudence* would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of *Dora Dotson*, means a cause that was a substantial factor in bringing about an [*occurrence*] [*injury*] [*occurrence or injury*], and without which cause such [*occurrence*] [*injury*] [*occurrence or injury*] would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that *an accountant* using ordinary care would have foreseen that the [*occurrence*] [*injury*] [*occurrence or injury*], or some similar [*occurrence*] [*injury*] [*occurrence or injury*], might reasonably result therefrom. There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*].

### COMMENT

**Source of definitions.** The definitions include the standard and accepted elements of nonmedical professional malpractice. *See Fireman's Fund American Insurance Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (attorney); *Atkins v. Crosland*, 406 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 417 S.W.2d 150 (Tex. 1967) (accountant); *Ryan v. Morgan Spear Associates, Inc.*, 546 S.W.2d 678 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (architect). The definition of "proximate cause" is based on language from *Transcontinental Insurance Co. v. Crump*:

> [W]e first examine the causation standards for proximate cause and producing cause. "The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004). "The approved definition of 'proximate cause' in negligence cases and the approved definition of 'producing cause' in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." [*Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026, 1028–29 (Tex. 1940).] In other words, the producing cause inquiry is conceptually identical to that of cause in fact.

*Transcontinental Insurance Co. v. Crump*, 330 S.W.3d 211, 222–23 (Tex. 2010). *See also Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

The *Crump* and *Ledesma* opinions address the definitions of "producing cause" and "cause in fact." As of the publication date of this edition, there is no decision that expressly overrules the traditional definition of "proximate cause" below:

> "Proximate cause," when used with respect to the conduct of *Dora Dotson*, 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 *an accountant* 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.

Former PJC 60.1. This definition was based on the definition approved by the court in *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959), and has been cited in many cases.

**When to use.** These definitions should usually be included in the court's charge in a nonmedical professional malpractice case. If the evidence raises "new and independent cause," the definitions in PJC 60.2 should be used in lieu of the definition of "proximate cause" above.

**Substitute particular professional.** A term describing the professional involved (e.g., *attorney*, *architect*) should be substituted as appropriate for the word *accountant*.

**Attorneys.**

*Implied representation of necessary skills.* An attorney engaging in the practice of law and contracting to represent a client as an attorney impliedly represents that he possesses the requisite degree of skill, learning, and ability that is necessary to practice the profession and that others similarly situated ordinarily possess; will exert his best judgment in the legal matter thus entrusted; and will exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand. *See Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ), *disapproved on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 664–65 (Tex. 1989); *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex. Civ. App. 1904, no writ). Note that the so-called good-faith doctrine, held by some courts of appeals to excuse attorneys' negligence in malpractice suits (*e.g., Cook*, 409 S.W.2d at 477), has been disapproved. *Cosgrove*, 774 S.W.2d at 665.

*Substitute "could" for "would."* In the above definitions of "ordinary care" and "negligence," the word "could" should be substituted for the word "would" in the case of an attorney. *Cosgrove*, 774 S.W.2d at 665.

*Loss of right of appeal—proximate cause for the court.* In legal malpractice claims involving the loss of a right of appeal, the supreme court has determined that the question of proximate cause of a claimant's damages is a matter of law for the court. *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex. 1989). Thus the jury should not be instructed on proximate cause issues involving the loss of a right of appeal.

*Caveat—legal specialists.* Whether a legal specialist is to be held to a higher standard than that of an ordinary attorney, as set forth above, has not been decided. If a higher standard is applicable, the appropriate term to describe a specialist in the particular specialty (e.g., *a legal specialist in Estate Planning and Probate*) should be substituted for the term *an accountant* in the definitions of "negligence" and "proximate cause"; in the definition of "ordinary care," the words *an accountant of ordinary prudence* should be replaced with the phrase *a legal specialist of ordinary prudence in Estate Planning and Probate*.

*Areas of specialization.* The Supreme Court of Texas, by order, has recognized certain areas of legal specialization. To be certified as a specialist in these areas, the attorney must satisfy a number of requirements, including satisfactorily completing a course in the area and passing a written examination. The areas of specialization now certified are Administrative; Business Bankruptcy; Civil Appellate; Civil Trial; Consumer and Commercial; Consumer Bankruptcy; Criminal; Criminal Appellate; Estate Planning and Probate; Family; Health; Immigration and Nationality; Juvenile; Labor and Employment; Oil, Gas, and Mineral; Personal Injury Trial; Real Estate—Commercial; Real Estate—Residential; Real Estate—Farm and Ranch; Tax; and Workers' Compensation. Also recognized as specialists are patent lawyers licensed to practice before the U.S. Patent and Trademark Office; this license is based on educational credentials in a technical field and an examination administered by the Patent Office. The concept of legal specialization may also be associated with an attorney's holding himself out as specially qualified in a particular area.

**Accountants.**

*Accountant's standard of care.* As members of a skilled professional class, accountants are subject generally to the same rules of liability for negligence in practicing their profession as are members of other skilled professions and are liable to their clients for professional negligence. The standard of care of auditors and public accountants is the same as that applied to lawyers, physicians, and members of other skilled professions who furnish their professional services for compensation. *See Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied); *Atkins v. Crosland*, 406 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 417 S.W.2d 150 (Tex. 1967).

*Public Accountancy Act.* Accountants are subject to Tex. Occ. Code ch. 901, the Public Accountancy Act, which is administered by the Texas State Board of Public Accountancy. The board is authorized to promulgate rules of

professional conduct, the violation of which may form the basis for a cause of action against an accountant. *See Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

*Registration statements subject to federal securities statute.* An accountant participating in the preparation of a registration statement is governed by the federal securities statute and is liable to anyone acquiring a security whose registration statement contains an untrue statement of fact or omits a required one. 15 U.S.C. § 77k(a)(4).

**Architects.**

*Implied possession, use of skill.* The architect's undertaking implies only that he possesses the skill and ability sufficient to draw and prepare the plans and specifications in an ordinary, reasonable manner and will exercise and apply that skill and ability with ordinary care. *See Ryan v. Morgan Spear Associates, Inc.*, 546 S.W.2d 678 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Capitol Hotel Co. v. Rittenberry*, 41 S.W.2d 697 (Tex. Civ. App.—Amarillo 1931, writ dism'd); *American Surety Co. v. San Antonio Loan & Trust Co.*, 98 S.W. 387 (Tex. Civ. App. 1906), *rev'd in part on other grounds sub. nom. Lonergan v. San Antonio Loan & Trust Co.,* 104 S.W. 1061 (Tex. 1907).

*Board of Architectural Examiners.* The practice of architecture is regulated by the Texas Board of Architectural Examiners, which is responsible for both examination and licensing. Tex. Occ. Code ch. 1051.

*Basis of liability.* The liability of an architect may be based on breach of contract, fraud, misrepresentation, or negligence. *See Cobb v. Thomas*, 565 S.W.2d 281 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Such cases may also involve the interpretation of written contracts and are consequently beyond the scope of this volume.

**Using "reasonable care" instead of "ordinary care."** In *Hiroms v. Scheffey*, 76 S.W.3d 486, 488–89 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the court noted that there was merit to the appellant's contention that the standard of care in medical malpractice cases should turn on whether the defendant exercised reasonable care rather than ordinary care. But the court ultimately did not resolve the issue because the appellant had failed to preserve error. The Committee raises the issue, however, because in some cases "reasonable" may be substituted for "ordinary," depending on the facts and circumstances. *See, e.g., Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985) (describing actionable negligence as breach of duty of reasonable care); *Helms v. Day*, 215 S.W.2d 356, 358 (Tex. Civ. App.—Fort Worth 1948, writ dism'd) (absent special contract to either cure or not charge for services, a physician warrants only that he "possesses a reasonable degree of skill, such as ordinarily possessed by a profession generally, and to exercise that skill with reasonable care and diligence") (citing *Graham v. Gautier*, 21 Tex. 111 (1858)); *Magnolia Paper Co. v. Duffy*, 176 S.W. 89, 92 (Tex. Civ. App.—San Antonio 1915, no writ) ("The final test of negligence is not usage or custom, but the inflexible rule which fixes reasonable care as the standard by which the conduct of the master to the servant is measured.").

# TAB D

## PJC 105.2 Instruction on Common-Law Fraud—Intentional Misrepresentation

Fraud occurs when—

1. a party makes a material misrepresentation, and

2. the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion, and

3. the misrepresentation is made with the intention that it should be acted on by the other party, and

4. the other party relies on the misrepresentation and thereby suffers injury.

"Misrepresentation" means—

*[Insert appropriate definitions from PJC 105.3A–105.3E.]*

### COMMENT

**When to use.** PJC 105.2 should be used in a common-law fraud case if there is a claim of intentional misrepresentation.

**Accompanying question, definitions.** PJC 105.2 is designed to follow PJC 105.1 and to be accompanied by one or more of the definitions of misrepresentation at PJC 105.3A–105.3E.

**Use of "or."** If more than one definition of misrepresentation is used, each must be separated by the word *or*, because a finding of any one type of misrepresentation would support recovery. *See Lundy v. Masson*, 260 S.W.3d 482, 494 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (approving the use of "or").

**Source of instruction.** The supreme court has repeatedly identified these elements of common-law fraud. *See, e.g., Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002) (identifying the recognized elements of common-law fraud); *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998) (discussing recoverable damages sounding in tort); *Oilwell Division, United States Steel Corp. v. Fryer*, 493 S.W.2d 487, 491 (Tex. 1973) (first announcing the recognized elements of common-law fraud and discussing fraudulent inducement as an affirmative defense).

**Reliance.** In *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923–24 (Tex. 2010), the supreme court explained that "fraud . . . require[s] that the plaintiff show actual and justifiable reliance" and held there was no evidence that the plaintiffs had justifiably relied on an audit report because they had knowledge of the company's true condition. *See Grant Thornton LLP*, 314 S.W.3d at 923 (measuring justifiability "given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud") (quoting *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)); *see also Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001). The supreme court has also rejected the argument that a party's failure to use due diligence bars a claim of fraud. *See Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (defendant in fraud case cannot complain that plaintiff failed to discover truth through exercise of care).