**Improper Relationship Between Educator and Student**

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# CPJC 21.32 Instruction-- Improper Relationship Between Educator and Student—By Employee of Complainant’s School

**LAW SPECIFIC TO THE CASE**

**Accusation**

 The state accuses the defendant of having committed the offense of having an improper relationship between an educator and a student.

**Relevant Statutes**

A person commits an offense if, while an employee of a public secondary school, that person engages in sexual contact with a person who is enrolled at the public secondary school at which the employee worked.

**Definitions**

*Sexual Contact*

"Sexual contact" means any touching by an employee of a public secondary school of the anus, breast, or any part of the genitals of a person enrolled in the secondary school where the employee worked, or any touching of any part of the body of a person enrolled in the public secondary school where the employee worked with the anus, breast, or any part of the genitals of the employee, committed with intent to arouse or gratify the sexual desire of any person*.*

*Intent to arouse or gratify the sexual desire of any person*

A person has the intent to arouse or gratify the sexual desire of any person when it is the person’s conscious objective or desire to arouse or gratify the sexual desire of any person.

*On or about*

The indictment alleges that the offense was committed on or about [*date*]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [*date of indictment*], the date the indictment was filed. But the offense cannot be so far back in time that it is outside the statute of limitations period – a particular amount of time required for a case to be indicted or prosecution will be barred. The statute of limitations for improper relationship between educator and student is three years from the date of the commission of the offense.

*[Include if complainant is under seventeen years old and requested by the defense, per Texas Code of Criminal Procedure § 38.37.]*

**Evidence of Wrongful Acts Defendant Possibly Committed**

During the trial, you heard evidence that the defendant may have committed wrongful acts against [*name*] not charged in the indictment. [*If requested, include description of specific acts.*] The state offered the evidence to show the state of mind of the defendant and the child [and/or] the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against [*name*]. Those of you who believe the defendant did the wrongful act may consider it.

 Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

*[Include if raised by the evidence and requested by the defense.]*

**State’s Election of a Particular Incident**

The state has offered evidence of more than one incident to prove improper relationship as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g.,* the first sexual contact to her breast that [*name*] testified that she remembered]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of improper relationship on that particular occasion. You cannot find the defendant guilty of improper relationship based on an occurrence at any other time or place other than the incident that the state has chosen.

 Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g.,* the defendant’s intent].

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, four elements. The elements are that----

 1. the defendant, in [*county*] County, Texas, on or about [*date*], engaged in [insert specific allegations of touching, e.g., touching of the breast of [*name*]] ;

 2. the defendant did this with the intent to arouse or gratify the sexual desire of any person;

 3. the defendant was an employee of a public secondary school; and

 4. [*name*] was enrolled in the school at which defendant worked.

*[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]*

You must all agree on elements 1, 2, 3, and 4 listed above.

 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

*[or]*

 The state has presented evidence of more than one incident to prove improper relationship between educator and student as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1, 2, 3, and 4 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

 If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, the four elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

*[Include defense if raised by the evidence; see CPJC XXX. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in* Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*]*

**COMMENT**

Improper relationship between educator and student is prohibited by and defined in Tex. Penal Code §21.12. The multiple subsections of the statute and enumeration of disjunctive conduct and attendant circumstance elements within those subsections offer numerous permutations of offenses. This pattern charge is drafted for an offense committed under section 21.12(a)(1), involving a defendant who is a public secondary school employee engaging in sexual contact – specifically here, touching of the breast – with a student enrolled at the same school where the defendant is employed. Practitioners faced with different fact patterns under section 21.12(a)(1) (*e.g.*, a private or primary school, or different varieties of sexual contact, or conduct involving sexual intercourse or deviate sexual intercourse) should tailor the instruction to fit their cases.

**Background of Section 21.12.** Section 21.12 was enacted by the Texas Legislature in 2003 as the first specific criminal prohibition on sexual relationships between educators and students. It has been amended five times: in 2007, adding online solicitation as a means of committing the offense, in 2009, adding the affirmative defense of spousal relationship, in 2011, expanding class of educators who can be charged, in 2017, amending the definition of the offense for defendants not employed by the same school as the complainant, and in 2021, adding a new offense-specific definition of “sexual contact,” and providing certain limits on schools’ disclosure of the names of individuals charged under the statute.

Relatively few appellate cases have interpreted the statutory language of section 21.12, and only a single Court of Criminal Appeals case. Decisions construing other statutes contained within Chapter 21, however, may be instructive, particularly with regard to offense elements that appear repeatedly in statutes within that chapter. Defendants have challenged the constitutionality of section 21.12(a) under a number of theories, typically grounded in the assertion of a fundamental right to engage in consensual sexual relationships. The courts of appeals have uniformly rejected these challenges. See, e.g,. Ramirez v. State, 557 S.W.3d 717 (Ct. App.-Corpus-Christi-Edinburg 2018) (discretionary rev. refused Jun. 6, 2018) (rejecting contention that defendant had fundamental right to consensual sexual relationship and finding that statute is rationally related to legitimate state interest); Toledo v. State, 519 S.W.3d 273 (Tex. App.-Houston 2017) (discretionary rev. refused Aug. 23, 2017) (rejecting substantive due process and equal protection challenges); In re Shaw, 204 S.W.3d 9 (Tex. App.-Texarkana 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting substantive due process, vagueness, and overbreadth challenges); Berkovsky v. State, 209 S.W.3d 252 (Tex. App.-Waco 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting challenges based on asserted fundamental right to consensual sexual relationship); Ex parte Morales, 212 S.W.3d 483 (Ct. App.-Austin 2006) (discretionary rev. refused Feb. 7, 2007) (rejecting equal protection, due process, and First Amendment challenges premised on asserted fundamental right to consensual sexual relationship). The Court of Criminal Appeals has not addressed the constitutionality of section 21.12(a).

**Formulation of Charge – Element of Sexual Contact.**In formulating a charge for section 21.12(a)(1), the Committee grappled with how the element of “sexual contact” fits within the larger structure of the statute. The element, as defined in section 21.12(e), poses several challenges in terms of drafting a charge. First, without looking to the definition of “sexual contact,” enumeration of the statutory elements of the offense of Improper Relationship will be silent as to any culpable mental state; the requirement that the defendant have “intent to arouse or gratify the sexual desire of any person” is a component of the definition of “sexual contact.” The Committee was concerned that not specifically instructing the jury that it should determine whether that culpable mental state was proved risked inadequately advising the jury as to a critical aspect of the state’s proof. See Victory v. State, 547 S.W.2d 1 (Tex. Crim. App. 1976) (holding in prosecution for indecency with a child that “intent to arouse or gratify” clause in statutory definition of “sexual contact” was an element of the offense required to be alleged in the indictment). This concern councils in favor of integrating the definition of “sexual contact” into the Application paragraph, rather than simply instructing the jury to determine whether the element of “sexual contact” was proved and direct them to an instruction on the definition of that phrase.

A second challenge in drafting is posed by the disjunctive phrasing of the definition of “sexual contact” and the risk of erroneously instructing jurors in a manner that permits a non-unanimous verdict. The conduct amounting to sexual contact under section 21.12(e) is “any touching . . . of the anus, breast, *or* any part of the genitals” of the enrolled person, *or* “any touching of any part of the body of the enrolled person . . . with the anus, breast, *or* any part of the genitals of the employee.” Tex. Penal Code § 21.12(e) (emphasis added). The Court of Criminal Appeals has held that the nearly identical definition of “sexual contact” contained in Tex. Penal Code 21.01 “criminalizes three separate types of conduct—touching the anus, touching the breast, and touching the genitals with the requisite mental state,” and that “[t]herefore, each act constitutes a different criminal offense and juror unanimity is required as to the commission of any one of these acts.” The Court in *Pizzo* reversed the guilty verdict because the judge’s instruction, which was based on the language of the indictment, improperly charged the jury in the disjunctive and thereby permitted the jury to convict without agreeing upon the body part that was touched. Pizzo v. State, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). In *Loving v. State*,the Court of Criminal Appeals reaffirmed its conclusion in *Pizzo* in holding, for Double Jeopardy purposes, that a defendant who exposed himself to a minor and touched the same minor minutes later had violated the Indecency With a Minor statute twice. Loving v. State, 401 S.W.3d 642, 649 (Tex. Crim. App. 2013). Although not binding for purposes of construing section 21.12, *Pizzo* and *Loving* provides a strong indication that the various ways of touching enumerated in section 21.12(e) are, also, separate offenses on which the jury must be separately instructed. This also councils in favor of a more integrated approach to crafting the Application paragraph.

Ultimately, the Committee elected to draft an Application paragraph that integrates the definition of “sexual contact” into the first two elements of the offense (one, touching, and two, intent to arouse or gratify). The inclusion of a single act of touching in the first element reflects the Committee’s view that, like the offense of Indecency With a Child, unanimity is required as to each incident of sexual contact. The Committee determined that this was the better view of the law in light of *Pizzo* and the structural and substantive similarities between the Indecency and Improper Relationship offenses. Nevertheless, some Committee members noted that, statutory language aside, the title of the offense perhaps supplies the basis for an argument that the gravamen of the offense is not the particular acts that constitute sexual contact but rather the “relationship” between educator and student.

 Finally, an additional definitional issue arises with respect to the element of “sexual contact”: whether the element is established on proof of touching over *or* under clothing, or whether instead touching under clothing is required to be proved. The question arises because of inconsistency among three separate statutory definitions of “sexual contact” that exist in Chapter 21 of the Penal Code. Some history is required to explain the point.

Prior to 2001, section 21.01(2) provided the only definition of the term: “any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.” Tex. Penal Code § 21.01(2). The definition applied for any offense contained within Chapter 21 of the Penal Code. In *Resnick v. State*, a case involving prosecution for public lewdness, the Court of Criminal Appeals rejected the contention that “touching” within the meaning of section 21.01(2) required that the defendant make skin-to-skin contact; because “the essence of the act of touching is to perceive by the sense of feeling,” the element of touching is proved by evidence of contact under *or* over clothing. Resnick v. State, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978). Then, in 2001, the legislature amended the offense of Indecency With a Child, Tex. Penal Code § 21.11, to add an offense-specific definition to the statute. The definition provided (and still provides) that for purposes of section 21.11, “sexual contact” means, inter alia, “any touching by a person, *including touching through clothing*, of the anus, breast, or any part of the genitals of a child.” Tex. Penal Code § 21.11(c)(1) (emphasis added). The legislature’s specific inclusion of “touching through the clothing” raised the question – or at least caused some defendants to raise the question – whether the definition of “sexual contact” in section 21.01(2) was thereby impliedly limited to touching under clothing.

In *Gonzalez v. State*,the court of appeals rejected this argument in a prosecution under 21.12. Gonzalez v. State, No. 13-15-00509-CR, 2017 WL 1281390 (Tex. App.—Corpus Christi-Edinburg Apr. 6, 2017) (pet. discretionary review refused Aug. 23, 2017). The court observed that the 2001 amendments were to a different statute – necessarily, since section 21.12 was first enacted two years later, in 2003. Relying on the canon of construction that the legislature is presumed to know the caselaw construing the meaning of the statutory language it enacts, the *Gonzalez* court concluded that the meaning of the phrase “sexual contact,” chosen by the legislature in 2003, was presumptively what governing caselaw held it to be: inclusive of touching under and over clothing. *Id.* at \*2. Other courts have reached the same conclusion in post-2001 prosecutions for public lewdness, which also incorporates the section 21.01 definition of “sexual contact.” See Perales v. State, No. 03-13-00511-CR, 2014 WL 5107130, at \*3 (Tex. App.—Austin Oct. 10, 2014); Williams v. State, No. 05-03-00648-CR, 2004 WL 95204, at \*1–2 (Tex. App.—Dallas Jan. 21, 2004)

The issue in *Gonzalez* may be posed in a different light in the aftermath of the 2021 amendments to section 21.12, which added a new, offense-specific definition of sexual contact. Tex. Penal Code § 21.12(e). Like section 21.01, and unlike section 21.11, section 21.12(e) defines sexual contact as, inter alia, “any touching” without specifying that the touching may be over or under the clothing. Given not only *Resnick* but also the more recent opinions from the courts of appeal construing the section 21.01 definition to include touching over and under clothing, the presumption is even stronger that the legislature intended for “touching” to be defined in a manner consistent with that caselaw. Although the Committee’s view was that touching over or under clothing would satisfy the element of “sexual contact” as defined in section 21.12(e), the pattern charge does not include reference to that fact because no such language appears in the statute. See Walters v. State, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007) (“[G]enerally speaking, neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction . . . is not grounded in the Penal Code.”).

Practitioners should note that the September 1, 2021, is the effective date of the legislation that created subsection (e). Offenses committed prior to September 1, 2021, are governed by the definition contained in section 21.01.

**Culpable Mental State.**A third question of statutory construction posed by section 21.12(a) is whether the state must prove any culpable mental state element with respect to the attendant circumstance of the student being enrolled in the school where the defendant was employed. Put differently and more practically, may a defendant who sincerely and reasonably is unaware that the individual with whom they engaged in sexual contact was a student at the school where the defendant is employed offer a mistake defense? Tex. Penal Code § 8.02. The question perhaps takes on additional importance in light of the fact that section 21.12 criminalizes relationships between school employees and students regardless of whether the student is a minor.

Only one court of appeals decision has squarely addressed this issue – albeit in abbreviated fashion – and has stated that at least a culpable mental state of recklessness must be proved with respect to the enrollment status of the student. Rejecting the defendant’s contention that “the statute does not include the element of knowledge in its definition and, as applied, did not require appellant to know the ‘complaining witness’ is a student,” the court observed first that the argument was not properly raised in the defendant’s pretrial motion for a writ of habeas corpus. It went on to state, “while section 21.12 lacks a specific mental state, section 6.02(c) of the penal code supplies the applicable mental state,” such that a culpable mental state of at least “recklessness suffices to establish criminal responsibility.” Ex parte Guerrero, No. 05-06-01316-CR, 2006 WL 3718339, at \*3 (Tex. App. Dec. 19, 2006). The court’s conclusion on the merits is arguably dicta, given its strong suggestion that the argument was not properly raised at that stage of litigation. Moreover, the court’s acceptance of the defendant’s premise that section 6.02(c) was applicable in construing section 21.12(a) is questionable in light of Victory v. State, 547 S.W.2d 1, 2 (Tex. Crim. App. 1976), in which the Court of Criminal Appeals held that the “intent to arouse or gratify” mental state component of the “sexual contact” definition was an element that must be alleged in the indictment. If section 21.12 in fact has a mental state element of “intent to arouse or gratify” then the definition of the offense does not fail to prescribe a culpable mental state, and section 6.02(c) is inapplicable.

An additional basis for arguing that section 6.02(c)is inapplicable to section 21.12(a) lies in section 6.02(b)’s proviso that “a culpable mental state is nevertheless required” if the definition of an offense does not supply one “*unless* the definition plainly dispenses with any mental element.” Tex. Penal Code § 6.02(b). Section 21.12(a)(1) contains no mental state element whatsoever. By contrast, three other subdivisions of the statute *do* contain mental state elements: section 21.12(e), defining “sexual contact” to require proof of “intent to arouse or gratify,” and (perhaps more significantly), sections 21.12(a)(2) and (3), which make it a crime for school employees holding certain positions to engage in sexual contact, deviate sexual intercourse, or sexual intercourse, and for any employee to engage in online solicitation, with “a person *the employee knows is* a person” who is a student at a school other than the one where the employee works, or is a participant in a school-sponsored activity. Tex. Penal Code §§ 21.12(3) & (e). In Long v. State, 931 S.W.2d 285, 291 (Tex. Crim. App. 1996), the Court of Criminal Appeals found evidence that the legislature had “plainly dispensed” with a culpable mental state element in one subdivision of a statute, when another subdivision of the same statute did contain a culpable mental state element.

For these reasons, and given the statute’s silence and the absence of guidance from the Court of Criminal Appeals, the Committee opted not to include in the charge any culpable mental state element with respect to the attendant circumstance of the student being enrolled in the school where the defendant worked. Practitioners, however, should be aware of this issue. Some members of the Committee were of the view that the absence of such a mental state element might pose a particularly grave risk of unfairness in cases where the student was 17 or older – that is to say, of an age where the conduct would not otherwise constitute a crime. In such instances, the offense may be more like a “circumstances of the conduct” offense in which “otherwise innocent behavior becomes criminal because of the circumstances under which it is done,” such that “a culpable mental state is required as to those surrounding circumstances.” McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). Even then, perhaps a fairness concern arises only when it is truly onerous to place the burden of ascertaining whether the complainant was a student on the defendant – such as when the defendant is only a periodic employee of the school, or when the student body is quite large. Practitioners should be alert to the possibility that there may be special situations where prudence counsels adding a culpable mental state element of knowledge or recklessness as to the attendant circumstance of the student being enrolled at the school where the defendant worked.

**Other Elements – Caselaw.** Texas courts have had occasion to construe two other attendant circumstance elements of the Improper Relationship statute. In *State v. Sutton*, the Court of Criminal Appeals reversed the conviction of a school district police officer for Improper Relationship on the ground that the element of “employee of a public or private primary or secondary school” was not proved. In the course of his duties the officer occasionally visited the school at which the complainant was a student, but he was employed by the Conroe ISD Police Department, not the school itself. Court rejected the state’s argument that the legislature intended to include within the term “employee” all employees of the school *district* as well as the school. State v. Sutton, 499 S.W.3d 434, 436–37 (Tex. Crim. App. 2016) (holding police officer employee of school district is not “employee of the school” within meaning of 21.12, and that police officer did not “work at” school at which victim was enrolled by virtue of occasionally going there in course of responsibilities);

In *Brookins v. State* the court of appeals took an expansive view of the meaning of “public secondary school” under section 21.12(a), holding that the phrase includes a Texas Youth Commission facility offering “educational programs [that] cover substantially the same field as typical high schools,” and rejecting the defendant’s argument that the term was meant to exclude nontraditional educational facilities. Brookins v. State, No. 08-10-00243-CR, 2011 WL 6382531, at \*5–6 (Tex. App.-El Paso Dec. 14, 2011).

# CPJC 21.33 Instruction-- Improper Relationship Between Educator and Student—By Employee of School Other Than Complainant’s

**LAW SPECIFIC TO THE CASE**

**Accusation**

The state accuses the defendant of having committed the offense of having an improper relationship between an educator and a student.

**Relevant Statutes**

A person commits an offense if, while an employee of a public or private primary or secondary school, and while holding a position of teacher, regardless of whether the employee holds the appropriate certificate, permit, license, or credential for the position, that person engages in sexual contact with a person who the employee knew was enrolled at a public secondary school other than the one at which the employee worked.

**Definitions**

*Sexual Contact*

"Sexual contact" means any touching by an employee of a public secondary school of the anus, breast, or any part of the genitals of a person enrolled in a public secondary school other than where the employee worked, or any touching of any part of the body of a person enrolled in the public secondary school with the anus, breast, or any part of the genitals of the employee, committed with intent to arouse or gratify the sexual desire of any person*.*

*Intent to arouse or gratify the sexual desire of any person*

A person has the intent to arouse or gratify the sexual desire of any person when it is the person’s conscious objective or desire to arouse or gratify the sexual desire of any person.

*On or about*

The indictment alleges that the offense was committed on or about [*date*]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [*date of indictment*], the date the indictment was filed. But the offense cannot be so far back in time that it is outside the statute of limitations period – a particular amount of time required for a case to be indicted or prosecution will be barred. The statute of limitations for improper relationship between educator and student is three years from the date of the commission of the offense.

*[Include if complainant is under seventeen years old and requested by the defense, per Texas Code of Criminal Procedure § 38.37.]*

**Evidence of Wrongful Acts Defendant Possibly Committed**

During the trial, you heard evidence that the defendant may have committed wrongful acts against [*name*] not charged in the indictment. [*If requested, include description of specific acts.*] The state offered the evidence to show the state of mind of the defendant and the child [and/or] the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against [*name*]. Those of you who believe the defendant did the wrongful act may consider it.

 Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

*[Include if raised by the evidence and requested by the defense.]*

**State’s Election of a Particular Incident**

The state has offered evidence of more than one incident to prove improper relationship as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g.,* the first sexual contact to her breast that [*name*] testified that she remembered]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of improper relationship on that particular occasion. You cannot find the defendant guilty of improper relationship based on an occurrence at any other time or place other than the incident that the state has chosen.

 Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g.,* the defendant’s intent].

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, six elements. The elements are that----

 1. the defendant, in [*county*] County, Texas, on or about [*date*], engaged in [*insert specific allegation of touching, e.g.*, touching the breast of [*name*]];

 2. the defendant did this with the intent to arouse or gratify the sexual desire of any person;

3. the defendant was an employee of a public secondary school;

 4. the defendant held the position of teacher [*include if raised by the evidence*, regardless of whether they hold the appropriate certificate, permit, license, or credential for the position];

 5. [*name*] was enrolled at a public secondary school other than the one at which the defendant worked; and

 6. the defendant knew the person [*name*] was enrolled at a public secondary school other than the one at which the defendant worked.

*[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]*

You must all agree on elements 1, 2, 3, 4, 5 and 6 listed above.

 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5 and 6 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, each of the six elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

 The state has presented evidence of more than one incident to prove improper relationship between educator and student as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1, 2, 3, 4, 5 and 6 listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

 If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, 4, 5 and 6 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, the six elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

*[Include defense if raised by the evidence; see CPJC XXX. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in* Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*]*

**COMMENT**

 Improper relationship between educator and student is prohibited by and defined in Tex. Penal Code §21.12. The multiple subsections of the statute and enumeration of disjunctive conduct and attendant circumstance elements within those subsections offer numerous permutations of offenses. This pattern charge is drafted for an offense committed under section 21.12(a)(2)(A), involving defendant who is a public secondary school employee holding a position described by Section 21.003(a) or (b) of the Education Code – here, specifically, a teacher – engaging in sexual contact – here, specifically, touching of the breast – with a student enrolled at a different school than the one where the defendant is employed. Practitioners faced with different fact patterns under § 21.12(a)(2) (*e.g.*, a private or primary school, or different positions described in the Education Code, or different varieties of sexual contact, or conduct involving sexual intercourse or deviate sexual intercourse, or a complainant who was a student participant in an educational activity that was sponsored by a school district) should tailor the instruction to fit their cases.

**Background of Section 21.12.**Section 21.12 was enacted by the Texas Legislature in 2003 as the first specific criminal prohibition on sexual relationships between educators and students. It has been amended five times: in 2007, adding online solicitation as a means of committing the offense, in 2009, adding the affirmative defense of spousal relationship, in 2011, expanding class of educators who can be charged, in 2017, amending the definition of the offense for defendants not employed by the same school as the complainant, and in 2021, adding a new offense-specific definition of “sexual contact,” and providing certain limits on schools’ disclosure of the names of individuals charged under the statute.

Relatively few appellate cases have interpreted the statutory language of section 21.12, and only a single Court of Criminal Appeals case. Decisions construing other statutes contained within Chapter 21, however, may be instructive, particularly with regard to offense elements that appear repeatedly in statutes within that chapter. Defendants have challenged the constitutionality of section 21.12(a) under a number of theories, typically grounded in the assertion of a fundamental right to engage in consensual sexual relationships. The courts of appeals have uniformly rejected these challenges. See, e.g,. Ramirez v. State, 557 S.W.3d 717 (Ct. App.-Corpus-Christi-Edinburg 2018) (discretionary rev. refused Jun. 6, 2018) (rejecting contention that defendant had fundamental right to consensual sexual relationship and finding that statute is rationally related to legitimate state interest); Toledo v. State, 519 S.W.3d 273 (Tex. App.-Houston 2017) (discretionary rev. refused Aug. 23, 2017) (rejecting substantive due process and equal protection challenges); In re Shaw, 204 S.W.3d 9 (Tex. App.-Texarkana 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting substantive due process, vagueness, and overbreadth challenges); Berkovsky v. State, 209 S.W.3d 252 (Tex. App.-Waco 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting challenges based on asserted fundamental right to consensual sexual relationship); Ex parte Morales, 212 S.W.3d 483 (Ct. App.-Austin 2006) (discretionary rev. refused Feb. 7, 2007) (rejecting equal protection, due process, and First Amendment challenges premised on asserted fundamental right to consensual sexual relationship). The Court of Criminal Appeals has not addressed the constitutionality of section 21.12(a).

**Formulation of Charge – Element of Sexual Contact.**In formulating a charge for section 21.12(a)(2)(A), the Committee grappled with how the element of “sexual contact” fits within the larger structure of the statute. The element, as defined in section 21.12(e), poses several challenges in terms of drafting a charge. First, without looking to the definition of “sexual contact,” enumeration of the statutory elements of the offense of Improper Relationship will be silent as to any culpable mental state; the requirement that the defendant have “intent to arouse or gratify the sexual desire of any person” is a component of the definition of “sexual contact.” The Committee was concerned that not specifically instructing the jury that it should determine whether that culpable mental state was proved risked inadequately advising the jury as to a critical aspect of the state’s proof. See Victory v. State, 547 S.W.2d 1 (Tex. Crim. App. 1976) (holding in prosecution for indecency with a child that “intent to arouse or gratify” clause in statutory definition of “sexual contact” was an element of the offense required to be alleged in the indictment). This concern councils in favor of integrating the definition of “sexual contact” into the Application paragraph, rather than simply instructing the jury to determine whether the element of “sexual contact” was proved and direct them to an instruction on the definition of that phrase.

A second challenge in drafting is posed by the disjunctive phrasing of the definition of “sexual contact” and the risk of erroneously instructing jurors in a manner that permits a non-unanimous verdict. The conduct amounting to sexual contact under section 21.12(e) is “any touching . . . of the anus, breast, *or* any part of the genitals” of the enrolled person, *or* “any touching of any part of the body of the enrolled person . . . with the anus, breast, *or* any part of the genitals of the employee.” Tex. Penal Code § 21.12(e) (emphasis added). The Court of Criminal Appeals has held that the nearly identical definition of “sexual contact” contained in Tex. Penal Code 21.01 “criminalizes three separate types of conduct—touching the anus, touching the breast, and touching the genitals with the requisite mental state,” and that “[t]herefore, each act constitutes a different criminal offense and juror unanimity is required as to the commission of any one of these acts.” The Court in *Pizzo* reversed the guilty verdict because the judge’s instruction, which was based on the language of the indictment, improperly charged the jury in the disjunctive and thereby permitted the jury to convict without agreeing upon the body part that was touched. Pizzo v. State, 235 S.W.3d 711, 719 (Tex. Crim. App. 2007). In *Loving v. State*,the Court of Criminal Appeals reaffirmed its conclusion in *Pizzo* in holding, for Double Jeopardy purposes, that a defendant who exposed himself to a minor and touched the same minor minutes later had violated the Indecency With a Minor statute twice. Loving v. State, 401 S.W.3d 642, 649 (Tex. Crim. App. 2013). Although not binding for purposes of construing section 21.12, *Pizzo* and *Loving* provides a strong indication that the various ways of touching enumerated in section 21.12(e) are, also, separate offenses on which the jury must be separately instructed. This also councils in favor of a more integrated approach to crafting the Application paragraph.

Ultimately, the Committee elected to draft an Application paragraph that integrates the definition of “sexual contact” into the first two elements of the offense (one, touching, and two, intent to arouse or gratify). The inclusion of a single act of touching in the first element reflects the Committee’s view that, like the offense of Indecency With a Child, unanimity is required as to each incident of sexual contact. The Committee determined that this was the better view of the law in light of *Pizzo* and the structural and substantive similarities between the Indecency and Improper Relationship offenses. Nevertheless, some Committee members noted that, statutory language aside, the title of the offense perhaps supplies the basis for an argument that the gravamen of the offense is not the particular acts that constitute sexual contact but rather the “relationship” between educator and student.

 Finally, an additional definitional issue arises with respect to the element of “sexual contact”: whether the element is established on proof of touching over *or* under clothing, or whether instead touching under clothing is required to be proved. The question arises because of inconsistency among three separate statutory definitions of “sexual contact” that exist in Chapter 21 of the Penal Code. Some history is required to explain the point.

Prior to 2001, section 21.01(2) provided the only definition of the term: “any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.” Tex. Penal Code § 21.01(2). The definition applied for any offense contained within Chapter 21 of the Penal Code. In *Resnick v. State*, a case involving prosecution for public lewdness, the Court of Criminal Appeals rejected the contention that “touching” within the meaning of section 21.01(2) required that the defendant make skin-to-skin contact; because “the essence of the act of touching is to perceive by the sense of feeling,” the element of touching is proved by evidence of contact under *or* over clothing. Resnick v. State, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978). Then, in 2001, the legislature amended the offense of Indecency With a Child, Tex. Penal Code § 21.11, to add an offense-specific definition to the statute. The definition provided (and still provides) that for purposes of section 21.11, “sexual contact” means, inter alia, “any touching by a person, *including touching through clothing*, of the anus, breast, or any part of the genitals of a child.” Tex. Penal Code § 21.11(c)(1) (emphasis added). The legislature’s specific inclusion of “touching through the clothing” raised the question – or at least caused some defendants to raise the question – whether the definition of “sexual contact” in section 21.01(2) was thereby impliedly limited to touching under clothing.

In *Gonzalez v. State*,the court of appeals rejected this argument in a prosecution under 21.12. Gonzalez v. State, No. 13-15-00509-CR, 2017 WL 1281390 (Tex. App.—Corpus Christi-Edinburg Apr. 6, 2017) (pet. discretionary review refused Aug. 23, 2017). The court observed that the 2001 amendments were to a different statute – necessarily, since section 21.12 was first enacted two years later, in 2003. Relying on the canon of construction that the legislature is presumed to know the caselaw construing the meaning of the statutory language it enacts, the *Gonzalez* court concluded that the meaning of the phrase “sexual contact,” chosen by the legislature in 2003, was presumptively what governing caselaw held it to be: inclusive of touching under and over clothing. *Id.* at \*2. Other courts have reached the same conclusion in post-2001 prosecutions for public lewdness, which also incorporates the section 21.01 definition of “sexual contact.” See Perales v. State, No. 03-13-00511-CR, 2014 WL 5107130, at \*3 (Tex. App.—Austin Oct. 10, 2014); Williams v. State, No. 05-03-00648-CR, 2004 WL 95204, at \*1–2 (Tex. App.—Dallas Jan. 21, 2004)

The issue in *Gonzalez* may be posed in a different light in the aftermath of the 2021 amendments to section 21.12, which added a new, offense-specific definition of sexual contact. Tex. Penal Code § 21.12(e). Like section 21.01, and unlike section 21.11, section 21.12(e) defines sexual contact as, inter alia, “any touching” without specifying that the touching may be over or under the clothing. Given not only *Resnick* but also the more recent opinions from the courts of appeal construing the section 21.01 definition to include touching over and under clothing, the presumption is even stronger that the legislature intended for “touching” to be defined in a manner consistent with that caselaw. Although the Committee’s view was that touching over or under clothing would satisfy the element of “sexual contact” as defined in section 21.12(e), the pattern charge does not include reference to that fact because no such language appears in the statute. See Walters v. State, 247 S.W.3d 204, 212 (Tex. Crim. App. 2007) (“[G]enerally speaking, neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction . . . is not grounded in the Penal Code.”).

Practitioners should note that the September 1, 2021, is the effective date of the legislation that created subsection (e). Offenses committed prior to September 1, 2021, are governed by the definition contained in section 21.01.

**Optional Language in Application Paragraph Lack of Certificate, Permit, License, or Credential.** Section 21.12(a)(2) brings within the offense statute all school employees who hold positions described in Section 21.003(a) or (b) of the Education Code, “regardless of whether the employee holds the appropriate certificate, permit, license, or credential for the position.” The committee thought it appropriate to include this language in the Relevant Statutes portion of the charge, given that it is part of the statutory language of the offense. The committee debated how, if at all, to incorporate this into the enumeration of the elements of the offense in the Application paragraph. The clause does not add anything to the burden the state bears in proving the elements of the offense; indeed, it subtracts any need to prove that the school employee has the credentials that Section 21.003 mandates. Additionally, the committee believed it likely that in the majority of cases, the issue of whether the defendant-employee was legally credentialled would not arise, and that directing the jury to the issue by including this language in the ordinary course risked confusing rather than clarifying the jury’s task. On the other hand, the committee was mindful of the possibility that cases might arise where evidence was adduced of a defendant’s lack of credentials, and the arguable need in such cases for jurors to be apprised of the statutory language. The committee therefore crafted optional language to be included with the fourth element in the Application paragraph concerning the defendant holding the position of teacher, which corresponds to the statute’s placement of the “regardless” clause to modify the “position of teacher” element.

**Other Elements – Caselaw.**One appellate court has had occasion to construe the attendant circumstance of “public secondary school” within the meaning of 21.12(a). In *Brookins v. State*, considering appeal of a conviction under § 21.12(a)(1),the court of appeals defined “public secondary school” expansively, holding that the phrase includes a Texas Youth Commission facility offering “educational programs [that] cover substantially the same field as typical high schools.” The court rejected the defendant’s argument that the term was meant to exclude nontraditional educational facilities. Brookins v. State, No. 08-10-00243-CR, 2011 WL 6382531, at \*5–6 (Tex. App.-El Paso Dec. 14, 2011).

**CPJC 21.34 Instruction-- Improper Relationship Between Educator and Student—Commission by Online Solicitation—By Employee of Complainant’s School**

**LAW SPECIFIC TO THE CASE**

**Accusation**

The state accuses the defendant of having committed the offense of having an improper relationship between an educator and a student.

**Relevant Statutes**

A person commits an offense if they, while an employee of a public secondary school, by text message, knowingly solicit a person who is enrolled in the public secondary school where the other person works, regardless of age of the enrolled person, to meet them with the intent that the enrolled person will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with them.

**Definitions**

*Knowingly solicits a person to meet them*

A person knowingly solicits an enrolled person to meet them when they are aware that they are soliciting the enrolled person to meet them.

*Intent that the enrolled person will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with them*

A person has the intent that the enrolled person will engage in sexual contact with them when it is their conscious objective or desire that the enrolled person engage in sexual contact, sexual intercourse, or deviate sexual intercourse with them.

*Sexual Contact*

Sexual contact means any touching by an employee of a public secondary school of the anus, breast, or any part of the genitals of a person enrolled in the secondary school where the employee worked, or any touching of any part of the body of a person enrolled in the public secondary school where the employee worked with the anus, breast, or any part of the genitals of the employee, committed with intent to arouse or gratify the sexual desire of any person*.*

*Sexual Intercourse*

Sexual intercourse means any penetration of the female sex organ by the male sex organ.

*Deviate Sexual Intercourse*

Deviate sexual intercourse means any contact between any part of the genitals of one person and the mouth or anus of another person, or the penetration of the genitals or the anus of another person with an object.

*Intent to arouse or gratify the sexual desire of any person*

A person has the intent to arouse or gratify the sexual desire of any person when it is the person’s conscious objective or desire to arouse or gratify the sexual desire of any person.

*On or about*

The indictment alleges that the offense was committed on or about [*date*]. The state is not required to prove that the alleged offense happened on that exact date. It is sufficient if the state proves that the offense was committed before [*date of indictment*], the date the indictment was filed. But the offense cannot be so far back in time that it is outside the statute of limitations period – a particular amount of time required for a case to be indicted or prosecution will be barred. The statute of limitations for improper relationship between educator and student is three years from the date of the commission of the offense.

*[Include if complainant is under seventeen years old and requested by the defense, per Texas Code of Criminal Procedure § 38.37.]*

**Evidence of Wrongful Acts Defendant Possibly Committed**

During the trial, you heard evidence that the defendant may have committed wrongful acts against [*name*] not charged in the indictment. [*If requested, include description of specific acts.*] The state offered the evidence to show the state of mind of the defendant and the child [and/or] the previous and subsequent relationship between the defendant and the child. You are not to consider that evidence at all unless you find, beyond a reasonable doubt, that the defendant did, in fact, commit the wrongful act against [*name*]. Those of you who believe the defendant did the wrongful act may consider it.

 Even if you do find that the defendant committed a wrongful act, you may consider this evidence only for the limited purpose described above. You may not consider this evidence to prove that the defendant is a bad person and for this reason was likely to commit the charged offense. In other words, you should consider this evidence only for the specific, limited purpose[s] described above. To consider this evidence for any other purpose would be improper.

*[Include if raised by the evidence and requested by the defense.]*

**State’s Election of a Particular Incident**

The state has offered evidence of more than one incident to prove improper relationship as alleged in the indictment. The state is required to choose one of those incidents for you to consider in deciding whether it has met its burden of proof on that particular occasion. The incident that the state has chosen is [*insert specific incident, e.g.,* the first sexual contact to her breast that [*name*] testified that she remembered]. This is the only incident for which the defendant is on trial [in this case/in count [*number*]]. You are to confine your deliberations to deciding whether the defendant is guilty or not guilty of improper relationship on that particular occasion. You cannot find the defendant guilty of improper relationship based on an occurrence at any other time or place other than the incident that the state has chosen.

 Also, you may not consider evidence of any other incident for any purpose unless you find, beyond a reasonable doubt, that such incident occurred. Even then, you may consider it only for the specific, limited purpose of determining [*insert limited purpose, e.g.,* the defendant’s intent].

**Application of Law to Facts**

You must determine whether the state has proved, beyond a reasonable doubt, fourelements. The elements are that----

1. the defendant, in [*county*] County, Texas, on or about [*date*], sent a text message that solicited [*name*] to meet them by [*insert specific allegations*, *e.g.*, sending [*name*] a text message asking them to come to defendant’s home to engage in oral sex];

2. the defendant did so knowingly;

3. the defendant did so with the intent that [*name*] would engage in sexual contact, sexual intercourse, or deviate sexual intercourse with them; and

4. [*name*] was enrolled in the school at which defendant worked, [*if raised by the evidence*, regardless of the age of [*name*]].

*[Optional instruction, if raised by the evidence.]*

It is not a defense that the solicited meeting did not occur.

*[Select one of the following. Choose the second option if incident unanimity has been raised by the evidence and there has been no request for election.]*

You must all agree on elements 1, 2, 3, and 4 listed above.

 If you all agree the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, each of the four elements listed above, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

*[or]*

 The state has presented evidence of more than one incident to prove improper relationship between educator and student as alleged [in the indictment/in count [*number*]]. To reach a guilty verdict [in this case/in count [*number*]], you must all agree that the state has proved elements 1, 2, 3, and 4listed above, and you must also all agree that these elements occurred in the same incident. While it is permissible for you all to agree on more than one incident, to reach a guilty verdict in the case, you must all agree that these elements occurred in the same incident or incidents.

 If you all agree that the state has failed to prove, beyond a reasonable doubt, one or more of elements 1, 2, 3, and 4 listed above, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, the four elements listed above, and you all agree on the same incident or incidents when these elements occurred, you must [find the defendant “guilty”/proceed to consider whether the defense of [*insert defense, e.g.,* minimal age difference/marriage] applies].

*[Include defense if raised by the evidence; see CPJC XXX. Insert any other instructions raised by the evidence. Then continue with the verdict form found in CPJC 2.1, the general charge, in* Texas Criminal Pattern Jury Charges—General, Evidentiary & Ancillary Instructions*]*

**COMMENT**

Improper relationship between educator and student is prohibited by and defined in Tex. Penal Code §21.12. The multiple subsections of the statute and enumeration of disjunctive conduct and attendant circumstance elements within those subsections offer numerous permutations of offenses. This pattern charge is drafted for an offense committed under section 21.12(a)(3), involving a defendant who is a public secondary school employee who engages in conduct constituting the offense of Online Solicitation of a Minor, Tex. Penal Code § 33.021, with a person enrolled in the school where the employee works. Specifically, the charge is drafted assuming a fact pattern in which the Online Solicitation conduct falls under section 33.021(c) – specifically, solicitation by text message with intent to engage in oral sex amounting to sexual contact. Practitioners faced with different fact patterns under § 21.12(a)(3) (*e.g.*, a private or primary school, or different conduct facts under section 33.021, or a complainant who was a student participant in an educational activity that was sponsored by a school district) should tailor the instruction to fit their cases.

**Background and Constitutionality of Section 21.12 and Section 33.021.**Section 21.12 was enacted by the Texas Legislature in 2003 as the first specific criminal prohibition on sexual relationships between educators and students. It has been amended five times: in 2007, adding online solicitation as a means of committing the offense, in 2009, adding the affirmative defense of spousal relationship, in 2011, expanding class of educators who can be charged, in 2017, amending the definition of the offense for defendants not employed by the same school as the complainant, and in 2021, adding a new offense-specific definition of “sexual contact,” and providing certain limits on schools’ disclosure of the names of individuals charged under the statute.

Relatively few appellate cases have interpreted the statutory language of section 21.12, and only a single Court of Criminal Appeals case. Decisions construing other statutes contained within Chapter 21, however, may be instructive, particularly with regard to offense elements that appear repeatedly in statutes within that chapter. Defendants have challenged the constitutionality of section 21.12(a) under a number of theories, typically grounded in the assertion of a fundamental right to engage in consensual sexual relationships. The courts of appeals have uniformly rejected these challenges. See, e.g,. Ramirez v. State, 557 S.W.3d 717 (Ct. App.-Corpus-Christi-Edinburg 2018) (discretionary rev. refused Jun. 6, 2018) (rejecting contention that defendant had fundamental right to consensual sexual relationship and finding that statute is rationally related to legitimate state interest); Toledo v. State, 519 S.W.3d 273 (Tex. App.-Houston 2017) (discretionary rev. refused Aug. 23, 2017) (rejecting substantive due process and equal protection challenges); In re Shaw, 204 S.W.3d 9 (Tex. App.-Texarkana 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting substantive due process, vagueness, and overbreadth challenges); Berkovsky v. State, 209 S.W.3d 252 (Tex. App.-Waco 2006) (discretionary rev. refused Feb. 14, 2007) (rejecting challenges based on asserted fundamental right to consensual sexual relationship); Ex parte Morales, 212 S.W.3d 483 (Ct. App.-Austin 2006) (discretionary rev. refused Feb. 7, 2007) (rejecting equal protection, due process, and First Amendment challenges premised on asserted fundamental right to consensual sexual relationship). The Court of Criminal Appeals has not addressed the constitutionality of section 21.12(a).

The Court of Criminal Appeals has, however, addressed the constitutionality of the Online Solicitation of a Minor offense, Tex. Penal Code § 33.021, that section 21.12(a)(3) incorporates, and has in *dicta* affirmed the constitutionality of section 33.021(c). In *Ex parte Lo*, the Court of Criminal Appeals considered a First Amendment challenge to the law brought be a defendant prosecuted under section 33.021(b), which prohibits “communicat[ing] in a sexually explicit manner with a minor” and “distribut[ing] sexually explicit material to a minor.” The court held that the provision was overbroad in violation of the First Amendment, because it prohibited “the dissemination of a vast array of constitutionally protected speech and materials,” and therefore was not narrowly drawn to serve the state’s conceded compelling interest in protecting children from sexual predators.” Ex parte Lo, 424 S.W.3d 10, 23 (Tex. Crim. App. 2013). The court observed by contrast that section 33.021(c), which prohibits solicitation of a minor to meet for the purpose of engaging in sexual behavior, and which supplies the basis for the committee’s pattern charge, *was* a narrowly drawn prohibition on conduct. *Id.* at 16—17, 23. In Collins v. State, 479 S.W.3d 533 (Tex. App.-Eastland 2015), the court of appeals held that a conviction under section 21.12(a)(3) premised on engaging in conduct prohibited by section 33.021(b) was unconstitutional, based on the holding of *Lo*, but rejected constitutional challenges to other provisions of 21.12.

**Relevance of Minor Status.**An offense is committed under section 21.12(a)(3) where the defendant “engages in conduct described by Section 33.021” with a person described in subdivision (1), “regardless of the age of that person.” Section 33.021(c), however, prohibits solicitation of a “minor.” Two issues are therefore presented: whether the student with whom the defendant engages in a relationship in violation of section 21.12(a)(3) must be a minor, and how to instruct the jury on the proper answer to that question.

 As to the first issue, the committee debated the matter and ultimately determined that the student’s minor status is not an element of section 21.12(a)(3). The statute’s plain text points to this conclusion. It prohibits engaging in the “conduct” described by section 33.021. Section 1.07 of the Texas Penal Code defines “conduct” to mean “an act or omission and its accompanying mental state.” The definition of conduct does not encompass attendant circumstances. It is therefore consistent with the definition of “conduct” to read section 21.12(a)(3) as incorporating only “knowing solicitation . . . to meet” and the accompanying “intent” to engage in enumerated sexual activity from section 33.021(c). The final clause of section 21.12(a)(3) confirms this intention by stating that the offense if committed “regardless of the age” of the person. Only one appellate court has directly considered this question, and it, too, reached the conclusion that a solicited person’s minor status was not part of the “conduct described by Section 33.021,” and that “the legislature made it an offense for an educator to have an improper relationship with a student even if the student was not a minor at the time.” Collins v. State, 479 S.W.3d 533, 537–38 (Tex. App. –Eastland 2015).

 As to the issue of how to incorporate the statutory language of “regardless of the age of [the solicited] person” into the charge, the committee thought it appropriate to include this language in the Relevant Statutes portion of the charge, given that it is part of the statutory language of the offense. The committee debated how, if at all, to incorporate this into the enumeration of the elements of the offense in the Application paragraph. The clause does not add anything to the burden the state bears in proving the elements of the offense. Additionally, the committee believed it likely that in the majority of cases, which typically involve solicitation of an individual who is indisputably a minor, the issue of the solicited person’s age would not arise. Accordingly, directing the jury to the issue by including this language in the ordinary course risks confusing rather than clarifying the jury’s task. On the other hand, the committee was mindful of the possibility that cases might arise where evidence concerning the solicited person’s actual or apparent age is introduced, and the arguable need in such cases for jurors to be apprised of the statutory language. The committee therefore crafted optional language to be included with the fourth element in the Application paragraph, concerning the circumstance of the solicited person’s status as being enrolled in the school where the defendant worked. This placement corresponds to the placement of the “regardless” clause in section 21.12(a)(3).

**Instruction on Meeting Not Occurring.**An offense is committed under section 21.12(a)(3) where the defendant “engages in conduct described by Section 33.021.” Section 33.021(c), in turn, prohibits solicitation of a minor to “meet” for the purpose of enumerated sexual activity, and section 33.021(d) provides that it is “no defense” that the solicited “meeting” described in section 33.021(c) did not occur. The committee was therefore presented with the question of how, if at all, this “no defense” language should be incorporated into the charge for a section 21.12(a)(3) offense premised on commission of conduct described in section 33.021(c). The committee settled on an optional instruction to be given if non-occurrence of the solicited meeting was raised by the evidence. The language of the optional instruction tracks the language of section 33.021(d).

**Culpable Mental State Concerning Enrollment of Student.**A third question of statutory construction posed by section 21.12(a)(3) is whether the state must prove any culpable mental state element with respect to the attendant circumstance of the student being enrolled in the school where the defendant was employed. Put differently and more practically, may a defendant who sincerely and reasonably is unaware that the individual with whom they engaged in sexual contact was a student at the school where the defendant is employed offer a mistake defense? Tex. Penal Code § 8.02. The question perhaps takes on additional importance in light of the fact that, as discussed above, section 21.12 criminalizes relationships between school employees and students regardless of whether the student is a minor.

Only one court of appeals decision has addressed this issue in a prosecution under section 21.12(a)(1), which contains an identical attendant circumstance of student enrollment in the school at which the defendant worked. The court stated, with little analysis, that at least a culpable mental state of recklessness must be proved with respect to the enrollment status of the student. Rejecting the defendant’s contention that “the statute does not include the element of knowledge in its definition and, as applied, did not require appellant to know the ‘complaining witness’ is a student,” the court observed first that the argument was not properly raised in the defendant’s pretrial writ of habeas corpus application. It went on to state, “while section 21.12 lacks a specific mental state, section 6.02(c) of the penal code supplies the applicable mental state,” such that a culpable mental state of at least “recklessness suffices to establish criminal responsibility.” Ex parte Guerrero, No. 05-06-01316-CR, 2006 WL 3718339, at \*3 (Tex. App. Dec. 19, 2006). The court’s conclusion on the merits is arguably dicta, given its strong suggestion that the argument was not properly raised at that stage of litigation. Moreover, the court’s acceptance of the premise that section 6.02(c) was applicable in construing section 21.12(a)(1) is questionable in light of Victory v. State, 547 S.W.2d 1, 2 (Tex. Crim. App. 1976), in which the Court of Criminal Appeals held that the “intent to arouse or gratify” mental state component of the “sexual contact” definition was an element that must be alleged in the indictment. If section 21.12 in fact has a mental state element of “intent to arouse or gratify” then the definition of the offense does not fail to prescribe a culpable mental state, and section 6.02(c) is inapplicable.

Even stronger arguments supporting the conclusion that section 6.02(c) is inapplicable to section 21.12(a)(3) lie in section 6.02(b)’s proviso that “a culpable mental state is nevertheless required” if the definition of an offense does not supply one unless the definition plainly dispenses with any mental element.” Tex. Penal Code § 6.02(b). In contrast to section 21.12(a)(1), which contains no mental element, section 21.12(a)(3) requires (by virtue of incorporating section 33.021) that the defendant have the “intent” to engage in sexual activity. Hence, section 6.02(b) appears to be inapplicable to section 21.12(a)(3).

For these reasons, and given the statute’s silence and the absence of guidance from the Court of Criminal Appeals, the Committee opted not to include in the charge any culpable mental state element with respect to the attendant circumstance of the student being enrolled in the school where the defendant worked. Practitioners, however, should be aware of this issue. Some members of the Committee were of the view that the absence of such a mental state element might pose a particularly grave risk of unfairness in cases where the student was 17 or older – that is to say, of an age where the conduct would not otherwise constitute a crime. In such instances, the offense may be more like a “circumstances of the conduct” offense in which “otherwise innocent behavior becomes criminal because of the circumstances under which it is done,” such that “a culpable mental state is required as to those surrounding circumstances.” McQueen v. State, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). Even then, perhaps a fairness concern arises only when it is truly onerous to place the burden of ascertaining whether the complainant was a student on the defendant – such as when the defendant is only a periodic employee of the school, or when the student body is quite large. Practitioners should be alert to the possibility that there may be special situations where prudence counsels adding a culpable mental state element of knowledge or recklessness as to the attendant circumstance of the student being enrolled at the school where the defendant worked.

# CPJC 21.35 Instruction—Improper Relationship Between Educator and Student—Affirmative Defense of Marriage

*[Insert instructions for underlying offense]*

**Marriage**

 If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant is not guilty because of the [affirmative] defense of marriage.

It is [a/an] [affirmative] defense to the offense of improper relationship between educator and student if the person was the spouse of the **[student/enrolled participant]** at the time of the offense.

**Burden of Proof**

 [*Choose one of the following*:

The marriage defense is an affirmative defense. That means the burden is on the defendant to prove the defense by a preponderance of the evidence.

*OR*

The burden is on the defendant to prove the marriage defense by a preponderance of the evidence.]

**Definitions**

*[If there is a fact question concerning the existence of a marriage, the following definition should be modified to cover the facts at issue.]*

*Spouse*

“Spouse” means a person to whom a person is legally married.

*Preponderance of the Evidence*

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

**Application of Law to Facts**

 To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, that they were the spouse of [*name*] at the time of the offense.

 If you all agree the defendant has proved this defense by a preponderance of the evidence, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of improper relationship between educator and student, and that the defendant has not proved this affirmative defense by a preponderance of the evidence, you must find the defendant “guilty.”

**COMMENT**

**Alternative language for affirmative defenses.**The Committee concluded that when an affirmative defense is the only defense raised in a trial, jurors are not usually aided by use of the technical term. It typically only has meaning to jurors when used in comparison to a non-affirmative defense. As a result, trial judges have the option of dropping the word “affirmative” from the instruction. Where any party prefers the technical term, or when both a defense and an affirmative defense are submitted in the same trial (such as with necessity and duress), the bracketed “affirmative defense” language should be used as well as the first selection under “Burden of Proof.”

**Defining “Preponderance of the Evidence.”**The Penal Code does not define “preponderance of the evidence.” While terms left undefined by the Legislature should generally remain so in the charge, there is an exception for terms that have a known and established legal meaning. *See Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000) (inappropriate for jurors to apply own definitions of “arrest”). The court of criminal appeals has not determined whether “preponderance of the evidence” qualifies under this exception, but it long ago upheld an insanity instruction defining preponderance as “the greater weight of credible testimony.” *McGee v. State*, 238 S.W.2d 707, 716 (Tex. Crim. App. 1950) (op. on reh’g). Unlike the more common “reasonable doubt” standard—which it is better *not* to attempt to define, *Paulson v. State,* 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)—further explanation of the term “preponderance” may be of appreciable help to jurors. *See* *Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008) (finding no error in judge’s explanations to counter venire’s confusion between clear-and-convincing and preponderance standards). The “greater weight” or “greater weight and degree” definitions have long been used in both civil and criminal jury charges. *See, e.g., Harrell v. State*, 65 S.W.3d 768, 772 n.2 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (voluntary release of kidnapping victim); *Watts v. State*, 680 S.W.2d 667, 672 (Tex. App.—Fort Worth 1984, pet. ref’d) (insanity); *Benton v. State*, 107 S.W. 837, 838 (Tex. Crim. App. 1908) (jury charge on former jeopardy). That definition is part of the instruction on preponderance of the evidence required in civil cases. Tex. R. Civ. P. 226a III (amended by Order No. 11-9047, Mar. 15, 2011) (defining preponderance as “the greater weight of credible evidence presented in this case” and explaining that a fact must be “more likely true than not true” to be proved by a preponderance). The Committee thus concluded it would not be error to define the term for jurors and may frequently be helpful. At the same time, no case or rule requires it in criminal cases. *Campbell v. State*, 125 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

# CPJC 84.XX Instruction—Improper Relationship Between Educator and Student—Affirmative Defense of Minimal Age Difference and Prior Relationship

*[Insert instructions for underlying offense]*

**Minimal Age Difference**

If you all agree the state has proved, beyond a reasonable doubt, each of the [*number*] elements listed above, you must next consider whether the defendant is not guilty because of the [affirmative] defense of minimal age difference.

It is [a/an] [affirmative] defense to the offense of improper relationship between educator and student if –

1. the person was not more than three years older than the [**student/enrolled person]** at the time of the offense; and

2. the person and the **[student/enrolled person]** were at the time of the offense in a relationship that began before the person’s employment at a [*select one of the following two*] public OR private [*select one of the following two*] primary OR secondary school.

**Burden of Proof**

 [*Choose one of the following*:

The defense of minimal age difference is an affirmative defense. That means the burden is on the defendant to prove the defense by a preponderance of the evidence.

*OR*

The burden is on the defendant to prove the defense of minimal age difference by a preponderance of the evidence.]

**Definitions**

*Preponderance of the Evidence*

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

**Application of Law to Facts**

To decide this issue, you must determine whether the defendant has proved, by a preponderance of the evidence, that they were not more than three years older than [*name*] at the time of the offense, and was at the time of the offense in a relationship with [*name*] that began prior to the defendant’s employment at a [*select one of the following two*] public OR private [*select one of the following two*] primary OR secondary school.

 If you all agree the defendant has proved this defense by a preponderance of the evidence, you must find the defendant “not guilty.”

 If you all agree the state has proved, beyond a reasonable doubt, each of the elements of the offense of improper relationship between educator and student, and that the defendant has not proved this affirmative defense by a preponderance of the evidence, you must find the defendant “guilty.”

**COMMENT**

**Alternative language for affirmative defenses.**The Committee concluded that when an affirmative defense is the only defense raised in a trial, jurors are not usually aided by use of the technical term. It typically only has meaning to jurors when used in comparison to a non-affirmative defense. As a result, trial judges have the option of dropping the word “affirmative” from the instruction. Where any party prefers the technical term, or when both a defense and an affirmative defense are submitted in the same trial (such as with necessity and duress), the bracketed “affirmative defense” language should be used as well as the first selection under “Burden of Proof.”

**Defining “Preponderance of the Evidence.”**The Penal Code does not define “preponderance of the evidence.” While terms left undefined by the Legislature should generally remain so in the charge, there is an exception for terms that have a known and established legal meaning. *See Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000) (inappropriate for jurors to apply own definitions of “arrest”). The court of criminal appeals has not determined whether “preponderance of the evidence” qualifies under this exception, but it long ago upheld an insanity instruction defining preponderance as “the greater weight of credible testimony.” *McGee v. State*, 238 S.W.2d 707, 716 (Tex. Crim. App. 1950) (op. on reh’g). Unlike the more common “reasonable doubt” standard—which it is better *not* to attempt to define, *Paulson v. State,* 28 S.W.3d 570, 573 (Tex. Crim. App. 2000)—further explanation of the term “preponderance” may be of appreciable help to jurors. *See* *Murff v. Pass*, 249 S.W.3d 407, 411 (Tex. 2008) (finding no error in judge’s explanations to counter venire’s confusion between clear-and-convincing and preponderance standards). The “greater weight” or “greater weight and degree” definitions have long been used in both civil and criminal jury charges. *See, e.g., Harrell v. State*, 65 S.W.3d 768, 772 n.2 (Tex. App.—Houston [14th Dist.] 2001, pet. ref’d) (voluntary release of kidnapping victim); *Watts v. State*, 680 S.W.2d 667, 672 (Tex. App.—Fort Worth 1984, pet. ref’d) (insanity); *Benton v. State*, 107 S.W. 837, 838 (Tex. Crim. App. 1908) (jury charge on former jeopardy). That definition is part of the instruction on preponderance of the evidence required in civil cases. Tex. R. Civ. P. 226a III (amended by Order No. 11-9047, Mar. 15, 2011) (defining preponderance as “the greater weight of credible evidence presented in this case” and explaining that a fact must be “more likely true than not true” to be proved by a preponderance). The Committee thus concluded it would not be error to define the term for jurors and may frequently be helpful. At the same time, no case or rule requires it in criminal cases. *Campbell v. State*, 125 S.W.3d 1, 11 (Tex. App.—Houston [14th Dist.] 2002, no pet.).