PJC 40.10 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 cases other than a claim of Fifth Amendment privilege. See PJC 4[illegible] 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 40.11 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 51.11 **Informed Consent (Statutory)—Procedure on List A—No Emergency or Other Medically Feasible Reason for Nondisclosure—No Disclosure**

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the risks and hazards of *retinal surgery*.

The risks and hazards of *retinal surgery* required to be disclosed are—

1. *complications requiring additional treatment and/or surgery, and*
2. *recurrence or spread of disease, and*
3. *partial or total ~~loss of vision~~blindness.*

Would a reasonable person have refused such treatment if the above risks and hazards had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.11 submits statutory informed consent if the evidence shows that the procedure was on the list requiring disclosure (list A) but there is neither evidence reflecting disclosure nor evidence of emergency or other reason it was not medically feasible to make a disclosure. For submission of statutory informed consent under other states of the evidence, see PJC 51.10 and 51.12–51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne.*

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.11. As part of proximate

cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *retinal surgery*. For a compilation of the medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

Existence of presumption. Failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed creates a rebuttable presumption of a negligent failure to conform to the duty of disclosure. This presumption must be included in the charge to the jury.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

Implied informed consent. Informed consent is implied as a matter of law if a patient is unconscious or otherwise unable to give express consent and immediate surgery or other medical care or procedure is necessary to preserve the patient's life

or health. If there is a dispute concerning implied informed consent, a question should be submitted. See PJC 51.12. *See Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

PJC 51.12 **Informed Consent (Statutory)—Procedure on List A—No Emergency or Other Medically Feasible Reason for Nondisclosure—Disclosure Not in Statutory Form**

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the following risks and hazards of *retinal surgery*:

1. *complications requiring additional treatment and/or surgery, and*
2. *recurrence or spread of disease, and*
3. *partial or total ~~loss of vision~~blindness*.

The failure of a physician to disclose those risks and hazards on a written form, signed by the patient or a person authorized to consent for the patient and a competent witness, is presumed to constitute a negligent failure to disclose such risks. This presumption may be overcome if the physician adequately disclosed such risks and hazards in some other manner.

Did *Dr. Davis* fail to adequately disclose such risks and hazards in some other manner to *Paul Payne*?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable person have refused such treatment if those risks and hazards had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.12 submits statutory informed consent if the evidence shows that the medical procedure was on the list requiring disclosure (list A) and disclosure is not made in statutory form but there is evidence of disclosure, such as evidence of oral disclosure. For submission of informed consent under other states of the evidence, see PJC 51.10–51.11 and 51.13–51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.12. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *retinal surgery*. For a compilation of

the medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

Existence of presumption. Failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed creates a rebuttable presumption of a negligent failure to conform to the duty of disclosure. This presumption must be included in the charge to the jury.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

Implied informed consent. Informed consent is implied as a matter of law if a patient is unconscious or otherwise unable to give express consent and immediate surgery or other medical care or procedure is necessary to preserve the patient's life or health. *See Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

PJC 51.13 **Informed Consent (Statutory)—Procedure on List A—No Disclosure—Emergency or Other Medically Feasible Reason for Nondisclosure in Issue**

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the following risks and hazards of *a transfusion*:

1. *serious infection including but not limited to Hepatitis and HIV which can lead to organ damage and permanent impairment; and*

2. *transfusion related injury resulting in impairment of lungs, heart, liver, kidneys, and immune system; and*

3. *severe allergic reaction, potentially fatal.*

~~1. *fever; and*~~

~~2. *transfusion reaction, which may include kidney failure or anemia; and*~~

~~3. *heart failure; and*~~

~~4. *hepatitis; and*~~

~~5. *AIDS (acquired immunodeficiency syndrome); and*~~

~~6. other infections.~~

The failure of a physician to disclose those risks and hazards on a written form, signed by the patient or a person authorized to consent for the patient and by a competent witness, creates a presumption of a negligent failure to conform to the duty of disclosure. This presumption is overcome if there was an emergency or some other reason disclosure was not medically feasible.

Was *Dr. Davis*'s failure to disclose the risks and hazards of *a transfusion* negligence?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable person have refused such treatment if those risks had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.13 submits statutory informed consent if the evidence shows that the medical procedure was on the list requiring disclosure (list A) and disclosure was not made but there is evidence that would excuse the failure to disclose, such as an emergency or other medically feasible reason.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977); *see also Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

For submission of statutory informed consent under other states of the evidence, see PJC 51.10–51.12 and 51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.13. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *a transfusion*. For a compilation of the medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

PJC 61.7 Breach of Fiduciary Duty against Attorney in His Role as Attorney—Burden on Attorney

QUESTION

Did *Andy Attorney* comply with *his* fiduciary duty to Paul Payne?

Serving as *Paul Payne's* attorney, *Andy Attorney* owed *Paul Payne* a fiduciary duty. To prove *he* complied with this duty in connection with [specify conduct, agreement, or transaction that involves the alleged breach of fiduciary duty], *Andy Attorney* must show that—

[Select relevant obligations from below.]

1. the [*relevant agreement or transaction*] was fair and equitable to Paul Payne; [*and*]

2. *Andy Attorney* made reasonable use of the confidence *Paul Payne* placed in *him*; [*and*]

3. *Andy Attorney* acted in the utmost good faith and exercised the most scrupulous honesty toward *Paul Payne*; [*and*]

4. *Andy Attorney* placed *Paul Payne's* interests above *his* own interests; [*and*]

5. *Andy Attorney* fully and fairly disclosed all important information to *Paul Payne*.

Answer: "Yes" or "No"

Answer: _____

COMMENT

When to use. The attorney-client relationship gives rise to a fiduciary relationship as a matter of law. *Meyer v. Cathey*, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam). PJC 104.2 and 104.3 submit the general cause of action for breach of fiduciary duty. PJC 235.10 submits this claim in the context of a trustee relationship. PJC 61.7 submits the question of breach of fiduciary duty when the fiduciary is an attorney and the attorney bears the burden of proof. While PJC 61.7 submits the same obligations that are included in PJC 104.2 and 104.3, PJC 61.7 discusses the obligations in the context of an attorney's fiduciary duty.

Distinguished from negligence. To determine whether to submit a question of breach of fiduciary duty in addition to or in lieu of a negligence question, review PJC 61.6, which discusses the case law that prohibits fracturing legal malpractice claims into additional causes of action, including breach of fiduciary duty. This case law, generally arising in the summary-judgment context, consistently refers to an attorney's fiduciary obligations as involving the attorneys' integrity and fidelity toward the client and sometimes differentiates fiduciary duty claims from negligence claims based upon whether the attorney allegedly received an "improper benefit." *See Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App. —Fort

Worth 2002, pet. denied) ("A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations"); *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App—Dallas 2004, no pet.) ("An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interest to his own, retaining the client's funds, engaging in self-dealing, improperly using client's confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends"); *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App. —San Antonio 2003, pet. denied) (explaining that a breach of fiduciary duty claim encompasses whether an attorney obtained an improper benefit from the representation). *See also Young v. Dwayne R. Day, P.C.*, No. 01-16-00325-CV, 2017 WL 2117542 (Tex. App. —Houston [1st Dist.] May 16, 2017) (describing improper benefits as "an element of the claim of breach of fiduciary duty.").

Modification of instruction. PJC 61.7 lists all of the types of fiduciary obligations that attorneys owe to their clients. However, the court need not include all of these obligations in every case. Instead, the court should select and instruct on only those obligations that are appropriate under the individual case facts and the relevant conduct, agreement, or transaction.

Presumption of unfairness shifts burden of proof. When a client alleges that her attorney engaged in self-dealing, a presumption of unfairness arises and shifts to the attorney both the burden of producing evidence and the burden of persuasion. *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964); *Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); *Fillion v. Troy*, 656 S.W.2d 912, 914 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 699 (Tex. 2000); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied).

However, if there is a factual dispute whether the attorney profited or benefited from the alleged breach, a predicate jury question may be necessary to decide that issue. This mirrors the recommended practice described in the comments to PJC 104.2.

Because an attorney's fiduciary duty to a client covers contract negotiations, courts closely scrutinize agreements that attorneys enter with clients during the existence of the attorney-client relationship. *In re Davenport*, 522 S.W.3d 452, ___ (Tex. 2017); *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peder, P.C.*, 352 S.W.3d 445, 450 (Tex. 2011); *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 20 S.W.3d 692, 699 (Tex. 2000). The attorney bears the burden to establish that such contracts are fair and reasonable. *See Keck*, 43 S.W.3d at 699, *Celmer v. McGarry*, 412 S.W.3d 691, 706 (Tex. App.—Dallas 2013, pet. denied).

Liability questions normally place the burden of proof on the plaintiff, who is required to obtain an affirmative finding. When the burden shifts to the fiduciary, however, a "No" answer supports liability. Thus, when the burden is on the fiduciary to prove compliance with his fiduciary duties, subsequent questions that depend on a finding of breach of fiduciary duty may need to be conditioned on a "No" answer. This mirrors the recommended practice described in the comments to PJC 104.2.

Caveat. If the burden of persuasion is on the fiduciary, it is unclear which party bears the burden of requesting the compliance question. *Compare Moore v. Texas Bank & Trust Co.*, 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980) (explaining that the burden to properly request issue rests on plaintiff-beneficiary because it "is an element of the plaintiff's theory of recovery") *with Cole v. Plummer*, 559 S.W.2d 87, 89 (Tex. App.—Eastland 1977, writ ref'd n.r.e.) (fiduciary has burden of "securing a finding the confidential relationship was not breached").

Receipt of attorney's fees. Receipt of agreed-upon fees is not by itself an improper benefit. *See Gruber v. Murphy*, 241 S.W.3d 689, 699 (Tex. App.—Dallas 2007, pet. denied); *Franks v. Roads*, 310 S.W.3d 615, 624 (Tex. App.—Corpus Christi 2010, no pet.); *see also Ashton v. Koonsfuller, P.C.*, No. 05-16-00130-CV, 2017 WL 1908624 (Tex.App—Dallas, May 10, 2017) ("Koonsfuller obtaining its fee is not, standing alone, an improper benefit sufficient to constitute a breach of fiduciary duty").

Relevant conduct. As explained above, PJC 61.7 lists the types of legal fiduciary obligations that attorneys owe to their clients. The conduct that can violate these obligations is varied. While there is no one set of facts that always raises a claim for breach of fiduciary duty against an attorney in his/her role as an attorney, a survey of the case law shows that there are several recurring fact scenarios that tend to lead to such claims. Examples of such recurring factual scenarios may include:

A. Inappropriately using or disclosing confidential information. *See Brown v. Green*, 302 S.W.3d 1, 8–9 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *City of Garland v. Booth*, 895 S.W.2d 766, 772–73 (Tex. App.—Dallas 1995, writ denied). *Compare Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506–07 (Tex. App.—Houston [1st Dist.] 1995, no writ) (such conduct amounts to negligence only) with *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1992, writ denied) (such conduct breached a fiduciary duty).

B. Failing to disclose conflicts of interests, failing to withdraw from representing the client in light of those conflicts, and failing to advise the client to retain separate counsel because of those conflicts. *See Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 190–92 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see also Archer v. Med. Protective Co.*, 197 S.W.3d 422, 427–28 (Tex. App.—Amarillo 2006, pet. denied) (describing allegations involving divided loyalties, e.g., pursuit of attorney's own pecuniary interests over the in-

terests of his client stated a claim for breach of fiduciary duty). *But see Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., PC*, 284 S.W.3d 416, 431–32 (Tex. App.—Austin 2009, no pet.) (finding no breach of fiduciary claim because, "[a]s in *Murphy*, appellants 'do not allege the [Terry Defendants] deceived them, pursued their own pecuniary interests over [appellants'] interests, or obtained any improper benefit from failing to disclose the "conflict" or advising appellants to obtain separate counsel'").

C. Failing to adequately inform the client of matters material to the representation. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159–60 (Tex. 2004). "As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation." *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). "A fact is material if it would likely affect the conduct of a reasonable person concerning the transaction in question." *Fleming v. Curry*, 412 S.W.3d 723, 736 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Materiality centers on whether a "reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Id.* at 737. Practitioners, however, should be careful to distinguish a lawyer's failure to properly advise, inform, and communicate with clients about their cases, which involves a claim of professional negligence. *See Murphy*, 241 S.W.3d at 698. The fiduciary duty does not extend to matters beyond the scope of the representation. *Two Thirty Nine Joint Venture*, 145 S.W.3d at 159–60.

D. When representing two or more clients, settling the entire case on behalf of those clients without individual negotiations on behalf of any one client. *See Authorlee v. Tuboscope Vetco Int'l, Inc.*, 274 S.W.3d 111, 120 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). Courts have recognized this situation to involve a breach of fiduciary duty. *See Fleming v. Kinney*, 395 S.W.3d 917 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

E. Failing to turn over funds that belong to the client. *See Avila v. Havana Paint Co.*, 761 S.W.3d 398, 399–400 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

F. Abandoning a client in a manner that prejudices the client's rights. *Royden v. Ardoin*, 331 S.W.2d 206 (1960) (explaining that an attorney who abandons a case without just cause before completing the task for which his client hired him breaches his contract of employment and forfeits all right to compensation); *Staples v. McKnight*, 763 S.W.2d 914 (Tex. App.—Dallas 1988, writ denied) (same). *But see Goffney v. Rabson*, 56 S.W.3d 186, 193–94 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (concluding that a claim that an attorney abandoned the client at trial, failed to prepare adequately for trial, and misled the client into believing the case was properly prepared for trial constitutes a claim for legal malpractice rather than breach of fiduciary duty).

This list is not exhaustive. The case law more generally indicates that a breach of fiduciary duty may also involve failing to deliver funds belonging to the client, taking

advantage of client's trust, engaging in self-dealing, and making misrepresentations, *Geoffrey*, 56 S.W.3d at 193.

Remedies. If the client seeks recovery of actual damages as a remedy, PJC 84.3 should be submitted. If the client seeks the remedy of equitable fee forfeiture, the client may obtain that remedy upon certain findings by the trial court, without the need to prove causation or damages. *See Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999); PJC 84.7. ~~*See* PJC 84.5.~~

PJC 84.7 Attorney's Fee Forfeiture (Comment)

In *Burrow v Arce*, the Texas Supreme Court held that, in a breach of fiduciary case, an attorney may be required to forfeit some amount of the fees his client paid regardless of whether the client can prove that the attorney's breach caused harm. 997 S.W.2d 229 (Tex. 1999) at 240 ("a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client").

The remedy of fee forfeiture is equitable in nature and is restricted to "clear and serious" violations. *Burrow v Arce*, 997 S.W.2d at 241. Even then, not every serious breach should result in forfeiture of all compensation. *Id.* at 240. The remedy must "fit the circumstances presented." *Id.* at 241.

The money forfeited must be funds paid by the client, not some other party, or part of a contingency award. *See Swank v. Cunningham*, 258 S.W.3d 647, 673–74 & n.11 (Tex. App.—Eastland 2008, pet. denied).

Determining when a clear and serious violation has occurred. The Court's reasoning in *Burrow* relies heavily on the *Restatement (Third) of the Law Governing Lawyers* § 37 – "[W]hether an attorney must forfeit any or all of his fee for a breach of fiduciary duty to his client must be determined by applying the rule as stated in section 49 [section 37 in the final version] of the proposed *Restatement (Third) of The Law Governing Lawyers* and the factors we have identified to the individual circumstances of each case." 997 S.W.2d at 245. A *clear* violation occurs when a

reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful. *Id*. at 241. Whether the violation was *serious*, and ultimately to what extent forfeiture is appropriate, requires consideration of "the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies." *Id.* at 243. This list is not exclusive. *Id*. To that list, the Court added another—the public interest in maintaining the integrity of attorney-client relationships. *Id*. at 244.

Some of these considerations are appropriate for the jury, others are not.

The respective roles of the court and jury. The availability of the remedy and amount of the forfeiture, if any, involve decisions inherently equitable and must be made by the court. The court's decision, however, may require the jury's aid in resolving certain relevant factual disputes. As a general rule, a jury does not determine the expediency, necessity, or propriety of equitable relief. *Burrow*, 997 S.W.2d at 245 (*quoting State v. Texas Pet Foods, Inc*., 591 S.W.2d 800, 803 (Tex. 1979)). "If the relevant facts are undisputed, these issues may, of course, be determined by the court as a matter of law." *Id.* at 246. However, "when contested fact issues must be resolved before equitable relief can be determined, a party is entitled to have that resolution made by the jury." *Id.* at 245; *see also Miller v. Kennedy & Minshew, Professional Corp.*, 142 S.W.3d 325, 338 (Tex. App.—Ft. Worth 2003, pet. denied). "[F]actors like the adequacy of other remedies and the public interest in protecting the integrity of the attorney-client relationship, as well

as the weighing of all other relevant considerations, present legal policy issues well beyond the jury's province of judging credibility and resolving factual disputes." *Burrow*, 997 S.W.2d at 245. On the other hand, factual disputes for consideration by the jury "may include, without limitation, whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any harm to the client." *Id*. at 246.

"Once any necessary factual disputes have been resolved, the court must determine, based on the factors we have set out, whether the attorney's conduct was a clear and serious breach of duty to his client and whether any of the attorney's compensation should be forfeited, and if so, what amount." *Id*. at 246.

Possible jury questions. If "contested fact issues must be resolved before a court can determine the expediency, necessity or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues." *Longview Energy Company v. Huff Energy Fund, L.P.*, 533 S.W.3d 866, 873 (Tex. 2017) (*quoting DiGiuseppe v. Lawler*, 269 S.W.3d 588, 596 (Tex. 2008)). Possible fact issues for a jury to decide include, but are not limited to, whether or when the complained misconduct occurred, the attorney's mental state and culpability, the value of the attorney's services, and the existence and extent of any harm to the client. *Burrow*, 997 S.W.2d at 246; *Miller*, 142 S.W.3d at 338.

PJC 86.1 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 86.2 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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