

Unanimous Jury Findings on Exemplary Damages: How Difficult Can It Be?

by Karen Precella

Unanimity seems quite simple. But partial unanimity is surprisingly difficult. In 2003, House Bill 4 (“HB4”) adopted, among other things, a new requirement in chapter 41 of the Texas Civil Practice & Remedies Code (“CPRC”) that the jury must unanimously find exemplary damages; a jury, however, may continue to find liability for actual damages on a ten-juror vote. Complete unanimity (“yes” or “no”) on all issues remains simple: only the presiding juror need sign the verdict (either once or twice). On the other hand, the “partial” unanimity necessary to support a recovery of actual and exemplary damages as to only one or more defendants or one or more liability theories can become quite difficult. The difficulties arise from various sources, including the language of the enacting legislation, the need to protect a plaintiff’s right to recover actual damages based on a ten-juror vote, the need to verify a jury’s compliance with unanimity (and the “same ten juror” rule) through certification, and the complexities of a multi-theory or multi-defendant case. This article primarily discusses those unanimity issues along with other changes HB4 adopted in chapter 41 (“Damages”) of the CPRC.¹

What does the statute explicitly say about unanimity?

HB4’s unanimity language reads as follows:

- (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.

¹ An exhaustive treatment of all of the potential charge issues raised by all of the amendments enacted in HB4 is beyond the scope of this article. The final section of the article, however, lists some sources identifying potential issues in areas other than damages.

- (e) In all cases where the issue exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:

“You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.”

TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (d), (e) (Vernon Supp. 2004).²

As noted in the following sections, the statutory language itself creates some issues that will require judicial or legislative resolution. Moreover, a definitive single standard jury certificate by order or rule in place of the standard certificate previously required may prove difficult until some of those statutory construction issues are resolved. *See* Tex. R. Civ. P. 226a (admonitory instructions and certificate that the trial court “shall give” as adopted by an order promulgated pursuant to Rule 226a, the “Rule 226a Certificate”). As set out in the latter sections of the article, another layer of issues is added by the mere mechanics of implementing the unanimity requirements, which may further make a single standard certificate difficult.

The Supreme Court has proposed a change to Rule 226a as follows:

The court must give instructions to the jury panel and the jury as prescribed by order of the Supreme Court under this rule.

See Order No. 04-9224, Texas Supreme Court, dated October 7, 2004 (open for comment until January 15, 2005, and scheduled to become effective February 1, 2005, in all cases filed on or after September 1, 2004) (available at <http://www.supreme.courts.state.tx.us/>

² The HB4 amendments to chapter 41 of the Civil Practice and Remedies Code apply to actions filed on or after September 1, 2003. *See* Acts 2003, 78th Leg., R.S., ch. 204, § 23.02(d). “An action filed before the effective date of [HB4], including an action filed before that date in which a party is joined or designated after that date, is governed by the law in effect immediately before the change in law made by [HB4], and that law is continued in effect for that purpose.” *Id.*

rules/rules%20advisory%2010.7.04.htm). The rule thus no longer provides that a trial court “shall give such admonitory instructions” as appearing in the order promulgated thereunder.

Consistently, the Supreme Court’s proposed Rule 226a order (amending the admonitory instructions providing illustrative conditioning language and alternative certificates) grants trial courts fairly broad discretion in fashioning certificates appropriate to the case. *See* Order No. 04-9226, Texas Supreme Court, dated October 7, 2004 (open for comment until January 15, 2005, and scheduled to become effective February 1, 2005). (The proposal appears at the end of this article and is hereinafter referred to as the “Proposed Order.”) Not all issues arise in all cases, but some issues arise in even the simplest of cases.

Must the jury’s answers to both the liability for and amount of exemplary damages questions be unanimous?

“[E]xemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence.” TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a).³ Section (d) of 41.003 provides that the jury must be “unanimous in regard to finding *liability for and the amount* of exemplary damages.” *Id.* § 41.003(d) (emphasis added). Yet section (e) of 41.003 mandates an instruction that addresses only the “amount.” *Id.* The resulting issue: does unanimity apply to both the predicate state-of-mind liability answer (the “exemplary predicate”) *and* the amount answer?

³ A question is sometimes raised as to whether the unanimity requirements apply to other penalty damages, such as those under the Deceptive Trade Practices Act or the Insurance Code. Chapter 41 expressly excepts those statutes from its scope. TEX. CIV. PRAC. & REM. CODE ANN. § 41.002.

The consensus appears to be that unanimity applies to both the exemplary predicate (i.e., “liability for”) *and* the amount answers.⁴ Thus, the mandated instruction should appear in the amount question. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (“You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.”); *see also* STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 8.6, 9.6, 10.3, 80.6, 81.6, 82.3, 100.34 (2003); Proposed Order at 6 (“You are instructed that you must unanimously agree on the amount of any award of exemplary damages.”). And an instruction modified from the statutory-mandated instruction in the amount question may also be prudent in the exemplary predicate question. For example, tracking the statutory instruction, one instruction might be as follows: “You are instructed that, in order for you to answer the following question ‘Yes,’ your answer to the question must be unanimous.” *See* STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 4.2, 7.14, 51.4, 61.5, 110.33.5 (2003). *Cf.* Proposed Order at 6 (“You are instructed that in order to answer ‘Yes’ to [any part of] Question __, your answer must be unanimous.”).

In the event a practitioner disagrees that unanimity applies to both issues, an appropriate objection to any such instruction(s) in the exemplary predicate question should be lodged against the court’s charge (along with all other objections and/or

⁴ That conclusion is consistent with the supreme court’s Proposed Order and its prior discussion of the state-of-mind (or predicate) question as “liability for” exemplary damages. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 29-30 (Tex. 1994) (adopting bifurcated approach in which “the jury first hears evidence relevant to liability for actual damages, the amount of actual damages, and liability *for punitive damages* (e.g., *gross negligence*), and then returns findings on these issues. If the jury answers the *punitive damage liability question* in the plaintiff’s favor, the same jury is then presented evidence relevant only to the amount of punitive damages, and determines the proper amount of punitive damages, considering the totality of the evidence presented at both phases of the trial.”); Proposed Order (“jury must unanimously find ... any additional conduct, such as malice or gross negligence ... and [] the amount of exemplary damages to be awarded.”).

tenders to any included or omitted instruction, question or certificate that results in applying unanimity to the exemplary predicate answer) to preserve the complaint.

How many jurors does it take to answer the exemplary predicate question?

Pursuant to Texas Rule of Civil Procedure 292, a jury may render its verdict “by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve.” TEX. R. CIV. P. 292. Ten for “yes”; ten for “no.” Section 41.003(d) now requires twelve⁵ votes for “yes” but does not address the number of votes for “no” on the exemplary predicate answer. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d). The resulting issue: how many jurors does it take to answer the exemplary predicate question?

The statutory language creates several possibilities: (1) it implicitly raised the number of jurors required to vote “no” to twelve; (2) it eliminated the requirement to have ten agree (making anything other than unanimity irrelevant or immaterial as void of legal significance);⁶ or (3) it had no effect on the usual “ten juror” rule.

The consensus appears to be that section 41.003(d) did not increase the number of votes necessary for a “no” answer on the exemplary predicate question—in other words, ten can vote “no.” The current admonitory instructions in the Rule 226a Certificate provide: “you may answer a question upon the vote of ten or more jurors.” TEX. R. CIV.

⁵ This article assumes throughout a twelve-person jury, all twelve of whom deliberate at the end of trial. The article therefore uses a twelve-juror vote to describe unanimity and a ten-juror vote to describe less than unanimity. If the deliberating jury includes only eleven of the original twelve, the unanimity issues discussed in the article would apply to those eleven.

⁶ Immateriality can result where the answer would not alter the effect of the verdict, is found elsewhere in the charge, or is void of legal significance based on other questions. See *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995); *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.); see also *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999) (question on the amount of fees immaterial to the ultimate question of whether fees were recoverable as a matter of law); *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966) (court may disregard immaterial answer).

P. 226a. If at least ten votes are necessary, that instruction combined with the instructions on unanimity in each question could suffice to instruct on the number of jurors necessary for “no” votes. But an additional instruction could be appended to the unanimity-for-yes instruction set forth above, resulting in the following:

You are instructed that, in order for you to answer the following question “Yes,” your answer to the question must be unanimous. You may answer the following question “No” upon the vote of ten or more jurors.⁷

A party might still argue anything less than twelve makes no difference.

Paragraph 6 of the current Rule 226a Certificate provides:

You may render your verdict upon the vote of ten or more members of the jury. *The same ten or more of you must agree upon all of the answers made and to the entire verdict.* You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. *If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.*

Rule 226a Certificate (emphasis added).

The Proposed Order modifies paragraph 6 to the following:

Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

Proposed Order at 5. The “the same ten of you language” would now apply not to all the “verdict” or to “all answers” but to those questions answered “upon the vote of ten or more jurors.” *Id.*

The Proposed Order also suggests the following conditioning language in the exemplary predicate question:

⁷ See Background—Potential Amendments to Rules 226a and 292, Agenda of Supreme Court Advisory Committee, August 13, 2004, http://www.supreme.courts.state.tx.us/rules/advisory_agenda_081304.htm.

You are instructed that in order to answer “Yes” to [any part of] Question ___, your answer must be unanimous. You may otherwise vote “No” to [any part of] Question ___ only upon a vote of 10 jurors. *Otherwise, you must not answer [that part of] Question ___.*

Proposed Order at 6 (emphasis added). The language indicates that “no” does not require twelve votes. But it also indicates (when combined with proposed paragraph 6) that while a “no” vote requires ten, less than ten results in not answering.

In the event a practitioner disagrees that only ten jurors need vote “no” or that less than ten results in not answering, and wants to complain on appeal, the practitioner must preserve the complaint. The practitioner should make an appropriate objection to the above instructions and request an instruction that requires twelve jurors to vote “yes” or “no” (or at least ten to vote “no”) to preserve the complaint. Moreover, in the event less than all (or less than ten) jurors are allowed to agree to a “no,” the practitioner must decide whether to take steps to preserve an “incomplete” verdict issue.⁸ But, assuming a proper certification on at least one ten-vote underlying liability answer with resulting actual damages, a party may contemplate (if necessary) accepting the partial verdict on liability and waiving the exemplary damage claim.⁹ That result is one that may have to be tested through appellate review.

⁸ TEX. R. CIV. P. 295 (“If [the verdict] is incomplete, or not responsive to the questions contained in the court’s charge, or the answers to the questions are in conflict, the court shall in writing instruct the jury in open court of the nature of the incompleteness, unresponsiveness, or conflict, provide the jury such additional instructions as may be proper, and retire the jury for further deliberations.”); *Fleet v. Fleet*, 711 S.W.2d 1, 2 (Tex. 1986) (“[A] judgment cannot be based on a verdict containing unanswered issues, supported by some evidence, unless the issues are immaterial. . . . [A] trial court will not be reversed for rendering judgment . . . unless the party who would benefit from the answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury redeliberate on the issues or that the trial court grant a mistrial.”); *Suggs v. Fitch*, 64 S.W.3d 658 (Tex. App.—Texarkana 2001, no pet.) (any error in irregularity in polling to confirm number of jurors who agreed to verdict waived when not raised before jury discharged); *Norwest Mortgage, Inc. v. Salinas*, 999 S.W.2d 846, 865 (Tex. App.—Corpus Christi 1999, pet. denied) (“[i]n order to preserve error, the appellant must object to the conflict or inconsistency before the jury is discharged”).

⁹ For example, in *Osterberg v. Peca*, 12 S.W.3d 31, 55-56 (Tex. 2000), the jury deadlocked on the reasonable amount of attorney’s fees incurred in the case. The plaintiff failed to object or request an

Is “0” an amount of exemplary damages awarded that requires a vote of 12?

An issue similar to the “no” answer in the predicate question arises with a “0” answer in the amount question. Recall that the statutory language provides: (1) “[e]xemplary damages may be *awarded* only if the jury was *unanimous* in regard to . . . *the amount* of exemplary damages”; and (2) the jury must be instructed that “in order for you to *find exemplary damages*, your answer to the question regarding *the amount* of such damages must be *unanimous*.” TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.003 (d), (e) (emphasis added). The resulting issue: does a “0” answer require the vote of twelve jurors?

The statutory language does not explicitly except out a “0” answer from the unanimity provisions. As a result, some practitioners conclude that “0” is the same as a positive amount and would thus require a twelve-juror vote. On the other hand, other practitioners note that the statutory language speaks in terms of an “award”—zero at least arguably not being an award. The language also speaks of finding an “amount” of “exemplary damages”—zero at least arguably not being a finding of an amount of exemplary damages. The statute therefore may not require unanimity for a “0” answer.

The Proposed Order instructs the jury: “you must unanimously agree on the amount of any award of exemplary damages.” Proposed Order at 6. The Proposed Order allows the jury to certify the amount question by either unanimity or a vote of ten (or arguably not at all, if not listed by the jury in its certification). *Id.* at 7-8. Practitioners

answer to the question. Instead, the plaintiff “asked the trial court to accept the verdict, and then asked the court to enter judgment as a matter of law for his attorney’s fees. The trial court refused . . .” 12 S.W.3d at 55-56. Relying upon *Fleet* and *Continental Casualty Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964), the supreme court held that “by failing to object when the jury did not return an answer, [the plaintiff] waived any right to have the trial judge supply his own factfinding or grant a new trial on the issue, and waived his right to appeal a judgment on the issue of attorney’s fees.” *Id.* Similarly, a party who wants to accept the jury’s findings to recover actual damages might seek to accept the partial verdict and waive the exemplary damage claim rather than force the hung jury result by a “no” ten-vote on the predicate.

would need to assess the answers to determine what number of jurors answered the amount question to determine if any potential complaint exists.

Assuming the statute requires unanimity for a “0” answer, the result of a less-than-unanimous vote to answer “0” could be a hung jury unless the certificate allows recovery on a partial verdict by (if necessary) waiving the exemplary damage claim. Given a unanimous jury must have agreed to the predicate state-of-mind answer to reach the conditioned amount question, one would suspect the less-than-unanimous “0” would be rare (even in bifurcated cases). But, depending on what the court submits and a party’s position on the issue, the cautious practitioner should be prepared to, for example, make objections and/or offer requests to the charge, request a jury polling, object to the verdict, and urge re-deliberation or seek a mistrial to preserve any complaint about an incomplete verdict or denial of a mistrial.¹⁰

Does unanimity apply to any or all of the underlying liability findings?

As set out above, an award of exemplary damages appears to require a unanimous exemplary predicate answer that “the harm with respect to which the [plaintiff] seeks recovery of exemplary damages results from (1) fraud; (2) malice; or (3) gross negligence.” TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a), (d). On the other hand, as also set out above, only ten jurors need agree to the affirmative liability answers underlying the exemplary predicate question to recover actual damages. TEX. R. CIV. P. 292. The resulting issue: does a less-than-unanimous liability answer but unanimous exemplary predicate answer result in inconsistent or conflicting answers such that unanimity on the underlying liability answers should be required prior to answering the exemplary damage questions?

¹⁰ See nn.8-9.

Some who read HB4 argue that it impliedly requires *all* underlying liability answers to be unanimous to reach the exemplary damage questions to avoid *any* possible inconsistency or conflict. But inconsistency will not necessarily result from one or more less-than-unanimous affirmative liability answers and an award of exemplary damages. For example, if the jury voted 10-2 on tortious interference with contract but 12-0 on fraud, the fraud finding could support exemplary damages. Likewise, if the jury voted 11-1 on negligence but 12-0 on breach of fiduciary duty, a 12-0 verdict on malice based on the breach of fiduciary duty finding could support exemplary damages. Various other permutations could exist in a multi-theory charge. Moreover, requiring unanimity on *all* liability answers would impose a burden greater than that imposed by statute or rule for a plaintiff's recovery of actual damages.

On the other hand, requiring unanimity on the theory of liability on which the exemplary predicate question is conditioned may, at least sometimes, be appropriate. If not, the unanimous exemplary damage predicate answer may be inconsistent or conflict with the underlying less-than-unanimous liability answer.¹¹ In that context, a juror has voted “no” (in a 10-2 or 11-1 vote) on, for example, fraud, tortious interference or negligence yet voted “yes” on clear and convincing evidence of fraud, malice or gross negligence.

Fraud provides a clear potential for inconsistency. Exemplary damages based on fraud is generally submitted in two questions—fraud by preponderance of the evidence for actual damages and fraud by clear and convincing evidence for exemplary damages.

¹¹ An irreconcilable conflict exists when one finding would result in judgment for one of the parties and the other finding would result in a judgment for the other party. See, e.g., *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 689-90 (Tex. App.—Dallas 2000, no pet.); *Checker Bag Co. v. Washington*, 27 S.W.3d 625, 642 (Tex. App.—Waco 2000, pet. denied).

See STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 105.1, 110.33 (2002). The same fraud (i.e., the same basis for fraud and resulting harm) should be at issue in both questions, only differing in the elevated burden of proof and juror agreement requirements. Twelve jurors on the higher burden (same fraud) is mutually exclusive with only ten jurors on the lower burden (same fraud).

Other contexts may be less clear. For example, if only ten jurors vote “yes” on negligence, a vote of twelve jurors of “yes” on gross negligence may also create a conflict. But a court should reconcile the jury’s answers if reasonably possible. *See Bender v. S. Pac. Transp. Co.*, 600 S.W.2d 257, 260 (Tex. 1980) (“the question is whether there is any reasonably possible basis upon which [the jury answers] may be reconciled”). One argument offered to reconcile any potential negligence/gross negligence conflict is that the “no” juror(s) may have found no proximate cause of the injury in the negligence finding but nevertheless found the conduct to be grossly negligent in the exemplary predicate finding. The counterargument to reconciliation is that gross negligence cannot exist without negligence, of which proximate cause is an element. *See, e.g., Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 721-22 (Tex. App.—San Antonio 1994, writ denied) (only negligence that proximately causes damages justifies award of exemplary damages). Further, the claimant must prove that “the harm with respect to which [he] seeks recovery of exemplary damages results from” the gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a). Thus, if the “no” juror found no injury proximately caused by the negligence, a party could argue that the juror could not find—without creating a conflict—gross negligence in the absence of harm.

Another context that may be less than clear is if a single exemplary predicate question is conditioned on multiple liability theories. For example, if a jury votes 10-2 on defamation, 12-0 on tortious interference with contract and 12-0 on malice, is there any conflict between the liability answers and the exemplary predicate answer? Assuming tying of multiple theories is proper to impose exemplary damages, *perhaps* not.

As a practical matter, the likelihood of a juror answering “no” to the liability question and “yes” to the exemplary state-of-mind predicate (at least with a single theory) would seem small. Nevertheless, thought must be given to whether the charge should be modified to preclude the risk of inconsistent answers by, for example, additional conditioning language preceding the exemplary predicate. Conditioning language in the exemplary predicate state-of-mind question could instruct the jury not to answer the question unless the jury was unanimous as to the underlying liability answer.¹² Multiple defendants would require the instruction to require unanimity as to each defendant before the jury may answer for that defendant.¹³ Certification issues discussed below may also arise if unanimity is required for the underlying liability answers.

The Proposed Order provides that for a defendant to recover exemplary damages a jury must unanimously find “liability on at least one claim for actual damages that will support an award of exemplary damages.” Proposed Order at 5. The Proposed Order

¹² *See, e.g.*, Background—Potential Amendments to Rules 226a and 292, Agenda of Supreme Court Advisory Committee, August 13, 2004, http://www.supreme.courts.state.tx.us/rules/advisory_agenda_081304.htm (essentially proposing addition of the [bracketed] language to the conditioning instruction appearing in, for example, PJC 110.33 (2002): “If you have answered ‘Yes’ to Question __, [and your answer to Question __ was unanimous,] then answer the following question. Otherwise, do not answer the following question.”).

¹³ For example, the instruction in the preceding footnote could be modified to a form that takes multiple defendants into account, e.g.: “Answer the following question for each of those below, if any, for whom you have answered ‘Yes’ to Question __ for that party and your answer to Question __ was unanimous for that party. Otherwise, do not answer the following question.” Another alternative would be to use separate exemplary state-of-mind predicate questions for each defendant with the instruction from the preceding footnote.

then provides the answers on the exemplary predicate and amount “must be conditioned on a unanimous finding regarding” liability “except in an extraordinary circumstance when the conditioning instruction would be erroneous.” *Id.* The Proposed Order then gives the following example by way of illustration of conditioning language preceding the exemplary predicate question:

Answer Question ___ for D1 only if you unanimously answered “Yes” to Question[s] ___ regarding D1. Otherwise, do not answer Question ___ for D1.

Answer Question ___ for D2 only if you unanimously answered “Yes” to Question[s] ___ regarding D2. Otherwise, do not answer Question ___ for D2.

Proposed Order at 6. Thus, the Proposed Order requires unanimity on an underlying liability finding except in “extraordinary circumstances.”

Again depending on what the trial court submits and a practitioner’s position, counsel must decide whether and how to preserve the issue. A charge that *does* (inappropriately according to the complainant) require unanimity on the underlying answers may require objections to various parts of the charge regarding unanimity conditioning and certification. A charge that *does not* (inappropriately according to the complainant) require unanimity on the underlying answers may require requests of conditioning language and modifications to the certificate(s) and objecting as necessary to each instance in which the charge fails to secure unanimity. Moreover, if the jury returns with an apparent or potential conflict or incomplete verdict, a party should determine whether additional action is necessary or desired to preserve the issue by, for

example, objecting to the answers, polling the jury, requesting re-deliberation, and/or seeking a mistrial.¹⁴

How does the jury certify its complete or partial unanimity?

A jury must certify its answers. Pursuant to Rule 290, if unanimous, a verdict is to be signed by the presiding juror. TEX. R. CIV. P. 290. Pursuant to Rule 292, if a vote is less than unanimous (but at least ten), “the verdict must be signed by each juror concurring therein.” TEX. R. CIV. P. 292. The signature of at least ten jurors ensures the same ten jurors agreed with no “shifting majorities” between questions. *See, e.g., Jones v. Square Deal Cab Co.*, 501 S.W.2d 906 (Tex. Civ. App.—Houston [14th Dist.] 1973), *writ ref’d n.r.e.*, 506 S.W.2d 855 (Tex. 1974). Similarly, a certification of unanimity is necessary to verify compliance with chapter 41. (Proposed amendments to Rule 292 recognize that necessity, adding a subsection (b) that tracks the statute. *See* Order No. 04-9224, available at <http://www.supreme.courts.state.tx.us/rules/rules%20advisory%2010.7.04.htm>.) Moreover, “[i]n any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant....” TEX. CIV. PRAC. & REM. CODE ANN. § 41.006. Multi-defendant cases can thus create unique certification problems. The resulting issue: How does the court craft its charge to obtain certification of different parts of the verdict for each defendant with the requisite signatures of ten or twelve jurors?

The current Rule 226a Certificate, as incorporated in the state bar patterns, requires either a presiding juror’s signature *or* ten or eleven signatures of the less-than-unanimous jury. TEX. R. CIV. P. 226a; STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 1.3.4, 40.3.5, 100.3.5 (2002). If no unanimity is required, the current certificate (or

¹⁴ *See* nn.8-9.

similar form) would suffice. If the jury is unanimous on all answers as to all defendants, the presiding juror's signature (once or twice) also would continue to suffice. But, because a ten-juror affirmative vote can support actual but not exemplary damages, the charge must be crafted to take into account the potential for (1) less-than-unanimous answers as to one or more defendants on one or more theories of liability and damage and (2) unanimous exemplary answers for one or more defendants based on one or more theories of liability. As a result, the simple "either/or" certificate does not suffice to implement HB4's unanimity requirements.¹⁵

Further complicating matters, the unsettled issue noted above of whether a unanimous liability finding is required (at least in some cases) to answer the exemplary damage questions also could potentially affect how the jury should certify its answers. Also, merely using a "presiding juror" signature on the questions that require a unanimous "yes" does not obtain a certification of the "no" votes on exemplary damages (to the extent necessary). A jury also could be unanimous on the predicate for, but not the amount of, exemplary damages. Anything less than twelve votes, however, *may* be irrelevant, immaterial or otherwise subject to waiver on the exemplary damage claim.

Suggestions for the certificates have ranged *from* certification with each question *to* a modified two-part certificate at the end of the charge *to* two certificates with one at the end of the "nonunanimous" section and one at the end of the "unanimous" sections of the charge *to* a fill-in-the-blank proposal. And, indeed, more than one way may work to attain the necessary certifications.¹⁶ The unresolved statutory construction issues and

¹⁵ As noted above, the Rule 226a admonitory instruction in paragraph 6 also must be modified. *See supra*.

¹⁶ One version contemplated by the State Bar Pattern Jury Charge Committees retained the current end-of-the-charge placement but split the certificate. The two-part certificate included the following: "Certificate for Questions No. ___ through No. ___ [*all questions which do not require a unanimous verdict*]" to be

almost endless permutations that could arise in a complex case make a single perfect “pattern” applicable to all cases a virtual impossibility. Instead, almost any “pattern” certificate will require modification in anything but the simplest of cases. As a result, the Proposed Order leaves the trial court with fairly broad discretion in fashioning the certificate(s).

In considering modifications to the current Rule 226a Certificate, the Supreme Court Advisory Committee considered a two-certificate option (which would be a three-certificate option in a bifurcated trial).¹⁷ Assuming a single-defendant case, one proposed format was as follows:¹⁸

Part 1

[Insert all questions not requiring unanimity.]

Certificate for Part 1

[Appearing after questions that do not require a unanimous verdict.]

If you are unanimous as to every answer, the presiding juror must certify the verdict on behalf of the jury by signing in the space provided below.

I, the Presiding Juror of the Jury, certify that the jury has answered the above and foregoing questions as instructed, the jury is unanimous as to every answer, and the jury returns the above answers into court as its verdict.

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

signed only by the presiding jury (listing the questions again) or the at-least-ten who agree (listing the questions again). “Certificate for Question No. ___ and Question No. ___ [*exemplary damages predicate liability question and exemplary damages question*]” to be signed by the presiding jury if a unanimous “yes” (listing the questions again) or otherwise by up to twelve of those answering “no” to the [*exemplary damages predicate liability question*]. This two-part certificate raises some of the same issues set out below with the two-certificate format and may require a unanimous “0.”

¹⁷ PJC 100.4 already certifies either a unanimous or less-than-unanimous vote on the exemplary damage amount in a bifurcated case. STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 100.4 (2002). Depending upon how phase one is certified, modification of the phase one certificate could be required.

¹⁸ See Background—Potential Amendments to Rules 226a and 292, Agenda of Supreme Court Advisory Committee, August 13, 2004, http://www.supreme.courts.state.tx.us/rules/advisory_agenda_081304.htm.

If you are not unanimous as to every answer, the jurors who have agreed to each answer must certify the verdict by signing in the spaces provided below.

We, members of the jury, certify that the jury has answered the above and foregoing questions as instructed, the undersigned group of us has agreed as to every answer and we return the above answers into court as our verdict.

[Insert 11 numbered lines for name/signature.]

Part 2

[Insert all questions not requiring unanimity.]

Certificate for Part 2

[Appearing after questions that require a unanimous verdict.]

If you are unanimous as to every answer in Part 2, the presiding juror must certify the verdict in Part 2 on behalf of the jury by signing in the space provided below.

I, the Presiding Juror of the Jury, certify that the jury has answered the above and foregoing questions in Part 2 as instructed, the jury is unanimous as to every answer in Part 2, and the jury returns the above answers into court as its verdict on Part 2.

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

If you are not unanimous as to every answer in Part 2, the jurors who have agreed to each answer in Part 2 must certify the verdict in Part 2 by signing in the spaces provided below.

We, members of the jury, certify that the jury has answered the above and foregoing questions in Part 2 as instructed, the undersigned group of us has agreed as to every answer in Part 2, and we return the above answers into court as our verdict on Part 2.

[Insert 11 numbered lines for name/signature.]

This two-certificate format takes into account several permutations. In the face of less-than-unanimity on *all* questions in Part I, Certification for Part 1 allows for a 10-2 or 11-1 verdict on all questions and could support a judgment in favor of either party. But could it be pertinent that some but not all questions were unanimous? If unanimity on an underlying liability finding is required for exemplary damages, and the jury is unanimous on one but not all theories, the all-or-nothing certification may leave a hole. Also, one reconciliation for the potential conflict discussed above is that unanimity on some underlying liability answer in Part 1 would make unanimity in the exemplary predicate answer in Part 2 consistent. If the jury does not certify unanimity on anything less than all questions, does this certificate allow that reconciliation? Other examples of oddities may exist. But those outliers may not justify the overly complicated alternative(s) as the base pattern.

Certification for Part 2 by the presiding juror takes into account (1) a unanimous “no” to the exemplary predicate and (2) a unanimous “yes” to the exemplary predicate and amount answer (of “0” or a positive amount). By the less-than-unanimous-ten-or-eleven signatures, the Part 2 certificate also takes into account a less-than-unanimous “no” on the exemplary predicate. Could Part 2 also encompass a unanimous “yes” to the exemplary predicate but less-than-unanimous amount answer? (In a bifurcated case, the amount answer will be split out in a third certificate, and unanimity or not should be clear.) If it does, depending on whether the amount answer is “0” or a positive amount subject to being awarded, as discussed above, counsel may want to contemplate seeking re-deliberation, a mistrial, or (if necessary) waiver of the exemplary damage claim.

One of the greatest difficulties with any certificate may come with multiple defendants (which is compounded with multiple claims). What if the jury is unanimous in Part 1 as to one or more but not all defendants? How should the jury certify its answers? If allowed only a single Part 1 certificate with all unanimous or not, the jury would certify a less-than-unanimous verdict (despite unanimity as to one or more defendants). That certification may raise the conflict problem discussed above with answers in Part 2. What if the jury is unanimous in Part 2 as to one or more but not all defendants on the exemplary predicate question and an amount? Again, if the jury is allowed to certify only “all” unanimity, the certificate would not support a recovery against even the defendant against whom the exemplary answers were unanimous. Would a party ever know that such a result occurred? Nevertheless, the number of permutations possible make formulation of a single standard pattern certificate that fits all cases a virtual impossibility.

The Proposed Order provides the following illustration for use at the end of the charge when some of the answers must be unanimous, using “[i]” for the underlying liability answer, “[ii]” for the exemplary predicate answer, and “[iii]” for the exemplary damage amount answer:

[After admonitory instructions and liability questions.]

Preceding question ii [exemplary predicate]:

Answer Question (ii) for D1 only if you unanimously answered “Yes” to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1.

Answer Question (ii) for D2 only if you unanimously answered “Yes” to Question[s] (i) regarding D2. Otherwise, do not answer Question

(ii) for D2.

You are instructed that in order to answer “Yes” to [any part of] Question

(ii), your answer must be unanimous. You may answer “No” to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer[that part of] Question (ii).

Preceding question iii [exemplary amount]):

Answer Question (iii) for D1 only if you answered “Yes” to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1.

Answer Question (iii) for D2 only if you answered “Yes” to Question (ii) for D2. Otherwise, do not answer Question (iii) for D2.

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer “All” or list answers: _____

Presiding Juror

Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

We agree to the answers to the following questions:

List answers: _____

[Insert 11 (or 5) numbered lines for name/signature.]

Proposed Order at 6-8. The Proposed Order also authorizes a trial court to determine “a clearer way of obtaining the required certificate is to segregate the questions to which the

jury's answer must be unanimous and request a certificate for each part of the charge." Proposed Order at 8.

The fill-in-the-blank format allows certification of less than all answers as unanimous, eliminating the problem that some liability answers might be unanimous but not certified as such. While the PJCs typically "letter" each person or entity submitted in a question, not all charges submitted do so. If not, and (for example) the jury certifies Question "1" (which includes four persons) as not unanimous, then even if a sub-part answer (such as 1(b)) were unanimous, the certificate would not suffice to certify unanimity. The jury needs to distinguish between sub-parts on the question submitted in support of an exemplary damage recovery.

Listing individual answers allows a jury to certify each answer but creates an opportunity for "missed" questions and an incomplete verdict (based on the sheer number of questions and sub-parts sometimes involved). Upon return of the verdict and before dismissal of the jury, care should be taken to ensure certification of all answers. The proposed instructions and certificate allow a jury not to answer the exemplary damage predicate(s). Thus, polling the jury may be necessary to verify the jury intended to leave the exemplary predicate blank.¹⁹

Listing individual answers should also allow counsel to locate the above-discussed potential conflicts between liability answers and the exemplary damage predicate(s). Again, upon return of the verdict and before dismissal of the jury, care should be taken to check for such potential conflicts. Polling, objection to the verdict and

¹⁹ See nn.8-9.

a request to redeliberate or for a mistrial may be necessary to preserve error on the perceived conflicts.²⁰

In summary, the certificate issue is a significant one that requires substantial consideration in each case to ensure that (1) the plaintiff protects its right to recover actual damages and to recover against less than all defendants or on less than all claims and (2) the defendant(s) ensure only upon proper unanimity are exemplary damages recovered. Many certificate formulations may work. Nevertheless, in addition to preserving any charge error before submission to the jury, counsel must also take additional care to scrutinize the jury's verdict before the trial court accepts it and dismisses the jury. Only by doing so can counsel determine if additional action is necessary or desired to preserve any potential issue regarding the verdict (such as improperly certified, conflicting or missing answers).

Does HB4's amendment of one of the exceptions to the exemplary damage cap affect the charge?

HB4 modified the exemplary damage cap buster in section 41.008(c)(7), and in the event that provision is at issue, the new language should be tracked as appropriate. *See* STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 100.4 (2003) (discussing 41.008, including injury to a child, elderly or disabled individual).

What other changes in the charge are necessary to accommodate amendments to other exemplary damage provisions?

HB4 also added and modified other definitions in chapter 41, including the predicates for exemplary damages in 41.001:

- (4) "Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the

²⁰ *See* nn.8-9.

term does not include exemplary damages or noneconomic damages.

...

(7) “Malice” means a specific intent by the defendant to cause substantial injury or harm to the claimant.

(8) “Compensatory damages” means economic and noneconomic damages. The term does not include exemplary damages.

...

(11) “Gross negligence” means an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (d), (e) (Vernon Supp. 2004). Although less momentous (and difficult) than the unanimity requirements, the added or modified definitions required modifications to various long-standing patterns. *See, e.g.*, STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 4.2 (malice/gross negligence), 100.27 (noneconomic), 110.28 (noneconomic), 110.30 (noneconomic), 110.33 (malice, gross negligence), 110.34 (economic) (2003). Others patterns and forms may require modification as well, and the careful practitioner will check the proposed charge against the chapter 41 amendments.

With the unanimity provision and modified predicates, an exemplary predicate question could appear as follows:

If you have answered “Yes” to Question [*applicable liability question*], then answer the following question. Otherwise, do not answer the following question.

You are instructed that, in order for you to answer the following question “Yes,” your answer to the question must be unanimous.

QUESTION ____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from [*malice, fraud or gross negligence*]?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

“Malice” means a specific intent by *Don Davis* to cause substantial injury or harm to *Paul Payne*.

[*and/or use appropriate definition for “fraud” or “gross negligence”*]

Answer “Yes” or “No.”

Answer: _____

See STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 110.33B (2003).

How do you submit the new net-of-taxes provision?

House Bill 4 also added section 18.091 to the CPRC:

(a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to **prove** the loss must be presented in the form of a ***net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law.***

b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, **the court shall instruct the jury** as to *whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.*

Tex. Civ. Prac. & Rem. Code Ann. § 18.091 (Vernon Supp. 2004) (emphasis added).

The provision may have broader application than intended (i.e., sweeping in employment cases as well). Applying the provision to employment cases could result in “double taxation” through a reduction in judgment and a payment of taxes on the reduced recovery. (A party might consider asking the trial court to have the jury find an amount before and after taxes or otherwise objecting on a “double taxation/less-than-whole” basis in an employment case. If resolved on appeal, both findings would be available to an

appellate court.) Nevertheless, for now, the provision applies generically to types of recovery, not types of claim—requiring additional proof and additional jury instructions.

Ignoring the proof issues, the statute mandates an instruction. A list of “taxation” instructions used in other forums can be found in the following article: Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004). The Texas statute appears slightly different in wording and perhaps intent than the instructions used in other forums. Thus, although perhaps easier said than done, simply tracking the statute as closely as possible may provide the best alternative until further clarification comes from the legislature or the courts about the purpose and content of a proper instruction. For example, the following Pattern Jury Charge is very basic:

You are instructed that any monetary recovery for _____ and _____ is subject to [*federal or state*] income taxes. You are instructed that any monetary recovery for _____ and _____ is not subject to [*federal or state*] income taxes.

See, e.g., STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 110.1.5 (2003).

A party must prove such types of damage “net of taxation.” The mandated instruction does not tell the jury what to do, if anything, with the “what is taxable” information as applied to the proof it will be given. Nevertheless, section 18.091 provides that the court “shall” instruct on whether a recovery is subject to certain taxes.

Is any change in the charge necessary by the new “actually paid and incurred medical expenses” language?

HB4 added section 41.0105 to the CPRC: “In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.” Tex. Civ. Prac. & Rem. Code

Ann. § 41.0105 (Vernon Supp. 2004). If a question exists as to whether such expenses were reasonable or such care was necessary, the jury should be asked to resolve that dispute. Similarly, if there is a question whether medical or health care expenses were actually paid or incurred by or on behalf of the plaintiff, a medical care element of damage should inquire as to “Medical care in the past actually paid or incurred by or on behalf of *Paul Payne*.” Cf. STATE BAR OF TEXAS PATTERN JURY CHARGES PJC 8.2, 80.2, 110.9 (2002).

What other changes in the court’s charge may arise from HB4?

Numerous other HB4 additions and amendments can impact the court’s charge. Although a full treatment is beyond the scope of this article; some of the other areas with a few sources of additional commentary on the effective dates of each change, the changes in general, and the impact of the changes on the charge are listed below.

Proportionate Responsibility. These changes (to Chapter 33 of the CPRC) appear to have less impact on the content of the charge than on the scope of its application. See, e.g., Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004); Kirk Preston Watson, *Lawyers Still Trying to do Math: Proportionate Responsibility, Including the New HB4*, State Bar Impact of House Bill 4 Course (2004).

Products Liability. Several new provisions (in Chapters 16 and 82 of the CPRC) may require charge modifications or determinations prior to submission, including a statute of repose, a government standards compliance rebuttable presumption, and non-manufacturing seller’s liability issues. See, e.g., Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004); E. Lee Parsley, *HB4’s Affect on Jury Charges*, Chapter 16, State Bar Advanced Civil Appellate Practice Course (2004); E. Todd Tracy, *How HB4 Changed Product Liability Law in Texas*, State Bar Personal Injury Trial Course (2004).

Healthcare. Numerous changes were made (in now Chapter 74 of the CPRC) regarding the trial of and recovery in healthcare liability cases, some of which affects the charge. See, e.g., John Blaise Gsanger, *New Jury Charges Under HB4*, State Bar Medical Malpractice Course (2004); E. Lee Parsley, *HB4’s Affect on Jury Charges*, Chapter 16, State Bar Advanced Civil Appellate Practice Course (2004); Paula F.

Sweeney, *Impact on Medical Malpractice*, State Bar Impact of House Bill 4 Course (2004).

Nonprofits and Schools. New immunity language (in the Health & Safety Code and the Education Code) affects the charge to the extent of any fact issue. *See, e.g.*, Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004); Michael Slack, *Miscellaneous Provisions of House Bill 4*, State Bar Impact of House Bill 4 Course (2004).

Asbestos. HB4 adopted (in Chapter 149 of the CPRC) limitations on certain liability for successor corporations in regard to asbestos-related claims and again affects the charge to the extent of any fact issue. *See, e.g.*, Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004); Michael Slack, *Miscellaneous Provisions of House Bill 4*, State Bar Impact of House Bill 4 Course (2004).

Environmental. HB4 also adopted (in Chapter 75 of the CPRC) certain air contamination trespass requirements and again affects the charge to the extent of any fact issue. *See, e.g.*, Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004); Michael Slack, *Miscellaneous Provisions of House Bill 4*, State Bar Impact of House Bill 4 Course (2004).

Class Action Attorneys' Fees and Fee Shifting. Although the rules appear to make the issue a legal one for the court, some argument might exist that reasonableness of fees raises a fact issue for the jury. *See, e.g.*, Elaine Carlson, *The New Texas Offer of Settlement Practice*, State Bar Expert Witness Course (2004); E. Lee Parsley, *HB4's Affect on Jury Charges*, Chapter 16, Advanced Civil Appellate Practice Course (2004); Mikal Watts, *Offer of Settlement - Chapter 42 of the Texas Civil Practice & Remedies Code and Rule 167*, State Bar Annual Meeting: Ultimate Trial Notebook (2004).

Conclusion.

The impact of HB4 reaches into many areas, and its language often leaves unanswered statutory construction questions. Practitioners should use caution when using old forms to propose charges in areas affected by HB4—even the standard certificate may require changes. Likewise, some of the prior PJC patterns and comments have been amended to accommodate changes resulting from HB4 and recent supreme court cases. Moreover, until the statutory construction issues are judicially or legislatively resolved, practitioners must contemplate whether preservation of error on an

unresolved issue is desired and, if so, what steps need to be taken for preservation. Finally, special care should be taken to ensure that certification protects a plaintiff's right of recovery against less than all defendants or on less than all claims while requiring the jury to be unanimous as contemplated by HB4's adoption of the chapter 41 amendments.

Karen Precella, whose practice focuses on civil appeals, is a partner in the law firm of Haynes and Boone, LLP, resident in its Fort Worth, Texas, office.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 04-9226

AMENDMENTS TO JURY INSTRUCTIONS UNDER RULE 226a, TEXAS RULES OF CIVIL PROCEDURE

ORDERED that

1. To implement Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 13.04, 2003 Tex. Gen. Laws 847, 888, codified as Tex. Civ. Prac. & Rem. Code § 41.003, Part III of the jury instructions prescribed under Rule 226a, Texas Rules of Civil Procedure, by orders dated July 20, 1966 (effective January 1, 1967), July 21, 1970 (effective January 1, 1971), October 3, 1972 (effective February 1, 1973), December 5, 1983 (effective April 1, 1984), March 10, 1987 (effective January 1, 1988), December 16, 1987 (effective January 1, 1988), and January 28, 1988 (effective January 1, 1988), is amended as follows.

2. These amendments, with any changes made after public comments are received, take effect on February 1, 2005, in all cases filed on or after September 1, 2004.

3. The Clerk is directed to:

- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.

4. These amendments may be changed in response to comments received before January 15, 2005. Any interested party may submit comments in writing as follows:

by mail to: Ms. Lisa Hobbs, Rules Attorney
The Supreme Court of Texas
P.O. Box 12248
Austin TX 78711

by fax to: 512-463-1365
Attn: Ms. Lisa Hobbs, Rules Attorney

by email to: Lisa.Hobbs@courts.state.tx.us

SIGNED AND ENTERED this 7th day of October, 2004.

Wallace B. Jefferson, Chief Justice

Nathan L. Hecht, Justice

Priscilla R. Owen, Justice

Harriet O'Neill, Justice

Steven Wayne Smith, Justice

J. Dale Wainwright, Justice

Scott Brister, Justice

AMENDMENTS TO PART III OF THE
JURY INSTRUCTIONS PRESCRIBED UNDER
RULE 226a, TEXAS RULES OF CIVIL PROCEDURE

[It is ordered . . .]

III.

COURT'S CHARGE

~~That~~ Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions; with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury as part of the charge:

Ladies and Gentlemen of the Jury:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. Unless otherwise instructed, you may render your verdict answer a question upon the vote of ten or more members of the jury jurors. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

(Definitions, questions and special instructions given to the jury will be transcribed here. If exemplary damages are sought against a defendant, the jury must unanimously find, with respect to that defendant, (i) liability on at least one claim for actual damages that will support an award of exemplary damages, (ii) any additional conduct, such as malice or gross negligence, required for an award of exemplary damages, and (iii) the amount of exemplary damages to be awarded. The jury's answers to questions regarding (ii) and (iii) must be conditioned on a unanimous finding regarding (i), except in an extraordinary circumstance when the conditioning instruction would be erroneous. The jury need not be unanimous in finding the amount of actual damages. Thus, if questions regarding (ii) and (iii) are submitted to the jury for defendants D1 and D2, instructions in substantially the following form must immediately precede such questions:

[Note: for ease of reading, the following examples, which are new, are not redlined.]

Preceding question (ii):

Answer Question (ii) for D1 only if you unanimously answered “Yes” to Question[s] (i) regarding D1. Otherwise, do not answer Question (ii) for D1. [Repeat for D2.]

You are instructed that in order to answer “Yes” to [any part of] Question (ii), your answer must be unanimous. You may answer “No” to [any part of] Question (ii) only upon a vote of 10 or more jurors. Otherwise, you must not answer [that part of] Question (ii).

Preceding question (iii):

Answer Question (iii) for D1 only if you answered “Yes” to Question (ii) for D1. Otherwise, do not answer Question (iii) for D1. [Repeat for D2.]

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

These examples are given by way of illustration.)

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

Judge Presiding

(The jury must certify to every answer in the verdict. The presiding juror may, on the jury’s behalf, make the required certificate for any answers on which the jury is unanimous. For any answers on which the jury is not unanimous, the jurors who agree must each make the required certificate. If none of the jury’s answers must be unanimous, the following certificate should be used:

[Note: For ease of reading, the following examples, which are partly new, are not redlined.]

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if the jury is unanimous.)

Presiding Juror

Printed Name of Presiding Juror

(To be signed by those rendering the verdict if the jury is not unanimous.)

Jurors' Signatures

Jurors' Printed Names

[Insert the appropriate number of lines — 11 or 5 — for signatures and for printed names.]

If some of the jury's answers must be unanimous and others need not be, the court should obtain the required certificate in a clear and simple manner, which will depend on the nature of the charge. The court may consider using the following certificate at the end of the charge:

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

I certify that the jury was unanimous in answering the following questions:

Answer "All" or list answers: _____

Presiding Juror

Printed Name of Presiding Juror

(If the answers to some questions were not unanimous, the jurors who agreed to those answers must certify as follows:)

We agree to the answers to the following questions:

List answers: _____

Jurors' Signatures

Jurors' Printed Names

[Insert the appropriate number of lines — 11 or 5 — for signatures and for printed names.]

The court may also determine that a clearer way of obtaining the required certificate is to segregate the questions to which the jury's answers must be unanimous and request a certificate for each part of the charge.)