PJC 1.10 Privilege—Generally No Adverse Inference

[Brackets indicate instructive text.]

You are instructed that you ~~may not draw an adverse inference from~~ must not infer anything by [*name of invoking party*]'s refusal to answer questions because of [*name of invoking party*]'s claim of [*privilege asserted*] privilege.

COMMENT

When to use. This instruction should be used in situations other than a claim of Fifth Amendment privilege. See PJC 1.11. On request by any party against whom the jury might draw ~~an~~ any ~~adverse~~ inference from a claim of privilege, the court ~~shall~~ must instruct the jury that no inference may be drawn therefrom. Tex. R. Evid. 513(d). ~~The court is not required by rule 513(d) to submit such an instruction regarding the privilege against self-incrimination. Tex. R. Evid. 513(c), (d); *see also Wilz v. Flournoy*, 228 S.W.3d 674 (Tex. 2007).~~

~~**Scope of assertion of privilege.** The Committee expresses no opinion as to the propriety of such an instruction on the assertion of a privilege by a nonparty witness.~~

PJC 1.11 Fifth Amendment Privilege – Adverse Inference May Be Considered

[Brackets indicate alternative or instructive text.]

[*Name of invoking party*] refused to answer certain questions on the grounds that it may tend to incriminate *him*. A person has a constitutional right to decline to answer on the grounds that it may tend to incriminate *him*. You may, but are not required to, infer by such refusal that the answers would have been adverse to [*name of invoking party*]'s interests.

COMMENT

When to use. On request by any party after another party has invoked their Fifth Amendment privilege against self-incrimination in the present case, the above instruction may be given at the court's discretion, as controlling authorities neither require nor prohibit its inclusion in the written charge of the court. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Wilz v. Flournoy*, 228 S.W.3d 674, 677 (Tex. 2007); *Texas Department of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995).

Nonparty Witness. The Committee expresses no opinion as to the propriety of such an instruction when a nonparty witness asserts a privilege.

~~PJC 5.4 Negligence Per Se—Complex Standard~~ *[Reserved for Expansion]*

~~"Negligence," when used with respect to the conduct of the *defendant railroad*, *means* a train's failure to sound a horn or whistle at least 1,320 feet from a crossing or its failure to continuously ring a bell from that distance up to the crossing.~~

~~"Negligence," when used with respect to the conduct of the *plaintiff motorist*, *means* a failure to stop within 50 feet, but not less than 15 feet, from the nearest rail~~

~~1. when the railroad engine approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and the engine by reason of its speed or nearness to such crossing is an immediate hazard; or~~

~~2. when an approaching train is plainly visible and is in hazardous proximity to such crossing.~~

~~QUESTION _____~~

~~Did the negligence, if any, of those named below proximately cause the occurrence in question?~~

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

1. *ABC Railway* _____

2. *Paul Payne* _____

COMMENT

When to use. Even if a negligence per se standard is lengthy or complex, or if different negligence per se claims are made by each party against the other, broad-form submission accompanied by an instruction may still be used. In this example, the plaintiff and the defendant alleged violations of different statutory standards by the other. The definition combines the two standards, Tex. Transp. Code §§ 471.006, 545.251, to inform the jury that a violation of either statute is negligence.

Like PJC 5.1–5.3, PJC 5.4 consists of two parts – a definition and a question. The statutory definition of "negligence" should be given *in lieu of* the usual definition of negligence if the case involves only negligence per se. If the case also involves a claim of common-law negligence, the statutory definition should be given *immediately after* the usual definition of negligence. Also in that case, the word *means* in the definition should be replaced with *also means*.

PJC 32.1 Preservation of Charge Error (Comment)

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 reading of the charge to the jury, Tex. R. Civ. P. 272; or

  by an earlier deadline set by the trial court, *King Fisher Marine Service, L.P. v. Tamez*, 443 S.W.3d 838, 843 (Tex. 2014) (providing that such a deadline must "afford[] the parties a 'reasonable time' to inspect and object to the charge").

- Objections must—

  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

  specifically point out the error and the grounds of complaint, Tex. R. Civ. P. 274.

- Requests must—

  be made separate and apart from any objections to the charge, Tex. R. Civ. P. 273;

  be in writing and tendered to the court, Tex. R. Civ. P. 278; and

  be in substantially correct wording, Tex. R. Civ. P. 278, which does not mean that the request be absolutely correct, nor does it mean that the request be merely sufficient to call the matter to the attention of the court, but instead means that the request is substantively correct and 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.

- Failing to make objections to the court's charge before the reading of the charge to the jury or by an earlier deadline set by the trial court.

- Making objections on the record while the jury is deliberating even if by agreement and with court approval.

- 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. *See Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 919–20, 920 n.3 (Tex. 2015) (per curiam).

- 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.

Principle of error preservation. In *State Department of Highways & Public Transportation v. Payne*, the supreme court 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 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). The keys to error preservation are (1) when in doubt about how to preserve, both object and request; and (2) in either case, clarity is essential: make your arguments timely and plainly enough that the trial court is aware of the claimed error, and get a ruling on the record. *See, e.g.*, *Wackenhut*, 453 S.W.3d at 919–20.

~~**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 388–89. 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, 235–36 (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, 226–28 (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 a 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.

PJC 32.2 Broad-Form Issues and the *Casteel* Doctrine (Comment)

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 388–89. 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, 235–36 (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, 226–28 (Tex. 2005).

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