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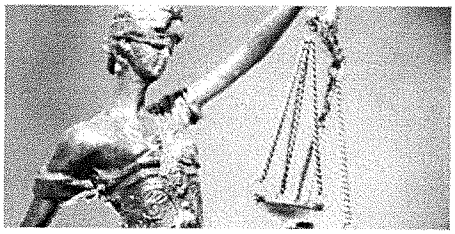

PATTERN JURY INSTRUCTIONS

FACULTY

Hon. Leonard B. Austin
Hon. Emily Pines (Ret.)

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Suffolk County Bar Association, New York

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JUSTICE LEONARD B. AUSTIN is a graduate of Georgetown University in 1974 and Hofstra University School of Law in 1977. Justice Austin engaged in the private practice of law until his election to the Supreme Court Bench in the Tenth Judicial District in 1998. He was reelected in 2012.

In his private practice, Justice Austin focused primarily on complex commercial litigation, matrimonial and family matters, personal injury and real estate matters. In 1980-81, he served as counsel to the Speaker of the New York State Assembly. In that capacity, he was assigned as counsel to the Agriculture and Commerce and Industry Committees.

Upon his election to the Bench, Justice Austin was assigned to a Dedicated Matrimonial Part in Suffolk County (1999) and a Matrimonial and Commercial Part in Nassau County (2000). In October 2000, and continuing until his elevation to the Appellate Division, Justice Austin presided in a Commercial Part. He was selected to serve as the Chairman of the Commercial Division Rules Committee and authored the first Uniform Commercial Division Rules (22 NYCRR 202.70). Since 2014, he has been a member of the Chief Judge's Commercial Division Advisory Council.

In March 2009, Justice Austin was appointed to the Appellate Division for the Second Judicial Department by Governor David Paterson.

Justice Austin is currently a member of the Pattern Jury Instructions Committee. He has served on the Office of Court Administration's Matrimonial Practice and Commercial Division Curriculum Committees. He is a member of the New York State, Florida, Nassau County, Suffolk County, and New York State Women's Bar Associations. Additionally, he served as the President of the American College of Business Court Judges, the Presiding Member of the Judicial Section of the New York State Bar Association and the President of the Theodore Roosevelt American Inn of Court.

Over the years, Justice Austin has authored several articles dealing with Consumer Class Actions, Equitable Distribution and New York City's Forfeiture Law. He is a frequent lecturer in the fields of appellate, commercial and matrimonial law and practice. Since 2002, he has been an Adjunct Professor of Law at the Maurice A. Deane School of Law at Hofstra University.

Hon. Emily Pines (Ret.)

Profession	Attorney-Litigation (commercial, construction, and governmental); Labor Negotiations Retired New York State Supreme Court Judge, (Commercial Division) Current Member of New York State Pattern Jury Instruction Committee
Current Employer/Title	Town of Brookhaven-Chief of Staff/Special Counsel
Experience	New York State Judge for seventeen years, handling matters in all areas of civil litigation, including fourteen years as a Justice of the New York Supreme Court assigned to a commercial part involving contract disputes, corporate dissolutions, securities litigations, shareholder disputes, and major construction related issues. Conducted numerous jury and non jury trials involving theses commercial and governmental issues. Practicing attorney for over 25 years, representing State, City, County and Town governmental entities in both litigation and transactional matters. Litigated in trial and appellate courts commercial, construction, governmental, public utility, tax related and administrative disputes. Negotiated and drafted numerous inter and intra governmental agreements, employment contracts, and legislation. As trial and appellate attorney, served as lead counsel in major construction litigations and appeals and administrative proceedings. Appointed in 2006 to the New York State Pattern Jury Instruction Committee, consisting of fourteen sitting and retired judges, writing all civil jury instructions and

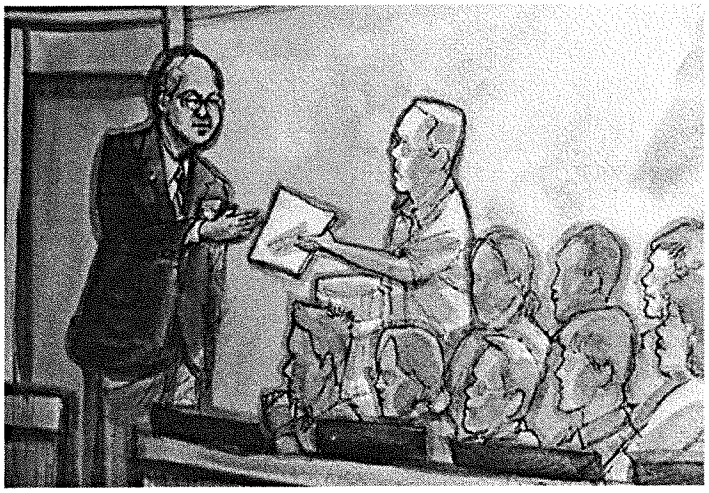
	related commentary for all jurists and attorneys in New York State. Senior non-elected official in Town of approximately 500,000 residents, handling labor relations, negotiating contractual and intergovernmental issues; assigned as special counsel to handle complex transactional and litigation matters.
Work History	Chief of Staff and Special Counsel, Town of Brookhaven, 2016-present; NYS Justice of the Supreme Court, 2002-2015; Suffolk County District Court Judge, 1999-2001; Brookhaven Town Attorney, 1993-1998; Partner, Boyle, Shea, Nornes & Pines, 1991-1992; Deputy County Attorney (Suffolk County), 1988-1992; Law Secretary to Justice Helen Freedman, 1986-1988; Assistant Division Chief, NYC Corporation Counsel (Commercial Division),1980-1986; Staff Counsel, New York State Public Service Commission, 1976-1979; Adjunct Professor, Touro Law School 2015-2017.
Alternative Dispute Resolution Experience	As N.Y.S. Supreme Court Justice, presiding over numerous litigations, actively facilitated resolution of complex pretrial disputes and and settlements of substantial claims. Guided negotiation by the parties, for purpose of reaching accords. In current capacity as Chief of Staff, conduct informal labor, employment and other negotiations for purposes of resolving disputes and avoiding litigation. Act as appointed Special Master in resolving issues in commercial disputes.
Awards	Municipal Attorney of the Year 1983 (awarded by Chief Judge of Court of Appeals); Town of Brookhaven, Women of the Year in Law 1999; Hofstra University, George M. Estabrook, Distinguished Service Award 2003; Hofstra University School of Law, Outstanding Women in the Law 2018.

Professional Licenses	Admitted to the Bar, New York, 1977; U.S. District Court, Southern, Eastern and Northern Districts of New York.
Professional Associations	New York State Bar Association; Suffolk County Bar Association; New York State Supreme Court Justices Association; New York State Pattern Jury Instruction Committee.
Education	Hofstra University (BA, Comparative Literature-1972, cum laude); Hofstra University (J.D., cum laude, award of service and scholarship).

CIVIL TRIALS: JURY CHARGES, VERDICT SHEETS & MATTERS RELATED TO JURY VERDICTS

HON. LEONARD B. AUSTIN, SUPREME COURT-APPELLATE DIVISION-(2d DEP'T)

HON. EMILY PINES, SUPREME COURT (Ret.), SUFFOLK COUNTY



I. JURY CHARGE

A. What is it?

The jury charge is the court's instructions to the jury on the law applicable to the particular case before the jury (New York Pattern Jury Instructions, Civil, ["PJI"] 1:20, 1:35).[1] It is given after the close of the evidence and the parties' summations.[2]

B. Why is it important?

The jury charge serves three principal functions: (1) to define to and explain for the jury the issues in the case; (2) to explain to the jury the applicable principles of law and processes to be used in deciding those issues; and (3) to set forth for an appellate court the trial judge's view of the issues presented by and law governing the case (1A PJI3d "Introductory Statement," at 1 [2019 ed]).

***The charge is essentially the map that the jury must follow in determining the issues in the case.

C. What should it contain?

1. Elements

The Introductory Statement to the PJI provides the following list of elements of a jury charge:

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[1]A cite to an instruction itself contains the initials of the treatise - PJI - followed by the specific section of it, e.g., PJI 1:1. A cite to the "Comment" portion of a section contains the volume in which the comment appears, the initials and edition as well the section in which the comment appears, e.g., 1A PJI3d 1:97.

[2]The Judge should provide the jury with a basic pre-trial charge at the outset of the case (*see* 1A PJI3d "Charge Prior to Trial, Introductory Statement" [2019 ed]). The instructions making up the pre-trial charge can be found at PJI 1:1 - PJI 1:14. The materials for this program concern the final charge to the jury.

- An identification of the parties and their relationship to the action;
- A balanced statement of the parties' respective contentions;
- A statement of the issues raised by the parties and what, under the governing substantive law, the jury must find for a party to prevail;
- An explanation of the processes of decision, e.g., the applicable burdens of proof, the effect of the denial of motions and applications made in front of the jury, cautions as to prejudice, sympathy and outside influences, the factors to be employed in weighing a witness' testimony;
- The manner in which damages must be computed; and,
- The form in which the jury will render its verdict.

(1A PJI3d "Introductory Statement").

2. Style

THE CHARGE MUST BE CLEAR, DETAILED, ACCURATE AND FOCUSED.

a. The charge must be clear: the charge must be understandable to a jury comprised of laypersons.

- Use language that lay jurors are likely to understand.
- Ensure that the charge contains no ambiguities and no contradictions.
- Use caution when employing in a charge technical terms, e.g., res ipsa loquitur, or legal terms of art, which will be meaningless to a lay jury.

b. The charge must be detailed: the charge must set forth the factual issues in the case and the parties' respective contentions, and it must set forth and explain all applicable legal principles and concepts.

- Avoid general statements of law; legal principles must be adequately explained.
- Ensure that the charge covers all causes of action, theories of recovery, and affirmative defenses, and counterclaims (1) that have been pleaded,

and (2) for which there is sufficient support in the trial record (*see J.R. Loftus v White*, 85 NY2d 874 [1995] [reversible error to fail to charge on a material issue where party requested charge]).

c. The charge must be accurate: the charge must provide an accurate overview of the factual issues in the case, an accurate and balanced summary of the parties' contentions, and correct statements of the law.

d. The charge must be focused: the charge must be specifically tailored to the particular case (*Green v Downs*, 27 NY2d 205, 208 [1970] ["The trial court's instructions should state the law as applicable to the particular facts in issue in the case at bar, which the evidence in the case tends to prove; mere abstract propositions of law applicable to any case, or mere statements of law in general terms, even though correct, should not be given unless they are made applicable to the issues in the case at bar"] [internal quotation marks omitted]).

C. For sample charges, see Exhibit A.

II. VERDICT SHEET

A. The verdict sheet is the means by which the jury will express its verdict. The verdict sheet is a document that contains sequentially numbered interrogatories, each interrogatory representing a discreet question to the jury.

B. A verdict sheet may come in one of three forms:

1. A general verdict- "A general verdict is one in which the jury finds in favor of one or more parties" (CPLR 4111[a]; *see* PJI 1:95 ["In reporting your verdict to the court, you will state either that it is in favor of the defendant or that it is in favor of the plaintiff. If your verdict is in favor of the plaintiff, you will state the amount you award to the plaintiff."]). For a general verdict, the interrogatories are

limited to identifying which party has prevailed and, if it is the plaintiff, the amount of the damages award.

2. A special verdict- "A special verdict is one in which the jury finds the facts only, leaving the court to determine which party is entitled to judgment" (CPLR 4111[a]). "When using a special verdict, the court shall submit to the jury written questions susceptible of brief answer or written forms of the several findings which might properly be made or it shall use any other appropriate method of submitting the issues and requiring written findings thereon" (CPLR 4111[b]).

3. A general verdict accompanied by answers to interrogatories- "When the court requires the jury to return a general verdict, it may also require written answers to written interrogatories submitted to the jury upon one or more issues of fact" (CPLR 4111[c]).

4. When the action is one to recover damages for personal injury, injury to property, or wrongful death, the court must instruct the jury that, if it awards damages, it must "itemize," i.e., specify, the amounts awarded for various elements of damages (CPLR 4111[e]). Similarly, when the action is one to recover damages for medical, dental or podiatric malpractice, the jury must be instructed to itemize a damage award (CPLR 4111[d]).

> a. Special verdicts and general verdicts accompanied by answers to interrogatories are often confused, but "[i]n the overwhelming number of civil cases tried before the [] court[s], CPLR 4111(c) [the general verdict accompanied by answers to interrogatories] applies" (*National Equipment Corporation v Ruiz*, 19 AD3d 5, 7-8 [1st Dept 2005]).
>
> b. "The better practice in today's varied and complex world of civil litigation is for the court to ask the jury for a general verdict but submit specific questions consistent with CPLR 4111(c)" (*National Equipment Corporation*, 19 AD3d at 8). Indeed, a CPLR 4111(c) verdict sheet is essential where there are multiple theories, multiple parties, complex issues, or where

their use would help jurors reach a decision (1A PJI3d 1:97; *see Russo v Jess R. Rifkin, D.D.S., P.C.*, 113 AD3d 570 [2d Dept 1985]; *see also Tart v New York Bronx Pediatric Medicine*, 116 AD3d 515 [1st Dept 2014]).

C. For sample verdict sheets, see Exhibit B.

III. THE PJI

A. What is the PJI?

The PJI "is a treatise intended as a working tool for judges in preparing their jury charges, counsel in preparing their requests to charge, and the bar in general in doing research" (1A PJI3d "How to Use These Volumes," at xxxix). "Although the charges [in the PJI] have been prepared after careful study and analysis by the [PJI] Committee, use of them by a trial court is as subject to reversal or objection by trial counsel as any other determination made during trial" (*id.*).

NOTE: The PJI is a critical tool in preparing a charge and verdict sheet, but the instructions in it are not sacrosanct; the pattern instructions must be used and modified to the extent necessary based on the particulars of a given case.

B. Format of PJI

1. The PJI contains a set of numbered sections, each section containing a discreet instruction.[3]

2. Generally, each section begins with an instruction, which is in bold-faced type, followed by a "Comment" section, which is in regular font. Some sections contain supplemental instructions. Those instructions apply to particular issues that may arise in connection with the main instruction. Supplemental instructions, which are in bold-face type, appear in the "Comment" sections.

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[3]The individual instructions are crafted together to create the charge.

3. A "Comment" section contains a detailed discussion of (1) the substantive law relating to the instruction, and (2) procedural considerations related to the cause of action (or defense) that is covered by the instruction.[4]

4. Many "Comment" sections include "Caveats." A "Caveat" appears at the very beginning of a "Comment." A "Caveat" contains a critical observation about the use of the instruction and highlights differences among departments.

5. Many sections contain model verdict sheets that can be adapted.

6. An example of a section of the PJI, illustrating an instruction, "Comment," and "Caveat" can be found at exhibit C.

C. How do you use the PJI?

1. Identify the individual instructions in the PJI that you need to craft a complete charge. These instructions will be identified by the Judge after hearing from the attorneys on the case (*see infra*).

2. Weave the individual instructions together to form a well organized,unambiguous charge.

a. Start with general principles governing the processes by which the jury will decide the case, including the burden of

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[4]"The Comments that follow the [instructions] have several purposes: (1) to present the authority on which the [instruction] is based and the secondary authorities to which the user can turn for a broader view of the subject; (2) to orient the user to the relation of the [instruction] to the general topic with which it deals and to other [instructions] with which it should or may be used; (3) to inform the user of the assumptions made in the preparation of the [instruction]; (4) to point out when the question dealt with is for the court and when for the jury; (5) to indicate what the commonly encountered variations in the factual context are and state in what way a particular variation will require the pattern [instruction] to be changed; (6) to note procedural considerations relating to, among other things, pleading and motion practice" (1A PJI3d "How to Use These Volumes," at xxxix-xliv).

proof, that the case must be decided based on the evidence, and the guidelines for evaluating the credibility of a witness (PJI 1:20 - PJI 1:27, see PJI 1:50 - PJI 1:94).

b. Then charge each separate cause of action and defense, capturing every relevant element of the claim that is in issue.

c. Next come damages: charge every species of damages sought by the plaintiff (or counterclaiming defendant) that was pleaded and supported by the trial evidence (tried separately in bifurcated trial).

d. Last, charge the jury on the form of the verdict it must return (*see* PJI 1:95, 1:97).

3. Based on the content of the charge, prepare a verdict sheet.

a. A general verdict will contain very few questions: is the verdict in favor of the plaintiff or the defendant, and if it is in favor of the plaintiff, what amount do you award him or her?

b. In most civil cases, a special verdict or general verdict accompanied by answers to interrogatories should be used. For each discreet question that the Judge would like the jury to answer, an interrogatory should be drafted. Generally, interrogatories should be used for each element of a cause of action or defense; separate interrogatories should also be used for each theory of liability.

c. A clear, accurate instruction should follow each interrogatory directing the jury how to proceed after answering the interrogatory (*see Crosby v Montefiore Medical Center*, 128 AD3d 523, [1st Dept 2015]). THE INTERROGATORIES AND THE INSTRUCTIONS MUST BE CLEAR AND UNAMBIGUOUS (*see Booth v J.C. Penny Company, Inc.*, 169 AD2d 663 [1st Dept 1991]). The interrogatories must be sequentially numbered.

IV. REQUESTS TO CHARGE & THE CHARGE CONFERENCE

A. Requests to charge

1. CPLR 4110-b provides that "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

NOTE: The Judge must give counsel an opportunity to submit written requests to charge (although requests made on the record are also permissible) and rule on those requests before summations.

2. The parties may also submit proposed verdict sheets.

3. The requests to charge and proposed verdict sheets should be marked for identification or as court exhibits.

B. Charge conference

1. At the charge conference, the Judge and the parties discuss the parties' respective requests to charge and any matter relating to the charge that the Judge wishes to raise. The charge conference may also be used to discuss the verdict sheet.

2. At the conference, the Judge may make his or her rulings on the parties' requests to charge, or the Judge may reserve decision.

3. As a result of CPLR 4111-b, the charge conference will necessarily occur before the parties' summations, and the Judge's decisions on

the requests to charge must be rendered on the record before summations.

4. Making a record- The Judge must ensure that an adequate record is made of the charge conference. The entire charge conference may be placed on the record, or the Judge can conduct the conference off-the-record to ascertain points of agreement and disagreement among counsel, then allow the parties to make a record concerning any objections they have to the Judge's determinations.

5. The verdict sheet- The Judge should afford counsel an opportunity to submit proposed interrogatories for the verdict sheet. Moreover, the Judge must provide to counsel the verdict sheet he or she intends to use before the parties' summations. The Judge should permit counsel to make a record with regard to any objections they have with respect to the verdict sheet.[5]

6. After the Judge has delivered the charge to the jury, he or she should provide counsel with an opportunity to raise any objections to the charge as it was delivered. This procedure allows counsel to point out to the Judge matters that he or she failed to cover in the charge, or matters that he or she did not address in conformity with the pre-summation rulings on the charge.

V. DEALING WITH JUROR NOTES

A. Jurors may send the Judge a note asking for myriad things, including the read-back of testimony, the re-reading of part or all of the charge, or clarification on matters covered in the charge or the verdict sheet.

B. When the Judge receives a note from the jury, the Judge, on the record,

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[5]Sometimes an objection to a matter relating to a verdict sheet constitutes an objection to the charge itself, and the Judge should consider whether a party's objection to the verdict sheet entails the argument that the charge does not adequately convey the legal principles desired by the party who objected to the verdict sheet (*see Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390 [4th Dept 2014]).

must inform counsel of the contents of the note, and provide counsel with an opportunity to suggest how the Judge should respond to the note (*see Garritano v Garritano*, 62 AD3d 657 [2d Dept 2009]; *Sands v Statler Hilton Hotel*, 40 AD2d 620 [4th Dept 1972]). After the Judge has determined how he or she will respond to the note, counsel should be given an opportunity to note any objections; if counsel agree with the Judge's proposed response, counsel's consent should be reflected on the record.

C. The Judge, on the record and in the presence of the jury and counsel (unless counsel consent on the record to the Judge communicating with the jury ex parte), must respond to the note. The response should be direct, clear and responsive to the question posed by the note.

D. The note should be marked as a court exhibit to preserve the record.

VI. TAKING A VERDICT

A. Before a jury's verdict will be recognized as binding, three elements should be satisfied. Those elements are (1) the open-court announcement of the verdict by the foreperson; (2) the polling of the jury; and (3) the entry of the verdict by the Part clerk in the minute book.

B. The open-court announcement of the verdict by the foreperson makes the verdict a "public" one.

C. The polling of the jury

1. Definition- the interrogation of each juror as to whether the verdict as announced is the verdict of that juror (*Duffy v Vogel*, 12 NY3d 169 [2009]).

2. Purpose- to afford jurors one final opportunity individually to express agreement or disagreement with the announced verdict (*Duffy v Vogel*, 12 NY3d at 174).

3. Rationales

a. protects the right of the parties to a public verdict demonstrably that of the jurors selected by the parties to resolve the case (*Duffy v Vogel*, 12 NY3d at 177);

b. recognizes that a juror is free to change his or her mind before the verdict is entered by the Part clerk (*Duffy v Vogel*, 12 NY3d at 174);

c. flushes out potential ambiguities in the verdict (*see Sharrow v Dick Corporation*, 86 NY2d 54 [1995]); and,

d. highlights potential juror confusion (*see People v Cain*, 76 NY2d 119 [1990]; *Ferguson v City of New York*, 201 AD2d 422 [1st Dept 1994]; *see also Reyes v 38 Sickles Street Corp.*, 188 AD2d 518 [2d Dept 1988]; *Luppino v Busher*, 119 AD2d 554 [2d Dept 1986]).

4. Procedure

a. Upon a party's request or on the trial court's own initiative, the jury is polled after the foreperson has announced the verdict and before the verdict is entered into the Part clerk's minutes. The poll must occur before the jury is discharged (*see Giannattasio v Kang*, 84 AD3d 728 [2d Dept 2011]).

b. Manner in which the poll is conducted - general verdict.

- When the jury has returned a general verdict, the court (or clerk) will ask each juror individually if the announced verdict is his or her verdict. The court (or clerk) should not ask each juror whether the announced verdict is the jury's verdict.

c. Manner in which the poll is conducted - special verdicts and general verdicts accompanied by answers to interrogatories.

- The trial court has discretion regarding the manner in which it conducts a poll on interrogatories, and any objection as to the manner in which it chooses to do so must be raised before that court at a time when it can take corrective action (e.g., before the poll is conducted or immediately thereafter).

- Two common methods of conducting a poll on interrogatories: (1) the court (or clerk) reads the contents of the verdict sheet then asks each juror, "Is that your verdict?"; and (2) the court (or clerk) reads the interrogatories one by one, asking each juror, in turn, his or her verdict on each interrogatory.

5. Dealing with concerns raised in the poll

If one or more jurors states that the announced verdict does not represent his or her verdict, or if the poll suggests the verdict is ambiguous, incomplete or the product of juror confusion, the court must take corrective action before it discharges the jury. The nature of the corrective action will vary based on the concern raised by the poll (*see infra*, "VII. Potential issues with a verdict").

6. Nature of Right

a. Is the right to a jury poll an unimportant one? NO. It's a significant right that the Court of Appeals characterizes as an "absolute" right (*Duffy v Vogel*, 12 NY3d 169). If a party requests a poll, the request must be granted regardless of the strength of the prevailing party's case or the clarity of the jury's responses in the verdict sheet.

b. If a party requests that the jury be polled and the trial court denies that request, the requesting party will be entitled to a new trial. It is per se reversible error to decline to conduct the poll.

NOTE: HARMLESS ERROR ANALYSIS IS INAPPLICABLE WHERE THE TRIAL COURT REFUSES TO CONDUCT A REQUESTED JURY POLL.

7. Waiver

a. Even though the right to the poll is characterized as "absolute," that right may be waived, either expressly or implicitly (*Duffy v Vogel*, 12 NY3d 169).

b. Most waivers in this context are implicit: a party fails to request the poll, and the right to the poll is therefore deemed waived.

C. Entry of the verdict in the Part clerk's minute book

This ministerial matter is governed by CPLR 4112, which provides that: "When the jury renders a verdict, the clerk shall make an entry in his [or her] minutes specifying the time and place of the trial, the names of the jurors and witnesses, the general verdict and any answers to written interrogatories, or the questions and answers or other written findings constituting the special verdict and the direction, if any, which the court gives with respect to subsequent proceedings."

VII. Potential issues with a verdict

A. Violation of the 5/6 Rule

1. Six jurors make up a civil jury (CPLR 4104); five of the six need to agree to render a general verdict or to answer an interrogatory (CPLR 4113[a]; *Schabe v Hampton Bays Union Free School District*, 103 AD2d 418 [2d Dept 1985]).[6] But all six jurors must participate in

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[6]While five jurors must agree to answer a given interrogatory, the same five need not agree on each and every interrogatory; interrogatories may be answered by any five jurors (*Schabe v Hampton Bays Union Free School District*, 103 AD2d 418).

deliberations on all matters (*see Sharrow v Dick Corporation*, 86 NY2d 54 [a juror, having disagreed with the remaining five jurors on liability, must still participate in deliberations on the damages issues]).

2. If the jury poll or verdict sheet demonstrates that all six of the jurors did not participate in the deliberations on all matters, then the trial court should direct the jurors that they all must participate in deliberations and to recommence them.

B. Ambiguity or confusion in the verdict

1. If a potential ambiguity in the verdict or potential juror confusion is raised by the jury poll, the jury's answers on the verdict sheet, or both, the trial judge should ascertain if there is in fact a problem with the jury's verdict and, if so, take steps to clarify the verdict.

2. Where ambiguity or confusion is tainting a verdict, the trial judge should:

a. instruct the jury in such a manner that it may clarify the ambiguity, or in such a manner as to eliminate any juror confusion; and,

b. direct the jury to recommence its deliberations.

See *Porret v City of New York*, 252 NY 208 (1929, Cardozo, J.); *Kelly v Greitzer*, 83 AD3d 901 (2d Dept 2011); *Bowes v Noone*, 298 AD2d 859 (4th Dept 2002); *Roberts v County of Westchester*, 278 AD2d 216 (2d Dept 2000); *Ryan v Orange County Fair Speedway*, 227 AD2d 609 (2d Dept 1996).

NOTE: On reconsideration of its verdict, the jury is free to substantively alter its original answers; the jury is not bound by its responses on the original verdict sheet (*see Kelly v Greitzer*, 83 AD3d 901; *DeCrescenzo v Gonzalez*, 46 AD3d 607 [2d Dept 2007]; *Bowes v Noone*, 298 AD2d 859; *Ryan v Orange County Fair Speedway*, 227

AD2d 609).

3. Situations that may present an ambiguous verdict or a verdict that is the product of confusion:

a. net damages where the jury apportioned fault to the plaintiff

i. When the jury apportions some fault to the plaintiff (*see* CPLR 1411), it is required to state the total amounts of damages the plaintiff sustained (*see* 1A PJI3d 2:36 [2015]). The jury is not to make any deductions from its awards based on the plaintiff's comparative fault; the court will calculate the amounts that the plaintiff may recover based on the jury's answers to the interrogatories (*see Ferguson v City of New York*, 201 AD2d 422).

For example, if the jury apportions fault equally between the plaintiff and the defendant and concludes that $50,000 is reasonable compensation for the plaintiff's past pain and suffering, the jury should reflect that apportionment on the verdict sheet and award the plaintiff $50,000 for past pain and suffering. The court will reduce the $50,000 award according to the jury's finding of comparative fault, resulting in an award of $25,000.

ii. If a jury returns a verdict apportioning fault to the plaintiff and awarding the plaintiff damages and its awards seem low, the jury may have been confused as to whether it should deduct from the awards the plaintiff's share of comparative fault. Sticking with the example above, if a jury apportions fault equally between the plaintiff and the defendant and intends to award the plaintiff $50,000 for past pain and suffering, but erroneously reduces its award by the plaintiff's share of comparative fault, the jury would state (erroneously) on the verdict sheet that the award for past pain and

suffering is $25,000. Then the court would apply (again) the plaintiff's comparative fault, leaving the plaintiff with a $12,500 recovery, only half what the jury intended.

iii. When apportionment has occurred and the awards seem low, the trial court may be asked by counsel to make a limited inquiry of the jury as to whether it deducted anything from the awards based on the plaintiff's comparative fault, or if the awards represent the total amount of damages without deduction for the plaintiff's comparative fault (*see Grant v Endy*, 167 AD2d 807 [3d Dept 1990]).

b. future damages

i. When awarding future damages in an action governed by the itemized verdict requirements of CPLR 4111(d) (medical, dental, podiatric malpractice) or (e) (personal injury, injury to property, wrongful death), the jury is required, for each species of future damages for which an award is made, to specify the number of years over which the amount awarded is intended to provide compensation.[7] For each category of future damages (e.g., future pain and suffering), the jury is supposed to award the total sum of reasonable compensation; the jury is not supposed to list the average annual sum of the total award (*see* 1B PJI3d 2:301 [2015]).

For example, if a jury intends to award $1,000,000 in future pain and suffering and the award is intended to cover a period of 10 years, the jury should report on the verdict sheet that the award for future pain and suffering

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[7]There are some differences in the itemization requirements for actions subject to CPLR 4111(d) on the one hand, and actions subject to CPLR 4111(e) on the other.

is $1,000,000. The jury should not report on the verdict sheet that the award is $100,000 ($100,000 x 10 years = $1,000,000).

ii. If a jury returns a verdict awarding future damages that are itemized and a particular award (or awards) seems low, the jury may have been confused as to the manner in which it should report the subject award (i.e., list the total amount or the per annum sum). The trial court may be asked to make a limited inquiry as to whether the jury truly intended to award the suspect amount, which will be the total amount of compensation for that type of damages (*see generally Grant v Endy*, 167 AD2d 807).

4. Where the jury's answers to the interrogatories are clear and there is no indication that the jury was confused, the trial court should not require the jury to reconsider its verdict or otherwise recommence deliberations (*see Pogo Holding Corp. v New York Property Insurance Underwriting Assoc.*, 97 AD2d 872 [2d Dept 1983]).

NOTE: ANY ISSUE REGARDING AN AMBIGUITY OR CONFUSION MUST BE ADDRESSED BEFORE THE JURY IS DISCHARGED. ONCE THE JURY HAS BEEN DISCHARGED, THE COURT LOSES THE POWER TO TAKE CORRECTIVE ACTION (*Moisakis v Allied Building Products Corp.*, 265 AD2d 457 [2d Dept 1999]). Even if a court addresses post-trial the issue of an ambiguous or confused verdict (*see* CPLR 4404), the only possible remedy the court can afford is a new trial.

C. Inconsistency in the verdict

1. When a special verdict (CPLR 4111[b]) or a general verdict accompanied by answers to interrogatories (CPLR 4111[c]) is used to reflect a jury's verdict, the potential for an inconsistent verdict is present.

2. A verdict is inconsistent when the jury's answers to two or more interrogatories cannot be logically reconciled, i.e., it is logically impossible to reconcile the answers (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]; *see Barry v Manglass*, 55 NY2d 803 [1981] [inconsistency exists when verdict on one claim necessarily negates an element of another cause of action]; *Bellinson Law, LLC v Iannucci*, 116 AD3d 401 [1st Dept 2014] [verdict inconsistent where jury's responses to two interrogatories were "in direct conflict with one another"]; *Applebee v County of Cayuga*, 103 AD3d 1267 [4th Dept 2013] ["legally impossible" for jury's responses to two interrogatories to be reconciled]; *Midler v Crane*, 67 AD3d 569 [1st Dept 2009] [inconsistency exists only when verdict on one claim necessarily negates an element of another cause of action]; *see also Mars Assocs., Inc. v New York City Ed. Construction Fund*, 126 AD2d 178 [1st Dept 1987]).

a. Most common example of an inconsistent verdict: Jury apportions fault to a party that it determined was not liable (e.g., that party was not negligent, that party's negligence was not a substantial factor in causing plaintiff's damages) (*see Kumar v PI Associates, LLC,* 125 AD3d 609 [2d Dept 2015]; *Allen v Lowczus*, 118 AD3d 1258 [4th Dept 2014]; *Kelly v Greitzer*, 83 AD3d 901; *Dubec v New York City Housing Auth.*, 39 AD3d 410 [1st Dept 2007]; *Palmer v Walters*, 29 AD3d 552 [2d Dept 2006]; *Mateo v 83 Post Avenue Assocs.*, 12 AD3d 205 [1st Dept 2004]; *Bowes v Noone*, 298 AD2d 859; *Ryan v Orange County Fair Speedway*, 227 AD2d 609).

b. Do not confuse an inconsistent verdict with a verdict that is allegedly against the weight of the evidence (*see* CPLR 4404). With respect to the former, the concern is that the jury's answers to two or more interrogatories cannot possibly be logically reconciled; with respect to the latter, the concern is that the jury's answers to the interrogatories are not consonant with a fair interpretation of the evidence (*see Hodge v Simpson*, March 22, 2013 NYLJ [Sup. Ct., Bronx County]).

c. A verdict is not inconsistent simply because a jury finds that a defendant is not liable to a plaintiff, but makes an award of damages (*Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31 [1980]; *Alcantara v Knight*, 123 AD3d 622 [1st Dept 2014]; *see Peters v Port Authority Trans-Hudson Corp.*, 234 AD2d 205 [1st Dept 1996] [fixing by jury of an amount for plaintiff's damages is not, standing alone, inconsistent with the determination of no liability and should not be taken as an allocation of responsibility to the defendant]). In such a circumstance, the jury's act of awarding damages is superfluous.

d. The issues of whether a defendant was negligent and whether that negligence was a proximate cause of a plaintiff's injuries are usually discreet, and a jury's finding that a defendant was negligent but that the negligence was not a proximate cause of the plaintiff's injuries is inconsistent only in the exceptional case where the two issues are "inextricably interwoven" (*Pavlou v City of New York*, 8 NY3d 961 [2007]; *Coma v City of New York*, 97 AD3d 715 [2d Dept 2012]).[8]

NOTE: IF THERE IS AN ISSUE AS TO WHETHER A VERDICT IS INCONSISTENT, THE TRIAL COURT, BEFORE THE JURY IS DISCHARGED, MUST ASCERTAIN IF THERE IS IN FACT AN INCONSISTENCY, AND, IF SO, TAKE CORRECTIVE ACTION (*see Smith v Field*, 302 AD2d 585). Even if a court addresses post-trial the issue of an inconsistent verdict (*see* CPLR 4404), the only possible remedy the court can afford is a new trial.

3. When there is an inconsistency in a *special verdict*, the trial judge may require the jury to reconsider its verdict or declare a mistrial (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507; *Bellinson Law, LLC v*

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[8]Examples of cases where the issues of a party's negligence and proximate cause were "inextricably interwoven" include: *Dessasore v New York City Housing Auth.*, 70 AD3d 440 (1st Dept 2010); *Alexander v City of New York*, 21 AD3d 389 (2d Dept 2005).

Iannucci, 116 AD3d 401). If the jury is discharged before an inconsistent verdict is resolved, the only remedy will be a new trial (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507; *see also Bellinson Law, LLC v Iannucci*, 116 AD3d 401; *Applebee v County of Cayuga*, 103 AD3d 1267; *Vera v Bielomatik Corp.*, 199 AD2d 132 [1st Dept 1993]).

4. When there is an inconsistency in a *general verdict accompanied by answers to interrogatories*, the trial judge's options depend on the manner of the inconsistency.

> a. If the answers to the interrogatories are consistent with one another, but one or more such answers conflict with the general verdict, the court has discretion to enter judgment according to the answers to the interrogatories (the specific trumps the general), require the jury to reconsider its verdict, or declare a mistrial (CPLR 4111[c]; *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31).
>
> b. If the answers to the interrogatories are inconsistent with one another, the Judge's options are limited to requiring the jury to reconsider its verdict or declaring a mistrial (CPLR 4111[c]; *Marine Midland Bank v John E. Russo Produce Co., Inc.*, 50 NY2d 31).
>
> c. If the jury is discharged before an inconsistent verdict is resolved, the only remedy will be a new trial (*see Bellinson Law, LLC v Iannucci*, 116 AD3d 401; *Applebee v County of Cayuga*, 103 AD3d 1267; *Vera v Bielomatik Corp.*, 199 AD2d 132).

5. What remedy should be afforded the parties when a verdict is inconsistent and the jury is still in the box? Should the jury be directed to reconsider its verdict or should the court declare a mistrial? Generally, directing the jury to reconsider its verdict is preferable to declaring a mistrial (*see Ryan v Orange County Fair Speedway*, 227 AD2d 609). But, a mistrial should be directed if the

jury is hopelessly confused (*Leal v Simon*, 147 AD2d 198 [2d Dept 1989]; *see Cortes v Edoo*, 228 AD2d 463 [2d Dept 1996]).

6. Before directing the jury to reconsider its verdict, the trial judge should explain to the jury the inconsistency in the verdict (*Ledogar v Forbes*, 84 AD3d 749 [2d Dept 2011]) and provide it with any further instructions necessary to resolve any confusion that led to the inconsistency (*see Roberts v County of Westchester*, 278 AD2d 216; *Cortes v Edoo*, 228 AD2d 463; *see also Kelly v Greitzer*, 83 AD3d 901).

NOTE: On reconsideration of its verdict, the jury is free to substantively alter its original answers; the jury is not bound by its responses on the original verdict sheet (*see Kelly v Greitzer*, 83 AD3d 90; *DeCrescenzo v Gonzalez*, 46 AD3d 607; *Mateo v 83 Post Avenue Assocs.*, 12 AD3d 205; *Bowes v Noone*, 298 AD2d 859; *Ryan v Orange County Fair Speedway*, 227 AD2d 609). Indeed, the jury should be instructed that it is free to reconsider all of its answers (*Alvarez v Beltran*, 121 AD3d 488 [1st Dept 2014]).

VIII. Trial motions following a verdict

A. CPLR 4406 permits only one formal, written post-trial motion under CPLR article 44. In addition, the parties are permitted to make oral motions.

1. Oral motion to set aside verdict and for judgment as a matter of law

Judgment as a matter of law notwithstanding a jury's verdict is available where no valid line of reasoning and permissible inferences could possibly have lead rational individuals to the conclusion reached by the jury on the basis of the evidence presented at trial (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]).

2. Oral motion to set aside a verdict as against the weight of the evidence and for a new trial

A jury's verdict may be set aside and a new trial ordered where the trial evidence so preponderated in favor of the party against whom the verdict was rendered that it could not have been reached on any fair interpretation of the evidence (*Lolik v Big V Supermarkets, Inc.*, 86 NY2d 744, 746 [1995]; *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195 [1st Dept 2004]).

B. Motion to amend pleading (conform the pleadings to the proof)

1. Under CPLR 3025, a party may amend a pleading at any time by leave of court, before or after judgment to conform the pleading to the trial evidence (CPLR 3025[b], [c]).

2. Absent prejudice, courts are free to permit amendment even after trial (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]). Prejudice is more than the mere exposure of the party to greater liability (*id.*). Rather, there must be some indication that the party has been hindered in the preparation of the party's case or has been prevented from taking some measure in support of its position (*id.*). The burden of establishing prejudice is on the party opposing the amendment (*id.*).

"EXHIBIT A"

PJI 2:152. Malpractice – Attorney

This is a claim for legal malpractice. Legal malpractice is negligence by an attorney.

As you have heard, the plaintiff AB claims that (he, she, it) retained the defendant CD to represent (him, her, it) in [*state matter for which CD was retained*] **and that CD performed that representation in a negligent manner in that** [*state AB's claims*]**. CD claims** [*state CD's contentions*].

An attorney who undertakes to represent a client is expected to exercise a reasonable degree of skill and be familiar with the applicable rules of practice and the settled principles of law and is expected to exercise reasonable care in representing the client. Reasonable care means that degree of care commonly exercised by an ordinary member of the legal profession. However, an attorney is not a guarantor of a favorable result and (he, she) is not liable simply because the client did not achieve the best possible result or the result the client sought. [*State where appropriate:* **Similarly, if an attorney explains to the client the nature of the risks involved in a certain course of action and the client elects to follow that course, the attorney is not responsible for the consequences as long as the attorney pursued the course using a reasonable degree of skill and care.**] [*State where appropriate:* **Additionally, as long as an attorney acts in a manner that is reasonable and consistent with the law as it existed at the time of the representation, (he, she) is not liable for failing to advise the client or take action based on a novel or questionable legal theory pertaining to the case].**

To establish CD's liability for malpractice, AB must prove, by a preponderance of the evidence, that, in representing AB in [*state matter in issue*] **CD failed to exercise that degree of care, skill and diligence commonly exercised by a member of the legal profession in that** [*set forth bases of claimed malpractice*]. **In determining the degree of skill commonly used by an ordinary member of the legal profession in CD's situation, you should consider all of the evidence you have heard** [*state where appropriate:* **including the testimony of the expert witnesses**]**. Once you have determined the degree of skill commonly used by an ordinary member of the legal profession in CD's situation, you should go on to decide whether CD departed from that standard in** [*state acts and omissions alleged to constitute defendant's malpractice].* **AB has the burden to prove, by a preponderance of the evidence, that CD did not, in fact, exercise that degree of skill, care and diligence commonly used by an ordinary member of the legal profession in the situation.**

If you decide that AB has not met this burden of proof, then you will find that CD was not negligent and will proceed no further. On the other hand, if you decide that AB has proven that CD did not exercise the required degree of skill, care and diligence, you

will find that CD was negligent and you must go on to consider whether AB has proven, by a preponderance of the evidence, that (he, she, it) sustained losses as a result of CD's negligence, that is, but for CD's negligence, AB would not have [*state as appropriate:* **lost the case, sustained a loss**].

[*Where the alleged negligence arose in the context of representation in litigation and an issue is raised as to whether the unfavorable result would not have occurred but for defendant attorney's malpractice, add the following:* **In deciding whether AB has proven that (he, she, it) would not have lost the case if CD had not been negligent, you must, in effect, decide a lawsuit within a lawsuit; that is, for AB to hold CD liable in this action, AB must prove, by a preponderance of the evidence presented in this case, that (he, she, it) would have been successful in (his, her, its) lawsuit with EF** [*identify AB's adversary in the underlying action]* **if CD had not** [*state claimed acts and omissions alleged to constitute defendant's malpractice]*. **I am now going to give you the law you must consider in deciding whether AB would have succeeded in the lawsuit between (him, her, it) and EF.** [*Insert rules that would govern burden of proof and substantive law in the action with EF].*

If you find that AB has proven, by a preponderance of the evidence, that (he, she, it) would not have (lost the case, sustained loss) if CD had not been negligent, you will find for AB [*add where appropriate:* **and report your findings to the court**].

[*Where there is an issue of the comparative fault of plaintiff and defendant, an appropriate charge and special verdict question should be given, see PJI 2:36, et seq.].*

(1) POSSESSOR'S LIABILITY

PJI 2.90 Possessor's Liability for Condition or Use of Premises – Standard of Care

As you have heard, the plaintiff AB brings this action against the defendant CD based on the claim that CD negligently maintained the property at [*state location of property*]. **The (owner, possessor) of (land, a building) has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable.**

In order to recover, the plaintiff, AB, must prove: (1) that the premises were not reasonably safe; (2) that the defendant, CD, was negligent in not keeping the premises in a reasonably safe condition; and (3) that CD's negligence in allowing the unsafe condition to exist was a substantial factor in causing AB's injury.

You must first consider whether the premises were reasonably safe. AB claims that the premises were not in a reasonably safe condition because [*state plaintiff's contentions*]. **CD contends** [*states defendant's contentions*]. **If you decide that the premises were reasonably safe, you will find for CD and proceed no further. If you decide that the premises were not reasonably safe, you will proceed to consider whether CD was negligent in permitting the unsafe condition to exist.**

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent (owner, possessor) of (land, a building) would use under the same circumstances, taking into account the foreseeable risk of injury. In deciding whether CD was negligent, you must decide whether CD created the [*state claimed condition*] **or either knew or, in the use of reasonable care, should have known, that the** [*state claimed condition*] **existed. If CD did not create the** [*state claimed condition*] **but knew or should have known about the** [*state claimed condition*], **you must decide whether CD had sufficient time before the accident to correct the** [*state claimed condition*], **provide reasonable safeguards or provide reasonable warning.**

In order to find that CD's conduct was negligent, you must find ([add where appropriate;] **that AB's presence was foreseeable and) that (a) CD created the** [*state claimed condition*] **or, (b) if CD did not create the** [*state claimed condition*], **CD either knew of the unsafe condition long enough before AB's injury to have permitted CD in the use of reasonable care to have it corrected or to take other suitable precautions and did not do so; or CD did not know of the condition but in the use of reasonable care should have known of it and corrected it (or taken other suitable precautions).**

[*If plaintiff's contention includes failure to warn and defendant contends that there was no duty to warn because of the condition, if unsafe, was open and obvious, the following should*

be given:] **On the question of the failure to warn, there is no duty to warn of unsafe conditions that are open and obvious. A condition is open and obvious if it could have readily been observed by any person reasonably using his or her senses.**

If you decide that the [*state claimed condition*] **was open and obvious, you will find for CD on AB's claim that there was a failure to provide a warning** ([*add where appropriate;*] **and you will proceed to consider AB's other claims concerning the** [*state claimed condition*]. **If you decide that** [*state claimed condition*] **was not open and obvious, you will proceed to consider whether CD gave an adequate warning. The adequacy of a warning depends on both the information it provides and the way the information is given).**

You will find that CD was negligent if you decide that ([*add where appropriate;*] **AB's presence was foreseeable and that) CD created the** [*state claimed condition*] **or either knew, or in the use of reasonable care should have known, about the** [*state claimed condition*] **long enough before the accident to have allowed (him, her, it), in the use of reasonable care to correct it or to take other suitable precautions and if you further find that (he, she, it) failed to do so. On the other hand, if you find that** ([*add where appropriate:*] **AB's presence was not foreseeable or that) CD did not create the** [*state claimed condition*] **and, further, that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the** [*state claimed condition*] **before the accident occurred, or if you find that CD corrected the** [*state claimed condition*] **or took other suitable precautions, then you will find that CD was not negligent.**

If you find that CD was negligent you must next consider whether that negligence was a substantial factor in causing AB's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not substantial factor in causing the injury, then AB may not recover. If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g. comparative fault, damages, verdict].*

([*Where there is an issue as to the plaintiff's comparative fault in light of the open and obvious nature of the condition or the adequacy of the warning, add:*] **If you find that the** [*state claimed condition*] **was open and obvious** (*state where appropriate:* **or that a warning was provided), you should consider (that, those) fact(s) in deciding whether AB was also at fault for causing (his, her) injuries. The burden is on CD to prove that AB was at fault and that AB's conduct contributed to causing (his, her) injuries. If you find that AB was not at fault or, if at fault, that (his, her) conduct did not contribute to causing (his, her) injuries, you must find that plaintiff was not at fault and you must go on to consider AB's damages, if any** [*in a bifurcated trial, substitute the following for the direction to go on to consider damages; in that event you should go no further and report your findings to the court*].

If, however, you find that AB was at fault and that (his, her) conduct contributed to causing (his, her) injuries, you must then apportion the fault between AB and CD [*add*

where appropriate: **and EF**].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both AB and CD [*add where appropriate:* **and EF**] **and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.**

See PJI 2:36.1 for an example that may be given to the jury to assist it to understand the process of arriving at percentages of fault. See PJI 2:36:2 for a charge to be given in the damages phase of a bifurcated trial before the same jury that decided liability.

"EXHIBIT B"

Special Verdict Form PJI 2:120 SV-1

(1) Was the defendant's product not reasonably safe in that

(a) It was defectively manufactured?

Yes_____ No_____

At least five jurors must agree on the answers to this question.

(b) It was defectively designed?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

(c) It was marketed with no or inadequate warnings?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

If your answer to all of these questions is "No," proceed no further on this claim. If you have answered "Yes" to one or more of these questions, you should continue and answer Question 2.

(2)(a) If you answered "Yes" to Question 1(a), was the manufacturing defect a substantial factor in causing the plaintiff's injury?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

(b) If you answered "Yes" to Question (1)(b), was the design defect a substantial factor in causing the plaintiff's injury?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

(c) If you answered "Yes" to Question (1)(c), was the failure to warn or inadequate warning a substantial factor in causing plaintiff's injury?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

If your answer to all of these questions is "No," proceed no further on this claim. If your answer to any of these questions is "Yes", you should continue and answer Questions 3, 4 and 5.

(3)(a) Did plaintiff misuse defendant's product?

(3)(b) If you answered "Yes" to Question 3(a), was plaintiff's injury caused by his or her misuse of the defendant's product?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

(4) Could the plaintiff, by the use of reasonable care, have discovered the defect and realized its danger?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

(5) Could the plaintiff, by the use of reasonable care, have avoided his or her injury?

Yes_____ No_____

At least five jurors must agree on the answer to this question.

If your answers to each of Questions 3, 4 and 5 are "No", proceed no further and report to the court. If your answer to any of these questions is "Yes", you should continue and answer Question 6.

(6) What is the percentage of responsibility chargeable to defendant and what is the percentage of responsibility chargeable to plaintiff?

Defendant ____%
Plaintiff _____%
Total must be 100%

At least five jurors must agree on the answer to this question.

Special Verdict Form PJI 2:275 SV-1 Apportionment of Fault

1. Was the defendant CD negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If you have answered Question "1" "Yes", proceed to Question "2". If you have answered Question "1" "No", proceed to Question "3".

2. Was defendant CD's negligence a substantial factor in causing (plaintiff's injury, the accident [or other appropriate characterization of the event])?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

Proceed to Question "3".

3. Was the defendant EF negligent?

At least five jurors must agree on the answer to this question.

Yes_____ No_____

[Insert signature lines]

If you have answered Question "3" "Yes", proceed to Question "4". If you have answered Question "3" "No", proceed no further and report to the court.

4. Was defendant EF's negligence a substantial factor in causing (plaintiff's injury, the accident [or other appropriate characterization of the event])?

At least five jurors must agree on the answer to this Question.

Yes_____ No_____

[Insert signature lines]

If you have answered Question "1", "2", "3" and "4" "Yes", proceed to Question "5". If your answer to any one of the Questions is "No", proceed no further

and report to the court.

5. What was the percentage of fault of defendant CD and what was the percentage of fault of defendant EF?

At least five jurors must agree on the answer to this Question.

CD _____%
EF _____%

Total must equal 100%

[Insert signature lines]

"EXHIBIT C"

NEGLIGENCE ACTIONS

(1) POSSESSOR'S LIABILITY

PJI 2.90 Possessor's Liability for Condition or Use of Premises – Standard of Care

As you have heard, the plaintiff AB brings this action against the defendant CD based on the claim that CD negligently maintained the property at [*state location of property*]. **The (owner, possessor) of (land, a building) has a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable.**

In order to recover, the plaintiff, AB, must prove: (1) that the premises were not reasonably safe; (2) that the defendant, CD, was negligent in not keeping the premises in a reasonably safe condition; and (3) that CD's negligence in allowing the unsafe condition to exist was a substantial factor in causing AB's injury.

You must first consider whether the premises were reasonably safe. AB claims that the premises were not in a reasonably safe condition because [*state plaintiff's contentions]*. **CD contends** [*states defendant's contentions*]. **If you decide that the premises were reasonably safe, you will find for CD and proceed no further. If you decide that the premises were not reasonably safe, you will proceed to consider whether CD was negligent in permitting the unsafe condition to exist.**

Negligence is the failure to use reasonable care. Reasonable care means that degree of care that a reasonably prudent (owner, possessor) of (land, a building) would use under the same circumstances, taking into account the foreseeable risk of injury. In deciding whether CD was negligent, you must decide whether CD created the [*state claimed condition*] **or either knew or, in the use of reasonable care, should have known, that the** [*state claimed condition*] **existed. If CD did not create the** [*state claimed condition*] **but knew or should have known about the** [*state claimed condition*], **you must decide whether CD had sufficient time before the accident to correct the** [*state claimed condition*], **provide reasonable safeguards or provide reasonable warning.**

In order to find that CD's conduct was negligent, you must find ([add where appropriate;] **that AB's presence was foreseeable and) that (a) CD created the** [*state claimed condition*] **or, (b) if CD did not create the** [*state claimed condition*], **CD either knew of the unsafe condition long enough before AB's injury to have permitted CD in the use**

of reasonable care to have it corrected or to take other suitable precautions and did not do so; or CD did not know of the condition but in the use of reasonable care should have known of it and corrected it (or taken other suitable precautions).

[If plaintiff's contention include failure to warn and defendant contends that there was no duty to warn because of the condition, if unsafe, was open and obvious, the following should be given:] **On the question of the failure to warn, there is no duty to warn of unsafe conditions that are open and obvious. A condition is open and obvious if it could have readily been observed by any person reasonably using his or her senses.**

If you decide that the [*state claimed condition*] **was open and obvious, you will find for CD on AB's claim that there was a failure to provide a warning** ([*add where appropriate;*] **and you will proceed to consider AB's other claims concerning the** [*state claimed condition*]. **If you decide that** [*state claimed condition*] **was not open and obvious, you will proceed to consider whether CD gave an adequate warning. The adequacy of a warning depends on both the information it provides and the way the information is given).**

You will find that CD was negligent if you decide that ([*add where appropriate;*] **AB's presence was foreseeable and that) CD created the** [*state claimed condition*] **or either knew, or in the use of reasonable care should have known, about the** [*state claimed condition*] **long enough before the accident to have allowed (him, her, it), in the use of reasonable care to correct it or to take other suitable precautions and if you further find that (he, she, it) failed to do so. On the other hand, if you find that** ([*add where appropriate:*] **AB's presence was not foreseeable or that) CD did not create the** [*state claimed condition*] **and, further, that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the** [*state claimed condition*] **before the accident occurred, or if you find that CD corrected the** [*state claimed condition*] **or took other suitable precautions, then you will find that CD was not negligent.**

If you find that CD was negligent you must next consider whether that negligence was a substantial factor in causing AB's injury. An act or failure to act is a substantial factor in bringing about an injury if a reasonable person would regard it as a cause of the injury. If you find that CD's negligence was not substantial factor in causing the injury, then AB may not recover. If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g. comparative fault, damages, verdict].*

([*Where there is an issue as to the plaintiff's comparative fault in light of the open and obvious nature of the condition or the adequacy of the warning, add:*] **If you find that the** [*state claimed condition*] **was open and obvious** (*state where appropriate:* **or that a warning was provided), you should consider (that, those) fact(s) in deciding whether AB was also at fault for causing (his, her) injuries. The burden is on CD to prove that AB was at fault and that AB's conduct contributed to causing (his, her) injuries. If you find that AB was not at fault or, if at fault, that (his, her) conduct did not contribute to causing (his, her) injuries, you must find that plaintiff was not at fault and you must go on to consider AB's**

damages, if any [*in a bifurcated trail, substitute the following for the direction to go on to consider damages; in that event you should go no further and report your findings to the court*].

If, however, you find that AB was at fault and that (his, her) conduct contributed to causing (his, her) injuries, you must then apportion the fault between AB and CD [*add where appropriate:* **and EF**].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both AB and CD [*add where appropriate:* **and EF] and determine what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.**

See PJI 2:36.1 for an example that may be given to the jury to assist it to understand the process of arriving at percentages of fault. See PJI 2:36:2 for a charge to be given in the damages phase of a bifurcated trial before the same jury that decided liability.

Comment

Caveat 1: Where the evidence raises questions of fact both as to whether a particular condition was open and obvious and as to whether the condition rendered the premises not reasonably safe, it is error to give the "failure to warn" portion of PJI 2:90 without telling the jury that, even if it finds no duty to warn, it should proceed to consider plaintiff's other claims with regard to the unsafe condition, Gaudiello v New York, 80 AD3d 726, 916 NYS2d 606 (2d Dept 2011) (citing PJI); Slatsky v Great Neck Plumbing Supply, Inc., 29 AD3d 776, 815 NYS 2d 201 (2d Dept 2006).

Caveat 2: The court's charge must make clear that, in order to find constructive notice of an unsafe condition, the jury must conclude that the condition was visible and apparent and had existed for a sufficient length of time for defendant to have discovered it and taken curative steps, Harrison v New York City Transit Authority, 113 AD3d 472, 978, NYS2d 194 (1st Dept 2014) (citing PJI) (reversing where court instructed that, to find constructive notice, the jury must find that "a reasonable person would conclude that [a dangerous] condition existed"; error not cured by subsequent instruction that jury "also needed to find that defendant failed to use reasonable care "or had a reasonable time to remove the snow or ice but failed to do so" as this instruction not related to notice).