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 [*justifiably*] 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., Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018); *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).

Justifiable. The word "*justifiably*" is in brackets in PJC 105.2 because some recent sSupreme cCourt cases list it as an element of fraud while others do not. *Compare Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019) (requiring *justifiable* reliance); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 554 (Tex. 2019) (same); *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*,

546 S.W.3d 648, 653 (Tex. 2018) (same), *with International~~l~~ Business~~.~~ Machines Corp. v. Lufkin Industries, LLC*, 573 S.W.3d 224, 228 (Tex. 2019) (requiring reliance without stating whether it must be justifiable); *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018) (same); *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) (same).

Justifiably as q~~Q~~uestion of l~~L~~aw or f~~F~~act. "Justifiable reliance usually presents a question of fact. . . . But the element can be negated as a matter of law when circumstances exist under which reliance cannot be justified." *Orca Assets*, 546 S.W.3d at 654 (citations omitted). *See also National Property Holdings L.P. v. Westergren*, 453 S.W. 3d 419, 424 (Tex. 2015) (holding that, as a matter of law, "a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract'~~'~~s unambiguous terms"); *Mercedes-Benz USA*, 583 S.W.3d at 559 (same). If the evidence in the case presents a question of fact for the jury, a practitioner may wish to ask the court to include "justifiable" in the question. *See Cho v. Kim*, 572 S.W.3d 783, 803 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding that when no party, either by objection or requested question, definition, or instruction, complained of the charge's failure to require that the reliance was justifiable, the court would not consider whether there was sufficient evidence of justifiable reliance~~,~~ and instead affirmed the jury's finding of reliance~~.~~); *Ghosh v. Grover*, 412 S.W.3d 749, 756 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (same). *See also Harstan, Ltd. v~~V~~. Si Kyu Kim*, 441 S.W.3d 791, 799 (Tex. App.—El Paso 2014, no pet.) (because no objection was raised to the lack of

"justifiable" in the statutory fraud question, the sufficiency of the evidence was measured by the charge as given). *Contra Ginn v. NCI Building Systems, Inc.*, 472 S.W.3d 802, 831 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (inclusion of "reliance" in fraud charge was sufficient, making "actually and justifiably relied" unnecessary).

Due dDiligence. A number of supreme court cases discuss a party's duty of due diligence or due care in a fraud case. Beginning with *Labbe v. Corbett*, 69 Tex. 503, 509, 6 S.W. 808, 811 (1888), the court held: "When once it is established that there has been any fraudulent misrepresentation, by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry." In *Isenhower v. Bell*, 365 S.W.2d 354, 357 (Tex. 1963), the court held: "Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based upon a plea that the party defrauded might have discovered the truth by the exercise of proper care." In *Koral Industries v. Security-Connecticut Life Insurance Co.*, 802 S.W.2d 650, 651 (Tex. 1990), the court held: "Failure to use due diligence to suspect or discover someone''s fraud will not act to bar the defense of fraud to the contract. . . . Therefore, only the insurer's actual knowledge of the misrepresentations would have destroyed its defense of fraud." *See also Hooks v. Lone Star Ltd. Partnership*, 457 S.W.3d 52, 57 n.6 (Tex. 2015) (noting that "Hooks and amicus … cite cases stating that if there is a fraudulent misrepresentation, it is no defense that proper inquiry might have revealed the truth. *See, e.g., Buchanan v. Burnett*, 102 Tex. 492, 119 S.W. 1141, 1142 (1909); *Labbe v. Corbett*, 69 Tex. 503, 6 S.W. 808, 811

(1888); *Mitchell v. Zimmerman*, 4 Tex. 75, 79–80 (1849). These cases, however, stand for the general proposition that one may be liable for fraud even if it could be discovered by due diligence; they do not hold that limitations is extended even if due diligence would reveal the fraud.").

Reliance. Most recently, ~~i~~In *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923–24 (Tex. 2010), the supreme court held:

"In measuring justifiability, we must inquire whether, "'~~-~~given a fraud plaintiff'~~'~~s individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff'~~'~~s part."'~~-~~ *Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990) … Moreover, "'~~-~~a person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.'" *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003).

~~(quoting *Haralson v. E.F. Hutton Group, Inc.* 919 F.2d 1014, 1026 (5th Cir. 1990 and *Lewis v. Bank of America NA*, 343 F.3d 540, 546 (5th Cir. 2003)).~~ In 2015, the supreme court held in *Westergren* that: "In an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests. ... [A] failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party." *Westergren*,

453 S.W.3d at 425 (citing *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962)). And in 2018, the court held in *Orca Assets* ~~that~~:

"~~w~~[W]hen a party fails to exercise such diligence, it is "'~~-~~charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated."'~~-~~ *See AKB* [*Hendrick, LP v. Musgrave Enterprises, Inc.*], 380 S.W.3d [221,] 232 [(Tex. App.—Dallas 2012, no pet.)]. To this end, that party "'~~-~~cannot blindly rely on a representation by a defendant where the plaintiff's knowledge, experience, and background warrant investigation into any representations before the plaintiff acts in reliance upon those representations.~~-~~'" *See Shafipour v. Rischon Development Corp.*, No. 11-13-00212-CV, 2015 WL 3454219 at *8 (Tex. App.—Eastland May 29, 2015, pet. denied).

Orca Assets, 546 S.W.3d at 654 ~~(quoting *AKB Hendrick, LP v. Musgrave Enterprises, Inc.*, 380 S.W. 3d 221, 232 (Tex. App.- Dallas 2012, no pet. and *Shafipour v. Rischon Development Corporation*, No. 11-13-00212-CV, 2015 WL 3454219 (Tex. App-Eastland May 29, 2015, pet. denied)~~.

~~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 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).~~

PJC 105.16 Question on Violation of Texas Securities Act—Control-Person Liability ~~(Comment)~~

If you answered "Yes" to Question _____ [*105.12*], then answer the following question. Otherwise, do not answer the following question.

QUESTION_____

Did *Deborah Dennis* directly or indirectly control *Don Davis*?

_____

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC~~Question~~ 105.16 submits liability under Tex. Rev. Civ. Stat. art. 581—33F, which provides that "[a] person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer~~[.]~~." Article 581—33F provides a defense if "the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist." See PJC 105.17. The two questions are submitted separately.

Importance of statutory language. Because PJC ~~questions~~ 105.16 and 105.17 submit a statutory liability and defense, they track the statutory language of a~~A~~rticle 581-~~–~~33F as required by the Texas Supreme Court. *Regal Finance Co.~~mpany~~ Ltd~~,~~ v. Tex~~.~~ Star Motors, Inc.*, 355 S.W.3d 595, 601 (Tex. 2010) (UCC liability) ("[A]~~a~~ jury charge submitting liability under a statute should track the statutory language as closely as possible.") (citing *Spencer v. Eagle Star Insurance~~.~~ Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994) (Insurance Code liability); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980) (DTPA liability)).

Broad-form submission. PJC 105.16 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (r~~R~~ule 277's use of "~~'~~whenever feasible"~~'~~ mandates broad-form submission in any or every instance in which it is capable of being accomplished).

Instruction on "control."~~.~~ The Texas Securities Act does not define "control person" or "control."~~.~~ The Texas Securities Board rules do not define "control person,"~~,~~ but the Board's rules do define "control" as~~:~~ "[t]~~Control—T~~he possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or company, whether through the ownership of voting securities, by contract, or otherwise." 7 Tex. Admin. Code § 107.2(9). The Securities and Exchange

Commission defines "control" in the same way. 17 C.F.R. § 230.405. The following instruction, which tracks the language in the rules, may be appropriate:

> *Deborah Dennis* controlled *Don Davis* if *she* possessed, directly or indirectly, the power to direct or cause the direction of *Don Davis*'s management and policies, whether through the ownership of voting securities, by contract, or otherwise.

Texas cases on control-person liability. In deciding control-person liability cases under the Texas Securities Act, Texas courts of appeals, while recognizing the breadth of the definition of "control," have looked to federal court cases for further guidance. The result has been several non-jury cases with varying descriptions of the proof required to prove control. Until the Texas Supreme Court resolves the differences between the courts of appeals, or decides that nothing more than the definition of "control" is necessary in the charge to the jury, none of these descriptions can be added to pattern jury charges. In the meantime, the practitioner should be aware of these descriptions and their differences and, in particular, the formulation adopted in the jurisdiction in which the case is tried. *Compare Frank v. Bear Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (person is a control person if it exercised control over the operations of the corporation in general and had the power to control the specific transaction or activity upon which the primary violation is predicated); *Darocy v. Abildtrup*, 345 S.W.3d 129, 137 (Tex.

App.—Dallas 2011, no pet.) (same); ~~and~~ *Barnes v. SWS Financial~~.~~ Services~~.~~*, 97 S.W.3d 759, 763 (Tex. App.—Dallas, 2003~~,~~ no pet.) (same); *with Fernea v. Merrill Lynch Pierce Fenner & Smith*, 559 S.W.3d 537, 555 (Tex. App.—Austin 2011, no pet.) ("[T]~~t~~he plaintiff must prove that the alleged controlling person (1) had actual power or influence over the controlled person, and (2) had the power to control or influence the specific transaction or activity that gave rise to the underlying violation."); *Texas Capital Securities Management v. Sandefer*, 80 S.W.3d 260, 268 (Tex. App.—Texarkana 2002, pet. struck) (controlling person must also have induced or participated in the violation).

~~**When to use.** A question with appropriate instructions should be submitted when "control person" liability is alleged under Tex. Rev. Civ. Stat. art. 581-33F, which imposes liability on persons who control a seller, buyer, or issuer of a security who commits a securities violation as defined by the Texas Securities Act. The trial court must condition the submission of such questions on a finding of a securities violation by the primary seller, buyer, or issuer.~~

~~**Definition of "control person."** The Committee believes that "control person" should be defined. However, because of uncertainty in the law regarding the requirements for control-person status, the Committee expresses no opinion about the proper definition.~~

~~Under the Texas Securities Act~~

~~[a] person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.~~

~~Tex. Rev. Civ. Stat. art. 581-33F(1). The Act does not provide a definition of "control." However, the comments to the statute provide that, "[d]epending on the circumstances, a control person might include an employer, an officer or director, a large shareholder, a parent company, and a management company." Tex. Rev. Civ. Stat. Ann. art. 581-33F cmt. (West 2010). *See Busse v. Pacific Cattle Feeding Fund # 1, Ltd.*, 896 S.W.2d 807, 815 (Tex. App.—Texarkana 1995, writ denied) ("Major shareholders . . . and directors . . . are control persons."); *Texas Capital Securities Management, Inc. v. Sandefer*, 80 S.W.3d 260, 268 n.3 (Tex. App.—Texarkana 2002, pet. struck) ("Although in [*Busse*] we found Busse, who was a majority shareholder and a director, to be a control person, we do not construe this case to mean evidence solely of status creates a prima facie showing of control person.").~~

~~The comments also provide that "[c]ontrol is used in the same broad sense as in federal securities law," Tex. Rev. Civ. Stat. Ann. art. 581-33F cmt., and the Texas Supreme Court has recognized that the legislature "intended the [Texas Securities Act]~~

to be interpreted in harmony with federal securities law." *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 840–41 (Tex. 2005). Accordingly, some Texas courts of appeals cite to the definition of "control" found in the federal securities laws, under which control "means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Barnes v. SWS Financial Services, Inc.*, 97 S.W.3d 759, 763 (Tex. App.—Dallas 2003, no pet.). *See* 17 C.F.R. § 230.405.

In analyzing control-person liability, Texas courts of appeals have articulated different tests. Some courts apply a two-prong test requiring proof that the defendant (1) exercised control over the operations of the corporation in general and (2) had the power to control the specific transaction or activity on which the primary violation is predicated. *See Frank*, 11 S.W.3d at 384 (citing *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 620 (5th Cir. 1993)); *see also Darocy v. Abildtrup*, 345 S.W.3d 129, 137 (Tex. App.—Dallas 2011, no pet.); *Barnes*, 97 S.W.3d at 764. The Texarkana court of appeals requires a showing that the defendant (1) had actual power or influence over the controlled person and (2) induced or participated in the alleged violation. *Sandefer*, 80 S.W.3d at 268 (relying on *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990)). *But see Abbott*, 2 F.3d at 620 n.18 ("We note that *Dennis* does not accurately reflect our rejection in [*G.A. Thompson & Co., Inc. v. Partridge*, 636 F.2d 945, 957–58 (5th Cir. 1981)] of a 'culpable participation' requirement. . . . We need not resolve

this inconsistency, because our holding turns on [the plaintiffs'] failure to establish [the defendants'] power to control [the controlled person]."). *See also* Bromberg & Lowenfels, 4 *Securities Fraud & Commodities Fraud* § 7:340 (2008) (discussing additional differences among the federal circuit courts of appeals regarding the proper test for control person liability under the federal securities laws). The Austin court of appeals recently joined the Dallas and Houston fourteenth courts of appeals in rejecting a "culpable participation" requirement for control person liability. *Fernea v. Merrill Lynch Pierce Fenner & Smith, Inc.*, No. 03-09-00566-CV, 2011 WL 2769838, at *15 & n.10 (Tex. App.—Austin July 12, 2011, no pet. h.). However, the Austin court articulated the two-part control-person test differently from the Dallas and Houston fourteenth courts of appeals: "[T]he plaintiff must prove that the alleged controlling person (1) had actual power or influence over the controlled person, and (2) had the power to control or influence the specific transaction or activity that gave rise to the underlying violation." *Fernea*, 2011 WL 2769839, at *15.

Parties. It is unnecessary to join the seller, buyer, or issuer as a party to a suit against alleged control persons as long as the evidence shows the defendant's control over the seller, buyer, or issuer and a violation of the Texas Securities Act by the seller, buyer, or issuer. *Summers v. WellTech, Inc.*, 935 S.W.2d 228, 231 (Tex. App.—Houston [1st Dist.] 1996, no writ). If the seller, buyer, or issuer is not a party to the suit, a predicate jury question (such as PJC 105.12) is still required if the material facts are disputed as to the seller's, buyer's, or issuer's violation of the Act. If the seller's,

~~buyer's, or issuer's violation is undisputed, the jury should be instructed about the violation and element 2 of PJC 105.12 should be modified to focus on the undisputed violation. In such a case, no predicate is required.~~

~~**Damages.** PJC 115.19, which addresses direct damages in fraud cases, may be modified to submit damages resulting from a securities law violation. The Comment to PJC 115.19 explains the necessary modifications and also addresses the remedy of rescission.~~

PJC 107.6 **Question and Instruction on Unlawful Employment Practices**

QUESTION _____

Was [*race, color, disability, religion, sex, national origin, or age*] a motivating factor in *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other ~~discriminatory~~ adverse employment action)*] *Paul Payne*?

A "motivating factor" in an employment decision is a reason for making the decision at the time it was made. There may be more than one motivating factor for an employment decision.

If you do not believe the reason *Don Davis* has given for [*failing or refusing to hire, discharge, or (describe other adverse employment~~discriminatory~~ action)*], you may, but are not required to, infer that *Don Davis* was motivated by *Paul Payne*'s [*race, color, disability, religion, sex, national origin, or age*].

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 107.6 should be used for a claim that the employer has committed an unlawful employment practice as set out in Tex. Lab. Code §§ 21.001–.556 (chapter 21) (formerly Texas Commission on Human Rights Act (TCHRA)). PJC 107.6 applies to employment practices prohibited by Tex. Lab. Code § 21.051(1) and will need to be modified according to the facts of the case. If there is a fact issue concerning the existence of an adverse employment action, an additional instruction or question may be necessary. See, e.g., PJC 107.10 (constructive discharge). If the claim is for discrimination based on a regarded-as or perceived disability, see PJC 107.11B~~A~~.

Broad-form submission. PJC 107.6 is a broad-form question designed to be accompanied by one or more appropriate instructions. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (~~quoting *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) ("interpreting~~ r~~R~~ule 277's use of "~~'~~whenever feasible"~~'~~ ~~to~~ mandates broad-form submission ~~'~~in any or every instance in which it is capable of being accomplished~~'")~~). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

Use of federal law. Chapter 21 of the Labor Code is expressly intended to implement policies of title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e to e–17; title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213; and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634, and their subsequent amendments. Tex. Lab. Code § 21.001(1), (3). *See also B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017) (title VII); *Morrison v. Pinkerton, Inc.*, 7 S.W.3d 851, 854 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (ADA). "As such, federal case law may be cited as authority in cases relating to the Texas Act." *-Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004); *Steak N Shake*, 512 S.W.3d at 279.

Chapter 21 is not, however, always identical to federal law. *See, e.g., Prairie View A&M University v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012) (the court declined~~ing~~ to follow the federal Ledbetter Act extending limitations, noting that Texas courts ~~:~~ only look to federal law for guidance in circumstances where t~~T~~itle VII and the TCHRA are analogous). *See also~~additionally~~ Comcast Corp.~~oration~~ v. National Ass'~~ociatio~~n of African-American Owned Media*, ___ U.S. __, 140 S. Ct. 1009, 206 L.Ed.2d 356 (2020) (applying but for causation standard to claims under 42 U.S.C. section 1981 for discrimination in the making and enforcement of contracts). ~~the general purposes provision does not require the TCHRA to forever remain identical to Title VII, regardless of subsequent amendments~~). ~~*Compare Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 479–80 (Tex. 2001), *with Gross v.*~~

~~*FBL Financial Services*, 557 U.S. 167, 177–78 (2009) (causation standard differs in age discrimination cases).~~

Source of question and definition. PJC 107.6 is derived from Tex. Lab. Code § 21.051(1), which parallels 42 U.S.C. § 2000e–2(a)(1) and prohibits intentional discriminatory practices. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (all discussing title VII's purpose); *see also Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001).

The definition of "motivating factor" is derived from the following: (1) Tex. Lab. Code § 21.125(a), which provides that "an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice"; and (2) section 709 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e.

The substance of the permissive inference portion of the question is derived from *Ratliff v. City of Gainsville*, 256 F.3d 355, 360–62 (5th Cir. 2001), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000).

Circumstantial evidence. A circumstantial evidence instruction may be appropriate. See PJC 100.8. *See also Ratliff*, 256 F.3d at 359–62; *Quantum Chemical Corp.*, 47 S.W.3d at 481–82.

Race and color. Discrimination because of or on the basis of race or color is prohibited by Tex. Lab. Code § 21.051. Though often intertwined, race and color are distinct bases of discrimination prohibited by the statute. *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609–10 (1987) (noting that the definition of "race" has changed over time, with persons now categorized as "Caucasian" having been viewed differently in the 19th century); *see also Wiltz v. Christus Hospital St. Mary*, No. 1:09-CV-925, 2011 WL 1576932, at *4 (E.D. Tex. Mar. 10, 2011) (intraracial discrimination is actionable under title VII).

National origin. Discrimination because of or on the basis of national origin includes discrimination because of the national origin of an ancestor. Tex. Lab. Code § 21.110. It may also include, but is not limited to, the denial of equal employment because of an individual's, or his ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group. 29 C.F.R. § 1606.1. *Cf. Quraishi v. Kaiser Foundation Health Plan*, No. CCB-13-10, 2013 WL 2370449 (D. Md. May 30, 2013) (distinguishing between claims of discrimination based on race and those based on national origin).

Age. Discrimination because of or on the basis of age applies only to discrimination against an individual forty years of age or older. Tex. Lab. Code § 21.101. There are, however, limited exceptions. *See* Tex. Lab. Code § 21.054(b) (relating to training programs), § 21.103 (compulsory retirement for certain key and pensioned employees), § 21.104 (peace officers and firefighters).

Sex. Discrimination because of or on the basis of sex includes discrimination because of pregnancy, childbirth, or a related medical condition.~~,~~ Tex. Lab. Code § 21.106.~~:~~ See PJC 107.15. It also includes~~,~~ ~~as well as~~ discrimination because of transgender status or sexual orientation. *Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 1747, 207 L.Ed.2d 218 (2020).~~.~~ Title VII's prohibition of sex discrimination encompasses "the entire spectrum of disparate treatment of men and women in employment," including sexual harassment. *Alamo Heights Independent School District v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018) (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)).

Moreover, title VII's protection against workplace discrimination on the basis of sex applies to harassment between members of different genders as well as the same gender. *Clark*, 544 S.W.3d at 771–72 (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

Religion. Discrimination because of or on the basis of religion may include discrimination on the basis of religious observance, practice, or belief. Tex. Lab. Code § 21.108. See PJC 107.16.

Disability. For discrimination because of or on the basis of disability, see the questions and instructions in PJC 107.11, ~~107.11A,~~ 107.12, 107.13, and 107.14.

Disparate treatment versus disparate impact. There is a difference between disparate treatment (Tex. Lab. Code § 21.051(1)) and disparate impact (Tex. Lab. Code §§ 21.051(2), 21.122) cases. PJC 107.6 submits disparate treatment. In a dis-

parate impact case, an employer may be held liable for unintentional discrimination where an employment practice or criterion, neutral on its face, has a disproportionate effect or impact on a protected group. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Chapter 21 defines "disparate impact" as a practice where the employer "limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee." Tex. Lab. Code § 21.051(2). For example, height and weight requirements may unlawfully discriminate against women and some ethnic or racial minorities. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Education requirements may impact impermissibly on historically disadvantaged minority groups. *See Griggs*, 401 U.S. at 431–33. Disparate impact is not restricted to objective criteria or written tests with a discriminatory effect. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989–91 (1988).

"Business necessity" is an affirmative defense to a disparate impact claim, except in the case of age-related claims (see below), if an employer can show that the job requirement is job-related and justified by a valid business necessity. Tex. Lab. Code § 21.115. "Business necessity" is never a justification, however, for intentional discrimination (disparate treatment). Tex. Lab. Code § 21.123.

Submission of disparate impact cases. Tex. Lab. Code § 21.122 sets forth the elements and burden of proof necessary in a disparate impact case and is the basis of the Committee's following suggested questions and instructions:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., women, racial minorities*]?

"Disparate impact" is established if an employer uses a particular employment practice, even if apparently neutral, that has a significant adverse effect on the basis of [*race, color, sex, national origin, etc.*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] job-related to the position in question and consistent with business necessity?

An employment practice is job-related if the practice clearly relates to skills, knowledge, or ability required for successful performance on the job. For an employment practice to be consistent with business necessity, it must be necessary to safe and efficient job performance.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*employment practice question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Has *Don Davis* refused to adopt an "alternative employment practice" to the job requirement inquired about in Question _____ [*disparate impact question*]?

An "alternative employment practice" is an employment practice that serves the employer's legitimate interest in an equally effective manner, but which does not have a disparate impact on [*name of protected group, e.g., women, racial minorities*].

Answer "Yes" or "No."

Answer: _____

"Disparate impact" was defined by the Supreme Court in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The "significant adverse effect" language originated in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (holding that a disparate impact claim under title VII is established when "an employer uses a nonjob-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women"). That language has not been expressly used by Texas courts. The Austin court of appeals has described disparate impact cases as those that involve facially neutral practices "that operate to exclude a disproportionate percentage of persons in a protected group and cannot be justified by business necessity." *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 44 (Tex. App.—Austin 1998, pet. denied). The requirements of business necessity are set forth in Tex. Lab. Code §§ 21.115, 21.122(a)(1). Tex. Lab. Code § 21.122(a)(2) states the burden of proof with respect to showing an alternative employment practice to be that "in accordance with federal law as that law existed [on] June 4, 1989"—a reference to the 1991 amendments to title VII that codified those burdens following the June 5, 1989, Supreme Court decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Therefore, the burden of proof, on a showing of disparate impact, is on the employer to demonstrate that the practice is "job-related" and consistent with business necessity. *Dothard*, 433 U.S. at 329. The instruction on "job-relatedness" is

derived from *Albemarle Paper Co.*, 422 U.S. at 425; *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981); and 29 C.F.R. § 1607. *See also* Tex. Lab. Code § 21.115; *Davis v. Richmond, Fredericksburg & Potomac Railroad Co.*, 803 F.2d 1322, 1327–28 (4th Cir. 1986); *EEOC v. Rath Packing Co. Creditors' Trust*, 787 F.2d 318, 328 (8th Cir. 1986). The "alternative employment practice" definition is derived from *Watson*, 487 U.S. at 998.

Disparate impact cases: age. Like race, color, disability, religion, sex, and national origin, age is a protected category under the Texas Labor Code. Tex. Lab. Code § 21.051; *see also* Tex. Lab. Code § 21.101. Under federal law, age discrimination is governed by the Age Discrimination in Employment Act of 1967 (ADEA) and its subsequent amendments (29 U.S.C. §§ 621–634). Tex. Lab. Code § 21.122(b) states that to determine the availability of and burden of proof applicable to a disparate impact case involving age discrimination, the court shall apply the judicial interpretation of the ADEA and its subsequent amendments.

"Disparate impact" claims based on age discrimination were first recognized by the Supreme Court in *Smith v. City of Jackson*, 544 U.S. 228 (2005). The scope of disparate impact under the ADEA is significantly narrower than disparate impact under title VII. *Smith*, 544 U.S. at 240–41. This is in part because the ADEA includes a narrowing provision providing that it is not unlawful for an employer "to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f).

Unlike the business-necessity test articulated under title VII, the reasonableness inquiry does not inquire whether there are other means by which an employer can accomplish its goals. *Smith*, 544 U.S. at 243. The U.S. Supreme Court held that whether the challenged employment action is based on reasonable factors other than age (RFOA) is an affirmative defense on which the defendant bears both the burdens of production and persuasion. *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84, 94–95 (2008). Adopting *Meacham*, the Third Court of Appeals has held that in order to establish the affirmative defense of RFOA, the employer has the burden to prove that (1) its decision was based on a factor other than age and (2) that factor is reasonable. *City of Austin v. Chandler*, 428 S.W.3d 398, 411 (Tex. App.—Austin 2014, no pet.). The definition of a reasonable factor other than age is taken from 29 C.F.R. § 1625.7(e)(1).

For submission of a disparate impact case based on age discrimination, the Committee recommends the following question and instruction:

QUESTION _____

Did *Don Davis*'s requirement that [*describe specific employment practice*] have a disparate impact on [*name of protected group, e.g., persons age forty or over*]?

"Disparate impact" is established if the identified and challenged practice has a significantly adverse effect compared to [*name of those outside the protected group, e.g., persons under forty*].

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question _____ [*disparate impact question*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Don Davis*'s requirement that [*describe specific employment practice*] based on a reasonable factor other than age?

A reasonable factor other than age is a non-age factor that is objectively reasonable when viewed from the position of a prudent employer mindful of its legal responsibilities under like circumstances.

Answer "Yes" or "No."

Answer: _____

Damages. See PJC 115.30 for the question submitting actual damages and PJC 115.31 regarding exemplary damages.

After-acquired evidence of employee misconduct. If the employer has pleaded the discovery of evidence of employee misconduct acquired only after the employee's employment was terminated, see PJC 107.7 for the applicable question.

Imputing bBias of sSomeone oOther tThan fFinal dDecisionmaker to eEmployer ("cCat's pPaw tTheory"). Discriminatory animus by a person other than the decision-maker may be imputed to an employer if evidence indicates that the person in question possessed leverage or exerted influence over the decision-maker. *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 593 (Tex. 2008) (citing *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226 (5th Cir. 2000)). *See, e.g., Williams-Pyro, Inc. v. Barbour*, 408 S.W.3d 467, 480 (Tex. App.—El Paso, 2013, pet. denied) (proper to impute ageist bias of production manager to employer based on evidence he influenced ultimate decision); *Gonzalez v. Champion Technologies, Inc.*, 384 S.W.3d 462, 474 (Tex. App.—Houston [14th Dist.] 2012, re'hrng overruled) ("[I]t is not outside the realm of possibility that Tarver, as head of the maintenance department, could have had as much influence over the firing of a member of that department as he claimed to have." (citations omitted)). *Cf. Staub v. Proctor*, 562 U.S. 411, 419—420, 131 S. Ct. 1186, 1192–93 (2011) (rejecting suggestion that discriminatory bias must be shown for ultimate decision-maker and allowing for possibility that bias by other supervisors who influenced the decision could be a proximate cause of an adverse employment action) (USERRA case); *Tawil v. Cook Children's Healthcare System*, 582 S.W.-3d 669, 689 (Tex. App.——Fort Worth 2019, no pet.) (workers compensation retaliatory discharge case).

If the "cat's paw theory" of liability is properly invoked, the following instruction may be given as part of the definition of "motivating factor":

You may find that [*race, color, disability, religion, sex, national origin, or age*] was a motivating factor in *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other discriminatory action)*] *Paul Payne* even if there is no evidence of discriminatory bias on the part of *Don Davis* if *Paul Payne* proves that another individual exhibited such discriminatory bias and had leverage or exerted influence over *Don Davis*'s decision to [*fail or refuse to hire, discharge, or (describe other discriminatory action)*] *Paul Payne*. *Paul Payne* is not required to prove that *Don Davis* knew or should have known of the other individual's discriminatory bias.

PJC 107.11 **Instruction on Disability**

PJC 107.11A **Instruction on Disability (Actual, or Record of)**

"Disability" means—

1. a mental or physical impairment that substantially limits at least one major life activity; or

2. a record of such an impairment.~~; or~~

~~3. being regarded as having such an impairment.~~

The term "disability" shall be construed in favor of broad coverage of individuals to the maximum extent permitted by these terms.

"Mental or physical impairment" means [*any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems, such as: neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; immune; circulatory; hemic; lymphatic; skin; and endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities*].

~~"Mental or physical impairment" includes an impairment that is episodic or in remission, if it would substantially limit a major life activity when active.~~

"Major life activity" includes, but is not limited to, [*caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, or working. The term also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions*].

~~"Substantially limits a major life activity" means an~~An impairment ~~that~~ is a disability if it substantially limits the ability to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a "disability."

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

"Record of such an impairment" means that an individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

~~"Regarded as having such an impairment" means being regarded as having an actual or perceived mental or physical impairment, other than an impairment that is minor and is expected to last or actually lasts less than six months, regardless of whether the impairment limits or is perceived to limit a major life activity.~~

Disability is not a motivating factor in an employment decision if an individual's disability impairs the individual's ability to reasonably perform the job in question, even with a reasonable accommodation.

COMMENT

When to use. PJC 107.11A is to be used with PJC 107.6 if disability (~~other than~~ actual or record of, and not including failure to accommodate) is alleged to be the basis of an employer's commission of an unlawful employment practice. If regarded as disability is the claim, PJC 107.11B~~A~~ should be used; if failure to accommodate is the claim, PJC 107.12 should be used.

This instruction includes two~~three~~ definitions of disability, but only the definition(s) raised by the pleadings and evidence should be submitted.

In most cases the issue of whether a given activity is a major life activity or whether a particular condition is a mental or physical impairment is not in dispute. In such cases, or if the court determines these issues as a matter of law, the list need not be

submitted. Instead, the jury should be instructed that the particular activity in question is a major life activity or that a physical or mental impairment exists. If there is a factual dispute about major life activity or physical or mental impairment, only the terms in brackets that are raised by the pleadings and evidence should be submitted.

Source of instruction. PJC 107.11A is derived from the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213, as amended by the ADA Amendments Act of 2008 (ADAAA), and from amendments to the Texas Labor Code. *See* Tex. Lab. Code ch. 21. The definitions are contained in the Equal Employment Opportunity Commission (EEOC) regulations implementing the equal employment provisions of the ADAAA, 29 C.F.R. §§ 1630.1–.16. Effective September 1, 2009, the disability discrimination provisions of chapter 21 of the Texas Labor Code were amended to conform to the amendments to the federal ADA. The implementing federal regulations relating to the federal amendments are effective May 24, 2011. *See* 29 C.F.R. §§ 1630.1–.16.

Additional instruction: substance addiction or communicable disease status. In the appropriate case, use the following instruction:

> "Disability" does not include [*a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance, ~~or~~nor does it include ~~a~~ a currently communicable disease or infection that constitutes a direct threat to the health or*

safety of other persons or that makes the affected person unable to perform the duties of the person's employment].

See Tex. Lab. Code § 21.002(6).

Additional instruction—effect of mitigating measures on disability determination. ~~Congress and the Texas legislature overturned the holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that mitigating measures must be taken into account in determining whether an impairment constitutes a substantial limitation on a major life activity.~~ The holding in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that mitigating measures must be taken into account in determining whether an impairment constitutes a substantial limitation on a major life activity, has been overturned by statute. 42 U.S.C. § 12102(4)(E); Tex. Lab. Code § 21.0021(b). Therefore, in circumstances where mitigating measures impact major life activities, the jury should be instructed as follows:

> In determining whether an individual has an impairment that substantially limits a major life activity, you must not consider the ~~ameliorative~~ helpful effects of mitigating measures, including—
>
> 1. medication, medical supplies, medical equipment, medical appliances, prosthetic limbs and devices, hearing aids, cochlear implants and other implantable hearing devices, mobility devices, and oxygen therapy equipment;

2. devices that magnify, enhance, or otherwise augment a visual image, other than eyeglasses and contact lenses that are intended to fully correct visual acuity or eliminate refractive error;

3. the use of assistive technology;

4. reasonable accommodations and auxiliary aids or services; and

5. learned behavioral or adaptive neurological modifications.

Submission of "regarded as" cases. The amendments to chapter 21 of the Texas Labor Code broadened the coverage for individuals with respect to "regarded as" claims. Under the previous version of the statute, plaintiffs were required to prove that the perceived impairment was one that is or would be a substantial limitation of a major life activity. The amendments dispense with this requirement. The amendments are the basis for~~–~~ the Committee's suggested instructions. Tex. Lab. Code § 21.002(12–a). For a "regarded as" only case, see PJC 107.11B~~A~~ .

Transitory and minor. Neither the ~~ADAAA~~ ADA nor the amendments to the Texas Labor Code cover impairments that are transitory and minor. *See* 42 U.S.C. § 12102(3)(B); Tex. Lab. Code § 21.002(12–a). Under both provisions, if the impairment lasts or is expected to last six months or less, it is "transitory." The statutory language of the Texas Labor Code differs from ~~that of~~ the ADA~~ADAAA~~. *Compare*

42 U.S.C. § 12102(3)(B), *with* Tex. Lab. Code § 21.002(12–a). ~~Under~~ At least one Texas court of appeals has held that under state law, the burden is on the plaintiff to prove that either the disability is ~~either~~ not transitory or is not minor. *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818, 835 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). *Cf. Eckman v. Centennial Savings Bank*, 784 S.W.2d 672 (Tex. 1990) (exceptions to coverage under statutory provisions are affirmative defenses). Federal law places the burden of proving "transitory and minor" on the defendant as an affirmative defense. *See Willis v. Noble Environmental Power, LLC*, 143 F. Supp. 3d 475, 484 (N.D. Tex. 2015) (citing 29 C.F.R. § 1630.15(f)).

Qualified individual. Pursuant to Texas Labor Code section 21.105, disability-based discrimination is actionable only when such discrimination occurs because of or on the basis of a physical or mental condition that does not impair an individual's ability to reasonably perform a job. A qualified individual is an individual "who, with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *City of Houston v. Proler*, 437 S.W.3d 529, 532 (Tex. 2014) (although decided under the law prior to the 2009 amendments to Texas Labor Code chapter 21, the definition of "qualified individual" did not change).

There is often no dispute on whether the plaintiff is a qualified individual able to perform the job's essential functions. If there is a dispute, the following question and instruction, based on 29 C.FR. § 1630.2(n), may be used: ~~. *See* 29 C.FR. 1630.2(n).~~

Was *Paul Payne* able to perform the essential functions of the [*insert job position*] with or without reasonable accommodation?

"Essential functions" means the fundamental job duties of the employment position the individual ~~[~~with a disability~~]~~ holds or desires. "Essential functions" does not include marginal functions of the position.

A job function may be considered essential for any of several reasons, including but not limited to the following:

1.~~(i)~~ The function may be essential because the reason the position exists is to perform that function;

2.~~(ii)~~ The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

3.~~(iii)~~ The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

In determining whether a particular function is essential, you may consider the following factors:

1.~~(i)~~ The employer'~~'~~s judgment as to which functions are essential;

2.~~(ii)~~ Written job descriptions prepared before advertising or interviewing applicants for the job;

3.~~(iii)~~ The amount of time spent on the job performing the function;

4.~~(iv)~~ The consequences of not requiring the incumbent to perform the function;

5.~~(v)~~ The terms of a collective bargaining agreement;

6.~~(vi)~~ The work experience of past incumbents in the job; and/or

7.~~(vii)~~ The current work experience of incumbents in similar jobs.

You may consider other factors.

PJC 107.11B Instruction and Question on Disability (Regarded aAs)

[*An actual impairment*] [*An employer's perception of an impairment*], either physical or mental, must not be a motivating factor for an employer's adverse action against an [*employee*] [*applicant*].

[*The employee must show the impairment either was not minor or that it lasted, or was expected to last, at least six months.*] [*The employer must show the impairment was minor and that it lasted or was expected to last less than six months.*]]

Was *Paul Payne*'s [*actual*] [*perceived*] impairment a motivating factor for *Don Davis*'s [*describe adverse employment action*] of *Paul Payne*?

A "motivating factor" in an employment decision is a reason for making the decision at the time it was made. There may be more than one motivating factor for an employment decision.

If you do not believe the reason *Don Davis* has given for [*failing or refusing to hire, discharging, or (describe other adverse employment action except for failing to accommodate)*], you may, but are not required to, infer that *Don Davis* was motivated by *Paul Payne*'s perceived [*mental or physical*] impairment.

COMMENT

When to use. PJC 107.11BA is to be used if a regarded-as disability is alleged to be the basis of an employer's commission of an unlawful employment practice.

Source of instruction. PJC 107.11BA is derived from the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213, as amended by the ADA Amendments Act of 2008 (ADAAA), and from amendments to the Texas Labor Code. *See* Tex. Lab. Code ch. 21. The definitions are contained in the Equal Employment Opportunity Commission (EEOC) regula-

tions implementing the equal employment provisions of the ADAAA, 29 C.F.R. §§ 1630.1–.16. Effective September 1, 2009, the disability discrimination provisions of chapter 21 of the Texas Labor Code were amended to conform to the amendments to the federal ADA. The implementing federal regulations relating to the federal amendments are effective May 24, 2011. *See* 29 C.F.R. §§ 1630.1–.16.

Impairment. A mental or physical impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems, such as neurological; musculoskeletal; special sense organs; respiratory (including speech organs); cardiovascular; reproductive; digestive; genitourinary; immune; circulatory; hemic; lymphatic; skin; and endocrine; or any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See* 29 C.F.R. § 1630.2(h). In rare cases—given the breadth of impairment—a jury may have to resolve a factual dispute about whether the plaintiff had an actual impairment, or a dispute about whether the employer perceived one.

Burden of p~~P~~roof~~——~~ m~~M~~inor and transitory. Neither the ADA nor the amendments to the Texas Labor Code cover impairments that are both minor and of short duration. *See* 42 U.S.C. § 12102(3)(B); Tex. Lab. Code § 21.002(12–a). Neither statute defines "minor," and they differ slightly with respect to duration: under the ADA, "an actual or expected duration of 6 months or less" is "transitory" and insufficient for coverage, while under Texas law the actual or expected duration must be less than six~~6~~ months for the impairment to be insufficient for coverage. There is scant authority—only one case directly on point—for which party bears the burden of proof on this issue under Texas law. That case, *Okpere v. National Oilwell Varco, L.P.*, 524 S.W.3d 818, 835 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), held the plaintiff's burden includes showing the impairment at issue was not minor or was not transitory. *Cf. Eckman v. Centennial Savings Bank*, 784 S.W.2d 672 (Tex. 1990) (exceptions to coverage under statutory provisions are affirmative defenses). Federal law places the burden on the defendant to prove an impairment's minor and transitory nature as an affirmative defense. *See Willis v. Noble Environmental Power, LLC*, 143 F. Supp. 3d 475, 484 (N.D. Tex. 2015) (citing 29 C.F.R. § 1630.15(f)). The appropriate instruction should be included, depending on how the burden of proof is allocated by the court.

Major life activity. The amendments to chapter 21 of the Texas Labor Code broadened the coverage for individuals with respect to "regarded as" claims. Under the previous version of the statute, plaintiffs were required to prove that the perceived impairment was one that is or would be a substantial limitation of a major life activity. The amendments dispense with this requirement. The amendments are the basis for the Committee's suggested instructions. *See* Tex. Lab. Code § 21.002(12–-a).

Imputing bBias of sSomeone Oother tThan fFinal dDecisionmaker to eEmployer ("cCat's pPaw tTheory"). For discussion on imputation a non-decisionmaker's bias to the employer under the "cCat's pPaw tTheory,"; please see the Ccomments to PJCin 107.6.

PJC 108.2 Disregarding the Corporate Fiction in Contract-Related Cases (Comment)

The two standards. In 1986, the supreme court held that Texas common law permits a claimant to pierce the corporate veil by proving constructive fraud. *Castleberry v. Branscum*, 721 S.W.2d 270, 273 (Tex. 1986). The legislature responded by enacting a statute that imposes a higher standard than *Castleberry* in certain contract-related cases. *Willis v. Donnelly*, 199 S.W.3d 262, 271-72 & n.12 (Tex. 2006); *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008). The instructions at PJC 108.3–108.8 contain alternative submissions reflecting the statutory and common-law standards.

The statute's scope and effect. In matters relating to "any contractual obligation of the corporation or any matter relating to or arising from the obligation," Tex. Bus. Orgs. Code § 21.223(b) requires claimants to prove that the shareholder "caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the [claimant] primarily for the direct personal benefit" of the shareholder. Tex. Bus. Orgs. Code § 21.223(b) (formerly Tex. Bus. Corp. Act art. 2.21(A), expired Jan. 1, 2010). The statute originally did not apply to tort claims, but subsequent amendments extended it to all claims "relating to or arising from" a contractual obligation, including torts, and section 21.224 now preempts common-law veil-piercing theories in cases governed by the statute. *Menetti v. Chavers*, 974 S.W.2d 168, 173–74 (Tex. App.—San Antonio 1998, no pet.) (statute applied when homeowner sued contractor for

breach of contract, fraud, Deceptive Trade Practices Act, and negligence); *TecLogistics, Inc. v. Dresser-Rand Group, Inc.*, 527 S.W.3d 589, 599 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (statute applied for breach of contract and fraud). The statute further modifies *Castleberry* by eliminating the failure to observe corporate formalities as a consideration for piercing the corporate veil in all claims against holders, owners, subscribers, or affiliates. Tex. Bus. Orgs. Code § 21.223(a)(3); *see also Aluminum Chemicals (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67 n.3 (Tex. App.—Texarkana 2000, no pet.).

Limited liability companies. Though section 21.223 refers to a "corporation," a separate provision of the Business Organizations Code extends section 21.223 to limited liability companies and their members, owners, assignees, affiliates, and subscribers. Tex. Bus. Orgs. Code § 101.002.

Determining whether section 21.223(a)(2) applies. In *TecLogistics, Inc.*, the court usefully organized the five elements that must all exist for section 21.223(a)(2) to apply. First, the defendant must have a relationship with a corporation or limited liability company, not some other type of entity. *TecLogistics, Inc.*, 527 S.W.3d at 597. Second, the defendant must be among a class of persons defined in the statute: "[a] holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate of such a holder, owner, or subscriber or of the corporation." *TecLogistics, Inc.*, 527 S.W.3d at 597. Third, the claimant must seek to impose individual liability on the defendant for a "contractual obligation of the corporation or any matter relating to or arising from the obligation,"

and not for liabilities unconnected to a contract. *TecLogistics, Inc.*, 527 S.W.3d at 597. Fourth, the claim must seek to hold the defendant liable to the corporation or one of the corporation's obligees, not to others. *TecLogistics, Inc.*, 527 S.W.3d at 597. Fifth, "the statute applies only if the basis of the individual defendant's liability is that the defendant 'is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory.'" *TecLogistics, Inc.*, 527 S.W.3d at 597 (quoting Tex. Bus. Orgs. Code § 21.223(a)(2)).

Role of common law theories in cases governed by Tex. Bus. Orgs. Code § 21.223(a)(2). In cases governed by section 21.223(a)(2), the Texas Supreme Court has not addressed whether a claimant must prove one or more common-law veil-piercing theories in addition to the heightened requirements of section 21.223(b). *See* Tex. Bus. Orgs. Code § 21.224 (the liability limited by section 21.223 "is exclusive and preempts any other liability imposed for that obligation under common law or otherwise"). The courts of appeals have answered this question in varying ways. *See, e.g.*, *TransPecos Banks v. Strobach*, 487 S.W.3d 722 (Tex. App.—El Paso 2016, no pet.) (common-law veil-piercing principles no longer apply in matters governed by the statute because section 21.224 preempts them); *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd) (to pierce the corporate veil, claimants must prove both a common-law theory and the requirements of section 21.223(b)).

"Actual fraud." The Texas Business Organizations Code does not define the term *actual fraud*, which appears in section 21.223(b). In *Castleberry*, decided before

the enactment of section 21.223(b) and its predecessor statute, the Texas Supreme Court defined actual fraud in the context of piercing the corporate veil as "involv[ing] dishonesty of purpose or intent to deceive." *Castleberry*, 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). Accordingly, recent court of appeals opinions have construed the statutory term *actual fraud* to mean "dishonesty of purpose or intent to deceive." *See, e.g.*, *AvenueOne Properties, Inc. v. KP5 Ltd. Partnership*, 540 S.W.3d 643, 648–49 (Tex. App.—Amarillo 2018, no pet.); *TransPecos Banks*, 487 S.W.3d at 730; *Tryco Enterprises, Inc.*, 390 S.W.3d at 508; *Dick's Last Resort of West End, Inc. v. Market/Ross, Ltd.*, 273 S.W.3d 905, 908–10 (Tex. App.—Dallas 2008, pet. denied). Courts have also held that the fraud must relate to the transaction at issue. *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 534 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also, e.g.*, *Menetti*, 974 S.W.2d at 175.

"Direct personal benefit." The Texas Business Organizations Code also does not define the term *primarily for the direct personal benefit*, which appears in section 21.223(b). *See Hong v. Havey*, 551 S.W.3d 875, 885-86 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("In cases in which the direct personal benefit showing has been met, evidence showed that funds derived from the corporation's allegedly fraudulent conduct were pocketed by or diverted to the individual defendant. … In contrast, evidence showing that fraudulently procured funds were used to satisfy a corporation's financial obligations cuts against the notion that the fraud was perpetrated primarily for the direct personal benefit of an individual.").

Preemption of individual liability. The limited liability for corporate obligations allowed by section 21.223 "is exclusive and preempts any other liability imposed for that obligation under common law or otherwise." Tex. Bus. Orgs. Code § 21.224. For cases discussing the statute's impact on an individual's direct liability for his own torts committed on behalf of a corporation, see *TecLogistics*, 527 S.W.3d at 595–602 (reviewing section 21.223's history and holding that the statute shielded a corporation's president from direct liability for fraud committed on behalf of the corporation); *Kingston v. Helm*, 82 S.W.3d 755, 764–65 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied) (section 21.223 does not shield corporate officers from individual liability for their own tortious acts); and *Bates Energy Oil & Gas v. Complete Oilfield Services*, 361 F. Supp. 3d 633, 664–73 (W.D. Tex. 2019) (analyzing Texas cases and choosing to follow *Kingston*).

"Injustice." For cases governed by the common law instead of the statute, the instructions that follow ask whether disregarding the corporate fiction will prevent injustice. *See SSP Partners*, 275 S.W.3d at 454–55; *Castleberry*, 721 S.W.2d at 271–73 ("[D]isregarding the corporate fiction is a fact question for the jury."). In *SSP Partners*, the Texas Supreme Court equated the term "injustice" with "abuse of the corporate structure." *SSP Partners*, 275 S.W.3d at 454–55. The court said that "injustice" does not mean "a subjective perception of unfairness by an individual judge or juror"; rather, it is a "shorthand reference[] for the kinds of abuse . . . that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like." *SSP Partners*, 275 S.W.3d at

455. For additional cases discussing the term "injustice" in the context of piercing the corporate veil, see *Wilson v. Davis*, 305 S.W.3d 57, 68–72 (Tex. App.—Houston [1st Dist.] 2009, no pet.) and *Mancorp, Inc. v. Culpepper*, 836 S.W.2d 844 (Tex. App.—Houston [1st Dist.] 1992), *on remand from* 802 S.W.2d 226 (Tex. 1990).

PJC 108.3 Instruction on Alter Ego

PJC 108.3A Instruction on Alter Ego in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

[*Name of corporation*] was organized and operated as a mere tool or business conduit of *Don Davis*; there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased; and *Don Davis* caused [*name of corporation*] to be used for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

In deciding whether there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased, you are to consider the total dealings of [*name of corporation*] and Don Davis, including—

1. the degree to which [*name of corporation*]'s property had been kept separate from that of *Don Davis*;

2. the amount of financial interest, ownership, and control *Don Davis* maintained over [*name of corporation*]; and

3. whether [*name of corporation*] had been used for personal purposes of *Don Davis*.

[*or*]

PJC 108.3B Instruction on Alter Ego in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

[*Name of corporation*] was organized and operated as a mere tool or business conduit of *Don Davis*; there was such unity between [*name of corporation*] and *Don Davis*

that the separateness of [*name of corporation*] had ceased; and holding only [*name of corporation*] responsible would result in injustice.

In deciding whether there was such unity between [*name of corporation*] and *Don Davis* that the separateness of [*name of corporation*] had ceased, you are to consider the total dealings of [*name of corporation*] and *Don Davis*, including—

1. the degree to which [*name of corporation*]'s property had been kept separate from that of *Don Davis*;

2. the amount of financial interest, ownership, and control *Don Davis* maintained over [*name of corporation*]; and

3. whether [*name of corporation*] had been used for personal purposes of *Don Davis*.

[*or*]

COMMENT

When to use. PJC 108.3 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation as an alter ego. Use PJC 108.3A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.3B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.4–108.8), PJC 108.3 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

Source of instruction. The instruction on alter ego is drawn from the supreme court's discussion of the indicia of corporate unity in *Castleberry v. Branscum*, 721 S.W.2d 270, 271–73 (Tex. 1986).

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

Failure to observe corporate formalities. Tex. Bus. Orgs. Code § 21.223(a)(3) provides that a defendant may not be liable to the corporation or its obligees for the failure of the corporation to observe any corporate formality, including the failure to "(A) comply with this code or the certificate of formation or bylaws of the corporation; or (B) observe any requirement prescribed by this code or the certificate of formation or bylaws of the corporation for acts to be taken by the corporation or its directors or shareholders."

Where the court admits evidence that the corporation failed to observe corporate formalities, it may be appropriate to include an instruction as follows:

> In answering this question do not consider the failure of the corporation to observe corporate formalities. *[Insert specific failures.]*

PJC 108.4 Instruction on Sham to Perpetrate a Fraud

PJC 108.4A Instruction on Sham to Perpetrate a Fraud in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[*or*]

PJC 108.4B Instruction on Sham to Perpetrate a Fraud in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] as a sham to perpetrate a fraud, and holding only [*name of corporation*] responsible would result in injustice.

[*or*]

COMMENT

When to use. PJC 108.4 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation as a sham to perpetrate a fraud. Use PJC 108.4A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.4B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.3 and 108.5–108.8), PJC 108.4 must be followed by the word *or*, because a finding of any one of the theories

for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

The common-law standard for sham to perpetrate a fraud. The Texas Supreme Court has not opined whether the *Castleberry* common-law standard still applies to claims of "sham to perpetrate a fraud" not governed by Tex. Bus. Orgs. Code § 21.223(a)(2). In 1986, *Castleberry* held that "constructive fraud, not intentional fraud, is the standard for disregarding the corporate fiction on the basis of a sham to perpetrate a fraud." *Castleberry v. Branscum*, 721 S.W.2d 270, 275; *see also Menetti v. Chavers*, 974 S.W.2d 168, 173–74 (Tex. App.—San Antonio 1998, no pet.) (discussing when a showing of actual fraud is necessary after the 1997 amendments to the Texas Business Corporation Act). Under the *Castleberry* standard, "constructive fraud is the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Castleberry*, 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)). However, the supreme court later held the "single business enterprise" theory invalid because, among other things, that common-law theory was "fundamentally inconsistent" with the legislature's subsequent rejection of constructive fraud as a basis for disregarding the corporate fiction. *SSP Partners v. Gladstrong Investments (USA) Corp.*, 275 S.W.3d 444, 456 (Tex. 2008); *see also Kingston v. Helm*, 82 S.W.3d 755, 764–65 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied) (quoting the 1996 Bar Committee notes to section 21.223's predecessor, which

opined that the legislature's decision to reject constructive fraud "should be considered by analogy in the context of tort claims").

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

PJC 108.5 Instruction on Evasion of Existing Legal Obligation

PJC 108.5A Instruction on Evasion of Existing Legal Obligation in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] as a means of evading an existing legal obligation for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[*or*]

PJC 108.5B Instruction on Evasion of Existing Legal Obligation in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] as a means of evading an existing legal obligation, and holding only [*name of corporation*] responsible would result in injustice.

[*or*]

COMMENT

When to use. PJC 108.5 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation to evade an existing legal obligation. Use PJC 108.5A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.5B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.3–108.4 and 108.6–108.8), PJC 108.5 must be followed by the word *or*, because a finding of any one of

the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

PJC 108.6 Instruction on Circumvention of a Statute

PJC 108.6A Instruction on Circumvention of a Statute in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to circumvent a statute for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[*or*]

PJC 108.6B Instruction on Circumvention of a Statute in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to circumvent a statute, and holding only [*name of corporation*] responsible would result in injustice.

[*or*]

COMMENT

When to use. PJC 108.6 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation to circumvent a statute. Use PJC 108.6A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.6B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.3–108.5 and 108.7–108.8), PJC 108.6 must be followed by the word *or*, because a finding of any one of

the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

PJC 108.7 Instruction on Protection of Crime or Justification of Wrong

PJC 108.7A Instruction on Protection of Crime or Justification of Wrong in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to protect a crime or justify a wrong for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[*or*]

PJC 108.7B Instruction on Protection of Crime or Justification of Wrong in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to protect a crime or justify a wrong, and holding only [*name of corporation*] responsible would result in injustice.

[*or*]

COMMENT

When to use. PJC 108.7 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation to protect a crime or justify a wrong. Use PJC 108.7A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.7B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.3–108.6 and 108.8), PJC 108.7 must be followed by the word *or*, because a finding of any one of the theories

for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

"Protection of crime." *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986), lists "protection of crime" as one of the grounds for disregarding the corporate fiction. This phrase appears to include but not be limited to "perpetration of crime." Its scope includes, therefore, not only those situations in which the party commits a crime but also situations in which a crime has been abetted or the criminal has otherwise received assistance. The practitioner should amend this question as appropriate to reflect the facts of the case.

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

PJC 108.8 Instruction on Monopoly

PJC 108.8A Instruction on Monopoly in Cases Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to achieve a monopoly for the purpose of perpetrating and did perpetrate an actual fraud on *Paul Payne* primarily for the direct personal benefit of *Don Davis*.

[*or*]

PJC 108.8B Instruction on Monopoly in Cases Not Governed by Tex. Bus. Orgs. Code § 21.223(a)(2)

Don Davis used [*name of corporation*] to achieve a monopoly, and holding only [*name of corporation*] responsible would result in injustice.

[*or*]

COMMENT

When to use. PJC 108.8 should be used as an instruction accompanying the question in PJC 108.1 if it is alleged that a defendant used a corporation to achieve or perpetrate a monopoly. Use PJC 108.8A in those contract-related matters governed by Tex. Bus. Orgs. Code § 21.223(a)(2) and PJC 108.8B in other matters. For additional discussion on section 21.223(a)(2), see PJC 108.2.

Use of "or." If used with other instructions (see PJC 108.3–108.7), PJC 108.8 must be followed by the word *or*, because a finding of any one of the theories for disregarding the corporate fiction defined in the instructions would support an affirmative answer to the question.

"Actual fraud," "direct personal benefit," and "injustice." See PJC 108.2 for cases discussing these terms.

PJC 110.1 Libel and Slander (Comment on Broad Form)

Explanatory note. Chapter 110 governs submission of libel and slander cases. The following general comments should be considered when using the pattern submissions in chapter 110.

Libel and slander distinguished. Defamation includes both libel and slander. Libel is a publication by writing or some other graphic means (including broadcasting). *See* Tex. Civ. Prac. & Rem. Code § 73.001; *Neely v. Wilson*, 418 S.W.3d 52, 60 (Tex. 2013) ("[T]he broadcasting of defamatory statements read from a script is libel rather than slander."). Slander is orally communicated defamatory words. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). Libel in Texas, when the common law still prevailed, was codified in a statute, now Tex. Civ. Prac. & Rem. Code §§ 73.001–.006. Slander remains controlled by the common law, subject to constitutional standards in an appropriate case. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 580 (Tex. 1994).

Broad-form submission. Tex. R. Civ. P. 277 requires that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277; *see Thota v. Young*, 366 S.W.3d 678, 689 (Tex. 2012) (rule 277's use of "whenever feasible" mandates broad-form submission in any or every instance in which it is capable of being accomplished). But defamation claims involve multiple elements and defenses, all of which may not apply to every case, and many publications give rise to

multiple allegedly defamatory statements. That many defamation cases involve constitutional issues further complicates the trial court's task in crafting a jury charge.

The questions and instructions in chapter 110 assume as their subject a single allegedly defamatory statement and provide patterns from which to select those elements or defenses that apply in a particular case. Broad-form submission, however, may be feasible in some cases, and the questions and instructions in chapter 110 may be combined as appropriate. *Compare McFarland v. Boisseau*, 365 S.W.3d 449, 452–54 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (applying *Casteel* to require separate damages questions for each allegedly defamatory statement where defendant argued that some statements were not defamatory as a matter of law) *with Beaumont v. Basham*, 205 S.W.3d 608, 622–23 (Tex. App.—Waco 2006, pet. denied) (affirming use of broad-form submission for defamation where there were three allegedly defamatory statements but defendant had not argued that any particular one of these statements was an invalid basis for defamation liability). For further discussion, see PJC 116.2 regarding broad-form issues and the *Casteel* doctrine.

PJC 110.2 Question and Instruction on Publication

QUESTION _____

Did *Don Davis* publish the following: [*insert alleged defamatory matter*]?

"Publish" means to communicate orally, in writing, or in print to a person other than *Paul Payne* who is capable of understanding and does understand the matter communicated.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. "To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private party, regarding the truth of the statement." *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *see also In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). Use PJC 110.2 to submit the element of publication if it is in dispute.

Source of definition. The definition of "publish" is from *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017) ("'Publication' occurs if the defamatory statements are communicated orally, in writing, or in print to some third person who is 'capable of understanding their defamatory import and in such a way that the third person did so understand.'") (quoting *Austin v. Inet Technologies, Inc.*, 118 S.W.3d 491, 496 (Tex. App.—Dallas 2003, no pet.). . "Orally, in writing, or in print" includes electronic communication, for example, publication on a website or in an e-mail. *See, e.g., Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 528–30 (Tex. 2019) (treating publication of reviews on the Glassdoor website as publication for purposes of defamation claim).

No compelled self-defamation. In *Rincones*, the Texas Supreme Court expressly declined to recognize a theory of compelled self-defamation. *Rincones*, 520 S.W.3d at 581. Compelled self-defamation is the theory that a communication by the plaintiff (rather than the defendant) satisfies the publication requirement when the defendant has put the plaintiff in a situation in which the plaintiff is "compelled" to make that communication—for example, when a defendant former employer tells a plaintiff former employee why he was fired and he is then "compelled" to give that reason to new prospective employers when asked why he left his former job.

PJC 110.3 Question and Instructions on Defamatory Nature of the Publication

If you answered "Yes" to Question _____ [*110.2*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement in Question _____ [*110.2*] defamatory concerning *Paul Payne*?

"Defamatory" means an ordinary person would interpret the statement in a way that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach the person's honesty, integrity, virtue, or reputation.

A statement is defamatory if—

1. the statement is defamatory considered in the context of other facts and circumstances sufficiently expressed before or otherwise known to the reader or listener; [*or*]

2. the overall gist—meaning the main theme, central idea, thesis, or essence—of the statement as a whole and in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it is defamatory; [*or*]

3. the implications that an objectively reasonable person would draw from specific parts of the statement are defamatory.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Use PJC 110.3 to submit the element of whether the publication was defamatory concerning the plaintiff. PJC 110.3 submits both the meaning of the publication and whether that meaning was defamatory. For example, when a publication is capable of both defamatory and nondefamatory meanings, PJC 110.3 should be submitted to let the jury decide whether *the publication in fact had the defamatory meaning. See Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 632 (Tex. 2018) ("[C]ourts sometimes determine that a statement is capable of at least one defamatory and at least one non-defamatory meaning. When that occurs, 'it is for the jury to determine whether the defamatory sense was the one conveyed.'") (quoting W. Page Keeton, Prosser and Keeton on Torts, § 111, at 782 (5th ed. 1984)).

Pleading requirement for extrinsic defamation. Extrinsic defamation must be specifically pleaded. That is, when a plaintiff relies on the context of "'other facts and circumstances sufficiently expressed before' or otherwise known to the reader" or listener to argue that a statement has a defamatory meaning, the plaintiff must plead the specific extrinsic facts and circumstances. *Tatum*, 554 S.W.3d at 626 (citing *Billington v. Houston Fire & Casualty Insurance Co.*, 226 S.W.2d 494, 497 (Tex. App.—Fort Worth 1950, no writ)).

Conditioning. If publication is not in dispute and PJC 110.2 is not submitted, the conditioning language should be deleted and the question should be modified as follows:

> Was the following defamatory concerning *Paul Payne*: [*insert alleged defamatory matter*]?

Source of definition and instruction. The definition of "defamatory" is taken from Tex. Civ. Prac. & Rem. Code § 73.001 and *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000). Although section 73.001 includes the phrase "blacken the memory of the dead," that phrase has not been included in light of authority holding that the legislature did not intend merely by codifying a definition to create by implication a cause of action for defaming the dead. *See Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 249 (Tex. 1942); *see also Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 940 n.1 (Tex. 1988) ("While one cannot bring a cause of action for the defamation of

a person already dead, one who is alive while he was defamed and later dies, has a cause of action for defamation which survives his death.").

The instruction on construing the statement is based on *Tatum*, 554 S.W.3d at625–32 (laying out separate tests for extrinsic defamation, textual explicit defamation, textual defamation by implication from an entire publication's gist, and textual defamation by implication from a distinct part of a publication).

Meaning. A potentially defamatory meaning can be found in two ways: either in the publication considered alone ("textual defamation"); or in the publication considered in light of other evidence ("extrinsic defamation"). *Tatum*, 554 S.W.3d at 626. Textual defamation "arises from the statement's text without reference to any extrinsic evidence." *Tatum*, 554 S.W.3d at 626. Extrinsic defamation "*does* require reference to extrinsic circumstances." *Tatum*, 554 S.W.3d at 626. "Extrinsic defamation occurs when a statement whose textual meaning is innocent becomes defamatory when considered in light of other facts and circumstances sufficiently expressed before or otherwise known to the reader." *Tatum*, 554 S.W.3d at 626 (citations omitted).

Textual defamation is either "explicit" or "implicit." *Tatum*, 554 S.W.3d at 626–27. Explicit textual defamation depends on the literal meaning of the allegedly defamatory publication. "[T]he defamatory statement's literal text and its communicative content align—what the statement says and what the statement *communicates* are the same. In other words, the defamation is both *textual* and *explicit*." *Tatum*, 554 S.W.3d at 627. By contrast, implicit textual defamation, or "defamation by implication," depends on a

defamatory meaning that "arises from the statement's text, but . . . does so implicitly." *Tatum*, 554 S.W.3d at 627.

A publication may create defamation by implication either because the gist of the entire publication has a defamatory meaning, *Tatum*, 554 S.W.3d at 627–28; *Turner*, 38 S.W.3d at 114, or because "a distinct portion" of the publication implies a defamatory meaning, *Tatum*, 554 S.W.3d at 628. "'Gist' refers to a publication or broadcast's main theme, central idea, thesis, or essence." *Tatum*, 554 S.W.3d at 629. The gist of a publication is "how a person of ordinary intelligence *would* perceive it," *Tatum*, 554 S.W.3d at 629, taking the publication as a whole. "The 'would' standard recognizes that gist, in particular, is the type of implication that no reasonable reader would fail to notice." *Tatum*, 554 S.W.3d at 629–30. Defamation by implication based on a part of the publication, by contrast, depends not on the meanings that a person of ordinary intelligence "would" perceive, but instead on the potential meanings that arise "from an objectively reasonable reading." *Tatum*, 554 S.W.3d at 631.

Role of the judge and jury in determining meaning. Before a jury can determine the meaning of a publication and whether that meaning is defamatory, the court must make a threshold determination that the publication is capable of a defamatory meaning. *Turner*, 38 S.W.3d at 114. In *Tatum*, 554 S.W.3d at 625–37, the supreme court synthesized its prior cases and established a framework for answering this question. The first step is to "determine whether the meaning the plaintiff alleges is reasonably capable of arising from the text of which the plaintiff complains." *Tatum*, 554 S.W.3d

at 625. The second step is to determine whether that meaning "is reasonably capable of defaming the plaintiff." *Tatum*, 554 S.W.3d at 625.

Additionally, in defamation by implication cases based on an implication from a specific part of a publication, the First Amendment imposes a further requirement that the plaintiff "point to 'additional, affirmative evidence' within the publication itself that suggests the defendant intends or endorses the defamatory inference." *Tatum*, 554 S.W.3d at 635 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512 520 (D.C. Cir. 1990)). For example, a court can consider whether the publication clearly discloses its factual bases; whether the alleged implication aligns or conflicts with the publication's explicit statements; whether the publication accuses the plaintiff or merely recites the accusations of others; whether the publication merely reports sets of facts or links key facts together; and whether the publication includes facts that negate the alleged implication. *Tatum*, 554 S.W.3d at 635. "The especially rigorous review that the requirement implements is merely a reflection of the underlying principle that obligates judges to decide when allowing a case to go to a jury would, in the totality of the circumstances, endanger first amendment freedoms." *Tatum*, 554 S.W.3d at 636.

If a statement is reasonably capable of having the meaning alleged by the plaintiff, and if that meaning is reasonably capable of defaming the plaintiff, then it is for the jury to determine whether the statement actually had that meaning and whether that meaning actually was defamatory. *Tatum*, 554 S.W.3d. at 624, 631–32. PJC 110.3 submits these questions.

Corporations and other entities. Corporations and other entities may bring actions for defamation. *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2013) (recognizing professional associations share the same rights as for-profit corporations as to maintaining defamation claims). *See also Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014); *General Motors Acceptance Corp. v. Howard*, 487 S.W.2d 708, 712–13 (Tex. 1972). In cases involving a corporate plaintiff, the definition of "defamatory" should be adjusted by changing "living person" to an appropriate descriptive term.

A corporation may suffer reputation damages; such damages are noneconomic in nature. *Waste Management of Texas*, 434 S.W.3d at 147. Defamation injures the corporation's reputation, not its business. *Waste Management of Texas*, 434 S.W.3d at 151 & n.35. Business disparagement and defamation are distinct causes of action. *Waste Management of Texas*, 434 S.W.3d at 155. *See also Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014). See PJC 110.15 for jury instructions concerning business disparagement.

Natural defects. Libel encompasses the publication of "natural defects" of an individual when that publication exposes the individual to public hatred, ridicule, or financial injury. Tex. Civ. Prac. & Rem. Code § 73.001. The few cases addressing "natural defects" involve accusations of a mental problem. *See, e.g.*, *Enterprise Co. v. Ellis*, 98 S.W.2d 452 (Tex. App.—Beaumont 1936, no writ) (accusation that plaintiff was "goofey" or suffering from mental imbalance); *Hibdon v. Moyer*, 197 S.W. 1117 (Tex. App.—El Paso 1917, no writ) (accusation that plaintiff suffered from "brainstorms");

see also Raymer v. Doubleday & Co., 615 F.2d 241, 243 (5th Cir. 1980) (accusation involving physical appearance, i.e., baldness or pudginess, did not implicate a natural defect according to the court). Because this category of defamation remains viable but has rarely been used as the basis for a cause of action, the Committee removed reference to "natural defects" from the statutory definition of "defamatory" in the pattern instruction.

Defamation injurious in office, profession, or occupation. Historically, a statement injuring one in his office, profession, or occupation has been classified as defamatory per se. *Hancock v. Variyam*, 400 S.W.3d 59, 63 (Tex. 2013). In *Hancock*, the court, relying on *Restatement (Second) of Torts* § 573 (1977), held that disparagement of a general character, equally discreditable to all persons, is not enough to make it defamatory per se unless the particular quality disparaged is of such character that it is peculiarly valuable in the plaintiff's business or profession. *Hancock*, 400 S.W.3d at 67 (statements that a physician professor had a "reputation for lack of veracity" and "deals in half truths" were not defamatory per se as affecting the plaintiff in his profession); *Bedford v. Spassoff*, 520 S.W.3d 901, 904 (Tex. 2017) (statement that a youth baseball team coach was a "home wrecker" was not defamatory per se because moral judgment is not a "peculiar or unique skill related to baseball or to running a baseball organization").

About the plaintiff. The allegedly defamatory statement must be directed at the plaintiff; that is, it must appear that the plaintiff is the person with reference to whom

the allegedly defamatory statement was made. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 429 (Tex. 2000).

Opinions; satire and parody. An opinion cannot be the basis for a defamation claim. "Statements that are not verifiable as false are not defamatory. And even when a statement is verifiable, it cannot give rise to liability if the entire context in which it was made discloses that it was not intended to assert a fact…A statement that fails either test—verifiability or context—is called an opinion." *Tatum*, 554 S.W.3d at 638 (citations omitted); *see also Tatum*, 554 S.W.3d at 639 ("[S]tatements that cannot be verified, as well as statements that cannot be understood to convey a verifiable fact, are opinions.").

Satires and parodies often contain statements that have the form of factual assertions. But the point of a satire or parody is not to assert the truth of these statements but rather to make a point or express an opinion through the use of humor, irony, exaggeration, or ridicule. If a satire or parody, read in context, would not "be reasonably understood as describing actual facts," *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004), it constitutes an opinion and cannot be the basis for a defamation claim. *Tatum*, 554 S.W.3d at 639; *Isaacks*, 146 S.W.3d at 156–57. For example, a publication having the form of a news story containing defamatory content is protected satire or parody if clues such as "a procession of improbable quotes and unlikely events" or a publication's "general and intentionally irreverent tone" would lead a reasonable reader to conclude that the "news story" does not describe actual facts. *Isaacks*, 146 S.W.3d at 161.

"Whether a statement is an opinion is a question of law." *Tatum*, 554 S.W.3d at 639.

PJC 110.4 Question and Instruction on Falsity

If you answered "Yes" to Question _____ [*110.3*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the statement [*insert matter alleged to be defamatory*] false at the time it was made as it related to *Paul Payne*?

"False" means that a statement is neither true nor substantially true. A statement is "substantially true" if, in the mind of the average person, it is no more damaging to the person affected by it than a literally true statement would have been.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Use PJC 110.4 when the plaintiff must establish that the publication is false.

At common law, falsity is presumed and substantial truth is an affirmative defense. *See* Tex. Civ. Prac. & Rem. Code § 73.005 ("The truth of the statement in the publication on which an action for libel is based is a defense to the action."). But a series of cases has limited the application of this presumption on constitutional grounds.

A public official or public figure must prove that defamatory statements made about him were false. *Bentley v. Bunton*, 94 S.W.3d 561, 586 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). And even a private plaintiff must prove falsity if the defamatory speech is of public concern and the defendant is a member of the media. *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017).

The common-law presumption of falsity continues to apply in cases brought by private plaintiffs involving matters of private concern. In such cases, the plaintiff need not prove falsity, and truth is an affirmative defense. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."). Use PJC 110.8 to submit substantial truth as an affirmative defense.

Source of definition and instruction. The definition of falsity is based on *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 640 (Tex. 2018) ("A statement is true if it is either literally true or substantially true."). The definition of "substantially true" is based on *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990) ("The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to Jacobs' reputation, in the mind of

the average listener, than a truthful statement would have been."). *See also Tatum*, 554 S.W.3d at 640. Falsity must be proved by a preponderance of the evidence. *Bentley v. Bunton*, 94 S.W.3d 561, 587 (Tex. 2002); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 117 (Tex. 2000).

False impression from publication as a whole. A publication made up of true statements may nonetheless be false if the publication, taken as a whole, creates a false impression of the plaintiff. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 437–38 (Tex. 2017); *Turner*, 38 S.W.3d at 114 ("Because a publication's meaning depends on its effect on an ordinary person's perception, courts have held that under Texas law a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory.") "Just as the substantial truth doctrine precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details, [this rule] permit[s] liability for the publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong." *Turner*, 38 S.W.3d at 115.

Give the following instruction when the plaintiff alleges that a publication as a whole creates a defamatory false impression:

> A publication is false if the entire publication, taken as a whole, creates a substantially false impression of the plaintiff by omitting material

facts or suggestively juxtaposing true facts, even though each individual statement in the publication, considered in isolation, is true.

Questions of law. Whether a plaintiff is a public figure or public official is a question of constitutional law to be decided by the court. *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966)). Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers,* 461 U.S. 138, 148 n.7 (1983).

Public-proceeding privilege. A publication by a newspaper or other periodical of a fair, true, and impartial account of certain public proceedings may not be the basis of a defamation action. Tex. Civ. Prac. & Rem. Code § 73.002(a), (b)(1). The public-proceedings privilege assesses whether the published account of the proceedings (not the underlying allegations made in those proceedings) was fair, true, and impartial. *KBMT Operating Co. v. Toledo,* 492 S.W.3d 710, 711 (Tex. 2016). Where there are no fact questions on the substantial truth of the account of the proceeding, the privilege is a question of law. Where the facts are contested, the public-proceeding defense may require a question whether the publication was a fair, true, and impartial account of the public proceeding involved. *Neely v. Wilson*, 418 S.W.3d 52, 68 (Tex. 2013). This defense does not apply if the material is republished with actual malice after it has ceased to be of public concern. Tex. Civ. Prac. & Rem. Code § 73.002(a).

Fair-comment privilege. A publication by a newspaper or other periodical of a reasonable and fair comment on or criticism of a matter of public concern may not be the

basis of a defamation action. Tex. Civ. Prac. & Rem. Code § 73.002(a), (b)(2). The fair-comment privilege cannot rest on a false statement of fact. Comments that assert or affirm false statements of fact are not within the privilege. *Neely*, 418 S.W.3d at 70. In an appropriate case, the court may submit an issue inquiring about the truth of a statement of fact essential to the existence of the privilege. This defense does not apply if the material is republished with actual malice after it has ceased to be of public concern. Tex. Civ. Prac. & Rem. Code § 73.002(a).

Accurate media report of third party's allegations. Texas law recognizes a defense for newspapers, other periodicals, or broadcasters to accurately report allegations made by a third party regarding a matter of public concern. Tex. Civ. Prac. & Rem. Code § 73.005(b). In an appropriate case, the court may submit an issue inquiring about the accuracy of the report to determine applicability of the defense.

Affirmative defense of truth should not be submitted when plaintiff bears burden of falsity. Where the plaintiff bears the burden to prove the falsity of a publication, there should be no submission of a question on the affirmative defense of truth. *Rosenthal*, 529 S.W.3d at 441 (anti-SLAPP case).

PJC 110.5 Question and Instruction on Negligence

If you answered "Yes" to Question _____ [*110.4*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.3*] was false and had the potential to be defamatory?

"Ordinary care" concerning the truth of the statement and its potential to be defamatory means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Fault is an element of defamation, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, use PJC 110.5. When actual malice is required, use PJC 110.6.

Actual malice is required when the plaintiff is a public official and the defamatory statement relates to his official duties or fitness for office. *Greer v. Abraham*, 489 S.W.3d 440, 444, 447 (Tex. 2016); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 811–15 (Tex. 1976). Actual malice is also required when the plaintiff is a public figure, either generally or with respect to the subject of the defamatory statement. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000); *Foster*, 541 S.W.2d at 816–17. And actual malice is required when the plaintiff is a private figure, but the defendant is a media defendant and the subject of the defamatory statement is a matter of public concern. *Brady v. Klentzman*, 515 S.W.3d 878, 883 (Tex. 2017).

In all other cases, negligence is required. *In re Lipsky*, 460 S.W.3d at 593 ("The status of the person allegedly defamed determines the requisite degree of fault. A private individual need only prove negligence, whereas a public figure or official must prove actual malice."); *Hancock v. Variyam*, 400 S.W.3d 59, 65 n.7 (Tex. 2013).

To establish negligence, the plaintiff must prove that (1) the defendant knew or should have known that the statement was false and (2) the content of the publication would warn a reasonably prudent person of its defamatory potential. *See Foster*, 541 S.W.2d at 819–20. "Defamatory" should be defined in this question if it is not defined earlier in the charge. See PJC 110.3 for a definition of "defamatory." If PJC 110.3 is used, no additional definition is required here.

Source of instruction. The instruction is based on *Foster*, 541 S.W.2d at 819–20 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974)) ("We hold that a private individual may recover damages from a publisher or broadcaster of a defamatory falsehood as compensation for actual injury upon a showing that the publisher or broadcaster knew or should have known that the defamatory statement was false. In addition, the liability of a publisher or broadcaster of a defamatory falsehood about a private individual may not be predicated upon 'a factual misstatement whose content [would] not warn a reasonably prudent editor or broadcaster of its defamatory potential.'"). *See also D Magazine Partners L.P. v. Rosenthal*, 529 S.W.3d 429, 440 (Tex. 2017) ("[T]he defendant is negligent if it 'knew or should have known a defamatory statement was false,' unless the content of the false statement 'would not warn a reasonably prudent editor or broadcaster of its defamatory potential.'") (quoting *Neely v. Wilson*, 418 S.W.3d 52, 72 (Tex. 2018)).

Satire or parody. By nature of a satire or parody, the defendant generally knows that the statements in the satire or parody are false. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 162 (Tex. 2004). But satire and parody are nonetheless protected and may not be the basis of a defamation claim when the statements in the satire or parody, taken as a whole, would not be reasonably understood as describing actual facts. *See* Comment to PJC 110.3. When a satire or parody *is* reasonably understood as describing actual facts, the fault inquiry is altered to ask not whether the defendant had the requisite degree of fault with respect to the falsity and defamatory nature of the publication,

but whether the defendant had the requisite degree of fault with respect to the publication's being taken as describing actual facts. *See Isaacks*, 146 S.W.3d at 163 (in context of actual malice fault standard).

When the allegedly defamatory publication is a satire or parody, substitute the following question:

QUESTION _____

Did *Don Davis* know or should *he* have known, in the exercise of ordinary care, that the [*article/broadcast/other context*] contained in Question _____ [*110.2 or 110.3*] would be reasonably understood by a person of ordinary intelligence as stating actual fact?

"Ordinary care" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

PJC 110.6 Question and Instructions on Actual Malice

If you answered "Yes" to Question _____ [*110.5*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that, at the time *Don Davis* made the statement in Question _____ [*110.3*]—

1. *Don Davis* knew it was false as it related to *Paul Payne*, or

2. *Don Davis* made the statement with a high degree of awareness that it was probably false, to an extent that *Don Davis* in fact had serious doubts as to the truth of the statement?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. Fault is an element of defamation, but the level of fault required can be either negligence or "actual malice," depending on the circumstances of the case. *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015). When negligence is required, use PJC 110.5. When actual malice is required, use PJC 110.6. For a discussion of the circumstances under which each level of fault is required, see the Comment to PJC 110.5.

PJC 110.6 can also be used when an actual malice finding is relevant to some other issue. For example, in a case brought by a private figure involving a matter of public concern, the plaintiff must prove actual malice by clear and convincing evidence to recover exemplary damages. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760–61 (1985) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). And actual malice may also be a fact issue in a case involving a qualified-privilege defense. *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 900 (Tex. 1970).

"Actual malice." Because the U.S. Supreme Court has expressed remorse over the use of "actual malice" to describe the standard, and chapter 41 of the Texas Civil Practice and Remedies Code uses "malice" in connection with exemplary damages, the instruction avoids the use of the phrases "actual malice" and "reckless disregard." *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989); *see also* Tex. Civ. Prac. & Rem. Code § 41.003.

Questions of law. Determination of whether the plaintiff is a public official or public figure is a matter of law for the court to decide. *WFAA-TV, Inc. v. McLemore*,

978 S.W.2d 568, 571 (Tex. 1998). Whether the subject matter of a publication is a matter of public concern is a question of law for the court. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983).

Source of definition and instruction. The instruction is derived from *Bentley v. Bunton*, 94 S.W.3d 561, 591, 600 (Tex. 2002). *See also St. Amant v. Thompson*, 390 U.S. 727 (1968). The definition of clear and convincing evidence is based on *Bentley*, 94 S.W.3d at 596–97. *See also* Tex. Civ. Prac. & Rem. Code § 41.001(2).

Organizations. When an organization is accused of defamation in a case requiring proof of actual malice, an instruction directing the jury to those persons within the organization whose state of mind is at issue may be appropriate. In determining whether an organization had actual malice, the U.S. Supreme Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that it was not enough that the *New York Times* had stories in its files showing that a proposed advertisement was false. The court instead noted that "[t]here was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable." *New York Times Co.*, 376 U.S. at 287. Accordingly, for the organization to be liable, "the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement." *New York Times Co.*, 376 U.S. at 287.

Satire or parody. By nature of a satire or parody, the defendant generally knows that the statements in the satire or parody are false. *New Times, Inc. v. Isaacks*, 146

S.W.3d 144, 162 (Tex. 2004). But satire and parody are nonetheless protected and may not be the basis of a defamation claim when the statements in the satire or parody, taken as a whole, would not be reasonably understood as describing actual facts. *See* Comment to PJC 110.3. When a satire or parody *is* reasonably understood as describing actual facts, the fault inquiry is altered to ask not whether the defendant had the requisite degree of fault with respect to the falsity and defamatory nature of the publication, but whether the defendant had the requisite degree of fault with respect to the publication's being taken as describing actual facts. *See Isaacks*, 146 S.W.3d at 163.

When the allegedly defamatory publication is a satire or parody, substitute the following question:

QUESTION _____

Do you find by clear and convincing evidence that at the time *Don Davis* published the [*article/broadcast/other context*] *he* knew or had a high degree of awareness that the [*article/broadcast/other context*] would reasonably be interpreted as stating actual fact?

"Clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the jury a firm belief or conviction as to the truth of the allegations sought to be established.

Answer “Yes” or “No.”

Answer: _____

PJC 110.7 Actual Malice in Cases of Qualified Privilege (Comment)

PJC 110.7 discusses some situations in which qualified privilege is a defense to defamation. Other examples are described in the Comments to PJC 110.4.

The common law provides a qualified privilege against defamation liability when "communication is made in good faith and the author, the recipient or a third person, or one of their family members, has an interest that is sufficiently affected by the communication." *Burbage v. Burbage*, 447 S.W.3d 249, 254 (Tex. 2014) (citation omitted). When the facts are undisputed and the language used in the publication is not ambiguous, the question whether a publication is protected by a qualified privilege is one of law for the court. *Burbage*, 447, S.W.3d at 254 (citing *Fitzjarrald v. Panhandle Publishing Co.*, 228 S.W.2d 499, 505 (1950)). Once the qualified privilege is shown to exist, the burden is on the plaintiff to show the privilege is lost. Privilege is an affirmative defense in the nature of confession and avoidance, and, except where the plaintiff's petition shows on its face that the alleged defamatory publication is protected by a privilege, the defendant has the burden of pleading and proving that the publication is privileged. *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 884 (Tex. 1970).

The plaintiff may overcome the qualified privilege only by establishing that the publication was made with actual malice. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995); *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896, 900–901 (Tex. 1970). It is unclear whether the plaintiff's burden of proof to defeat the privilege by showing actual malice is by a preponderance of the evidence or by clear and

convincing evidence. *Compare Hagler v. Proctor & Gamble Manufacturing Co.*, 884 S.W.2d 771 (Tex. 1994) (actual malice in qualified privilege context requires knowing falsity or reckless disregard for truth, citing cases indicating that such matters must be proved by clear and convincing evidence), *with Ellis County State Bank v. Keever*, 888 S.W.2d 790, 792–93 n.5 (Tex. 1994) (stating that preponderance of the evidence standard is firmly established in Texas civil cases; a more onerous burden is required only in extraordinary circumstances, such as when mandated by the U.S. Supreme Court). If the court concludes that actual malice provides the standard, the question in PJC 110.6 would be appropriate. If the court concludes that a preponderance burden of proof applies, the question in PJC 110.6 should be modified accordingly.

Whether a qualified privilege exists can depend on whether the publication of the alleged defamation was limited to certain persons. *See Randall's Food Markets, Inc.*, 891 S.W.2d at 646 ("The privilege remains intact as long as communications pass only to persons having an interest or duty in the matter to which the communications relate."). If the evidence raises a fact issue whether the defendant communicated the statement to persons not covered by the privilege, the court should submit that issue to the jury. *Mitre v. Brooks Fashion Stores Inc.*, 840 S.W.2d 612, 619 (Tex. App.—Corpus Christi–Edinburg 1992, writ denied), *overruled on other grounds by Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

PJC 110.8 Question and Instructions on Defense of Truth

QUESTION _____

Was the statement in Question _____ [*110.3*] true or substantially true at the time it was made as it related to *Paul Payne*?

A statement is "substantially true" if, in the mind of the average person, it is no more damaging to the person affected by it than a literally true statement would have been.

In connection with this question, you are instructed that *Don Davis* has the burden to prove substantial truth by a preponderance of the evidence.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 110.8 should be submitted only in cases when the common-law presumption of falsity applies; in such cases substantial truth is an affirmative defense. *See* Tex. Civ. Prac. & Rem. Code § 73.005(a); *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). PJC 110.8 should not be submitted when the common-law presumption does not apply and the plaintiff is required to prove falsity.

For a discussion of the circumstances under which the common-law presumption of falsity applies, see the Comment to PJC 110.4.

Source of instruction. The question is based on *Dallas Morning News, Inc*. v. *Tatum*, 554 S.W.3d 614, 640 (Tex. 2018) ("A statement is true if it is either literally true or substantially true."). The definition of substantial truth is based on the discussion of substantial truth in *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990) ("The test used in deciding whether the broadcast is substantially true involves consideration of whether the alleged defamatory statement was more damaging to Jacobs' reputation, in the mind of the average listener, than a truthful statement would have been."). *See also Tatum*, 554 S.W.3d at 640 ("A statement is substantially true if it is 'no more damaging to the plaintiff's reputation than a truthful statement would have been.'") (quoting *Neely v. Wilson*, 418 S.W.3d 52, 66 (Tex. 2013)).

False impression from publication as a whole. A publication made up of true statements may nonetheless be false if the publication, taken as a whole, creates a false impression of the plaintiff. *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429, 437–38 (Tex. 2017); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000) ("Because a publication's meaning depends on its effect on an ordinary person's perception, courts have held that under Texas law a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory.") "Just

as the substantial truth doctrine precludes liability for a publication that correctly conveys a story's 'gist' or 'sting' although erring in the details, [this rule] permit[s] liability for the publication that gets the details right but fails to put them in the proper context and thereby gets the story's 'gist' wrong." *Turner*, 38 S.W.3d at 115.

The following instruction should be used when the plaintiff alleges that a publication as a whole creates a defamatory false impression:

> A publication is not true or substantially true if the entire publication, taken as a whole, creates a substantially false impression of the plaintiff by omitting material facts or suggestively juxtaposing true facts, even though each individual statement in the publication, considered in isolation, is true.

[*PJCs 110.9-.14 are reserved for expansion*]