

Archived—May 2022 supp.

# Judicial Council of California Civil Jury Instructions

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## CACI\*

\* Pronounced “Casey”

Supplement With New and Revised Instructions

As approved at  
the Judicial Council’s Rules Committee April 2022 meeting  
and the Judicial Council May 2022 Meeting



**Judicial Council of California  
Advisory Committee on Civil Jury Instructions**

Hon. Martin J. Tangeman, Chair

LexisNexis Matthew Bender  
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## *Preface to CACI Updates*

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This supplement to the 2022 edition of CACI includes a number of additions and changes to the instructions, which were first published in 2003. In providing these updates, the Judicial Council Advisory Committee on Civil Jury Instructions is fulfilling its charge to maintain CACI. The committee is also striving to add instructions in new areas of the law and to augment existing areas.

The impetus for the revisions came from several sources including CACI users who detected changes in the law or who simply sought to do a better job of explaining the law in plain English. Responding to feedback from users is consistent with the Advisory Committee's goal to act as a vehicle for maintaining CACI as the work product of the legal community. We hope that our hundreds of contributors view our role in the same way and that they will continue to support us.

May 2022

Hon. Martin J. Tangeman  
Second District Court of Appeal  
Chair, Advisory Committee on Civil Jury Instructions

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May 2022

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## 406. Apportionment of Responsibility

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**[[Name of defendant] claims that the [negligence/fault] of [insert name(s) or description(s) of nonparty tortfeasor(s)] [also] contributed to [name of plaintiff]’s harm. To succeed on this claim, [name of defendant] must prove both of the following:**

- 1. That [insert name(s) or description(s) of nonparty tortfeasor(s)] [was/were] [negligent/at fault]; and**
- 2. That the [negligence/fault] of [insert name(s) or description(s) of nonparty tortfeasor(s)] was a substantial factor in causing [name of plaintiff]’s harm.]**

**If you find that the [negligence/fault] of more than one person including [name of defendant] [and] [[name of plaintiff]/ [and] [name(s) or description(s) of nonparty tortfeasor(s)]] was a substantial factor in causing [name of plaintiff]’s harm, you must then decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The percentages must total 100 percent.**

**You will make a separate finding of [name of plaintiff]’s total damages, if any. In determining an amount of damages, you should not consider any person’s assigned percentage of responsibility.**

**[“Person” can mean an individual or a business entity.]**

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*New September 2003; Revised June 2006, December 2007, December 2009, June 2011*

### Directions for Use

This instruction is designed to assist the jury in completing CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*, which must be given in a multiple-tortfeasor case to determine comparative fault. VF-402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors.

Throughout, select “fault” if there is a need to allocate responsibility between tortfeasors whose alleged liability is based on conduct other than negligence, e.g., strict products liability.

Include the first paragraph if the defendant has presented evidence that the conduct of one or more nonparties contributed to the plaintiff’s harm. (See *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33 [117 Cal.Rptr.3d 791] [defendant has burden to establish concurrent or alternate causes].) “Nonparties” include the

universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) Include “also” if the defendant concedes some degree of liability.

If the plaintiff’s comparative fault is also at issue, give CACI No. 405, *Comparative Fault of Plaintiff*, in addition to this instruction.

Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff’s harm is not an individual.

### Sources and Authority

- Proposition 51. Civil Code section 1431.2.
- “[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only ‘in proportion to the amount of negligence attributable to the person recovering.’ ” (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)
- “In light of *Li*, however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. . . . Such a doctrine conforms to *Li*’s objective of establishing ‘a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.’ ” (*American Motorcycle Assn., supra*, 20 Cal.3d at p. 583.)
- “[W]e hold that section 1431.2, subdivision (a), does not authorize a reduction in the liability of intentional tortfeasors for noneconomic damages based on the extent to which the negligence of other actors—including the plaintiffs, any codefendants, injured parties, and nonparties—contributed to the injuries in question.” (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 29 [267 Cal.Rptr.3d 203, 471 P.3d 329].)
- “The comparative fault doctrine ‘is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine “is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an ‘equitable apportionment or allocation of loss.’ ” [Citation.]’ ” (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.Rptr.3d 112].)
- “‘Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action.’ More specifically, a defendant has ‘the burden to establish concurrent or alternate causes by proving: that [the plaintiff] was

exposed to defective asbestos-containing products of other companies; that the defective designs of the other companies' products were legal causes of the plaintiffs' injuries; and the percentage of legal cause attributable to the other companies.' ” (*Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 332 [278 Cal.Rptr.3d 688], internal citations omitted.)

- “[A] ‘defendant[’s]’ liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff’s injuries*, not merely that of ‘defendant[s]’ present in the lawsuit.” (*Dafonte, supra*, 2 Cal.4th at p. 603, original italics.)
- “The proposition that a jury may apportion liability to a nonparty has been adopted in the Judicial Council of California Civil Jury Instructions (CACI) special verdict form applicable to negligence cases. (See CACI Verdict Form 402 and CACI Instruction No. 406 [‘Verdict Form] 402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors. [¶] . . . [¶] . . . “Nonparties” include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors.’)” (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 100 fn. 5 [168 Cal.Rptr.3d 323], internal citation omitted.)
- “[U]nder Proposition 51, fault will be allocated to an entity that is immune from *paying* for its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious.” (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 [6 Cal.Rptr.3d 695], original italics.)
- “A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff’s injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous.” (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [129 Cal.Rptr.2d 336].)
- “[T]here must be substantial evidence that a nonparty is at fault before damages can be apportioned to that nonparty.” (*Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 785 [180 Cal.Rptr.3d 479].)
- “When a defendant is liable *only* by reason of a derivative nondelegable duty arising from his status as employer or landlord or vehicle owner or coconspirator, or from his role in the chain of distribution of a single product in a products liability action, his liability is *secondary* (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51.” (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [71 Cal.Rptr.3d 518], original italics, internal citations omitted.)
- “Under the doctrine of strict products liability, all defendants in the chain of distribution are jointly and severally liable, meaning that each defendant can be held liable to the plaintiff for all damages the defective product caused.”

(*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1010 [169 Cal.Rptr.3d 208].)

- Proposition 51 does not apply in a strict products liability action when a single defective product produced a single injury to the plaintiff. That is, all the defendants in the stream of commerce of that single product remain jointly and severally liable. . . . [I]n strict products liability asbestos exposure actions, . . . Proposition 51 applies when there are multiple products that caused the plaintiff’s injuries and there is evidence that provides a basis to allocate fault for noneconomic damages between the defective products.” (*Romine, supra*, 224 Cal.App.4th at pp. 1011–1012, internal citations omitted.)
- “[T]he jury found that defendants are parties to a joint venture. The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 is not applicable.” (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

### **Secondary Sources**

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 156, 158–163, 167, 168, 171, 172, 176

Haning et al., California Practice Guide: Personal Injury, Ch. 9-M, *Verdicts And Judgment*, ¶ 9:662.3 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.52–1.59

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, §§ 4.04–4.03, 4.07–4.08 (Matthew Bender)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.91 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.14A, Ch. 9, *Damages*, § 9.01 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.61 (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.04 et seq. (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.284, 165.380 (Matthew Bender)



## 454. Affirmative Defense—Statute of Limitations

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**[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]’s claimed harm occurred before [insert date from applicable statute of limitation].**

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*New April 2007; Revised December 2007*

### Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations—Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*.)

“Claimed harm” refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

### Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- “A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable.” (*Glue-Fold, Inc., supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- “ “ “ “Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not ‘accrue until the party owning it is entitled to begin and prosecute an action thereon.’ ” . . . In other words, “[a] cause of action accrues ‘upon the occurrence of the *last element essential to the cause of action.*’ ” ” ” ” ” ( *Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323 [226 Cal.Rptr.3d 267], original italics.)

- “It is undisputed that plaintiffs discovered shortly after the accident in 2010 that [defendant] had failed to secure the insurance coverage plaintiffs requested. Thus, this case does not involve the delayed discovery doctrine, which makes ‘accrual of a cause of action contingent on when a party discovered or should have discovered that his or her injury had a wrongful cause.’ In delayed discovery cases, ‘plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.’ Here, the question is when plaintiffs incurred ‘actual injury’—not when they discovered [defendant]’s negligence. The trial court erred to the extent that it relied on the delayed discovery doctrine to determine when plaintiffs incurred actual injury.” (*Lederer v. Gursej Schneider LLP* (2018) 22 Cal.App.5th 508, 521 [231 Cal.Rptr.3d 518], internal citations omitted.)
- “Where, as here, ‘damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. . . . “Mere threat of future harm, not yet realized, is not enough.” . . . “Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action.” . . . Therefore, when the wrongful act does not result in immediate damage, “the cause of action does not accrue prior to the maturation of perceptible harm.” ’ ” (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)
- “[W]hen a defendant asserts a statute of limitations defense against a FEHA failure to promote claim, the burden is on the defendant to prove when the plaintiff knew or should have known of the adverse promotion decision. (*Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918, 947 [281 Cal.Rptr.3d 498, 491 P.3d 290].)
- “ ‘[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.’ Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action.” (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)
- “Violations of a continuing or recurring obligation may give rise to ‘continuous accrual’ of causes of action, meaning that ‘ “a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.” [Citation.]’ ” (*Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 59 [247 Cal.Rptr.3d 875].)
- “Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant.” (*Czajkowski v. Haskell & White* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)
- “ ‘[R]esolution of the statute of limitations issue is normally a question of fact . . . .’ ” (*Romano v. Rockwell Int’l, Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- “Commencement of the statute of limitations is usually a factual question, but can be resolved as a matter of law when, as here, the material facts are not disputed.” *Moss v. Duncan* (2019) 36 Cal.App.5th 569, 574 [248 Cal.Rptr.3d 689].)
- “Because the relevant facts are not in dispute, the application of the statute of limitations may be decided as a question of law.” (*Lederer, supra*, 22 Cal.App.5th at p. 521.)
- “Based upon our review of legal precedent and our understanding of the principles and policies of the continuous accrual theory, we conclude that the theory is not limited in its application to cases in which a payor has acted ‘wrongfully’ in the sense of failing or refusing to make a periodic payment to a payee.” (*Blaser v. State Teachers’ Retirement System* (2019) 37 Cal.App.5th 349, 372 [249 Cal.Rptr.3d 701].)
- “So long as the time allowed for filing an action is not inherently unreasonable, California courts afford ‘contracting parties considerable freedom to modify the length of a statute of limitations.’ ” (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 74 [215 Cal.Rptr.3d 835].)

### ***Secondary Sources***

4 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01–71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, §§ 345.19, 345.20 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.20 et seq. (Matthew Bender)

1 California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group, Ch. 17, *Preparing the Answer*, § 17-IV[I]

## 455. Statute of Limitations—Delayed Discovery

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**If [name of defendant] proves that [name of plaintiff]’s claimed harm occurred before [insert date from applicable statute of limitations], [name of plaintiff]’s lawsuit was still filed on time if [name of plaintiff] proves that before that date,**

**[[name of plaintiff] did not discover, and did not know of facts that would have caused a reasonable person to suspect, that [he/she/nonbinary pronoun/it] had suffered harm that was caused by someone’s wrongful conduct.]**

[or]

**[[name of plaintiff] did not discover, and a reasonable and diligent investigation would not have disclosed, that [specify factual basis for cause of action] contributed to [name of plaintiff]’s harm.]**

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*New April 2007; Revised December 2007, April 2009, December 2009, May 2020*

### Directions for Use

Read this instruction with the first option after CACI No. 454, *Affirmative Defense—Statute of Limitations*, if the plaintiff seeks to overcome the statute-of-limitations defense by asserting the “delayed-discovery rule” or “discovery rule.” The discovery rule provides that the accrual date of a cause of action is delayed until the plaintiff is aware of the plaintiff’s injury and its negligent cause. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2009, the date is August 31, 2007.

Read this instruction with the second option if the facts suggest that even if the plaintiff had conducted a timely and reasonable investigation, it would not have disclosed the limitation-triggering information. (See *Fox v. Ethicon Endo-Surgery* (2005) 35 Cal.4th 797 [27 Cal.Rptr.3d 661, 110 P.3d 914] [fact that plaintiff suspected her injury was caused by surgeon’s negligence and timely filed action for medical negligence against health care provider did not preclude “discovery rule” from delaying accrual of limitations period on products liability cause of action against medical staple manufacturer whose role in causing injury was not known and could not have been reasonably discovered within the applicable limitations period commencing from date of injury].)

See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts*.

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI

No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code of Civil Procedure section 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

“Claimed harm” refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

### Sources and Authority

- “An exception to the general rule for defining the accrual of a cause of action—indeed, the ‘most important’ one—is the discovery rule. . . . It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] . . . [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least ‘suspects . . . that someone has done something wrong’ to him, ‘wrong’ being used, not in any technical sense, but rather in accordance with its ‘lay understanding.’ He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has ‘notice or information of circumstances to put a reasonable person on *inquiry*’; he need not know the ‘specific “facts” necessary to establish the cause of action; rather, he may seek to learn such facts through the ‘process contemplated by pretrial discovery’; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he ‘cannot wait for’ them to ‘find him’ and ‘sit on’ his ‘rights’; he ‘must go find’ them himself if he can and ‘file suit’ if he does.” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)
- “[I]t is the discovery of facts, not their legal significance, that starts the statute.” (*Jolly, supra*, 44 Cal.3d at p. 1113.)
- “*Jolly* ‘sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing.

[Citation.] The first to occur under these two tests begins the limitations period.’ ” (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

- “While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute.” (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)
- “[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.” (*Fox, supra*, 35 Cal.4th at p. 803.)
- “The California rule on delayed discovery of a cause of action is the statute of limitation begins to run ‘when the plaintiff has reason to suspect an injury and some wrongful cause . . . .’ ‘A plaintiff need not be aware of the specific “facts” necessary to establish the claim; that is a process contemplated by pretrial discovery. . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.’ ” (*MGA Entertainment, Inc. v. Mattel, Inc.* (2019) 41 Cal.App.5th 554, 561 [254 Cal.Rptr.3d 314].)
- “[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times.” (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)
- “A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action.” (*Glue-Fold, Inc., supra*, 82 Cal.App.4th at p. 1029, internal citations omitted.)
- “A plaintiff’s inability to discover a cause of action may occur ‘when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.’ ” (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [171 Cal.Rptr.3d 1].)
- “[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. ‘Although never

fully articulated, the rationale for distinguishing between ignorance’ of the defendant and ‘ignorance’ of the cause of action itself ‘appears to be premised on the commonsense assumption that once the plaintiff is aware of’ the latter, he ‘normally’ has ‘sufficient opportunity,’ within the ‘applicable limitations period,’ ‘to discover the identity’ of the former. He may ‘often effectively extend[]’ the limitations period in question ‘by the filing’ and amendment ‘of a Doe complaint’ and invocation of the relation-back doctrine. ‘Where’ he knows the ‘identity of at least one defendant . . . , [he] must’ proceed thus.” (*Norgart, supra*, 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- “The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ‘ “information of circumstances to put [them] on inquiry’ ” or if they have ‘ “the opportunity to obtain knowledge from sources open to [their] investigation.’ ” In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation.” (*Fox, supra*, 35 Cal.4th at pp. 807–808, internal citations omitted.)
- “Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether ‘such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.’ ” (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)
- “[I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound. ‘ “ [W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date . . . .* ’ ” ” (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)
- “[T]he discovery rule ‘may be applied to breaches [of contract] which can be,

and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.’ ” (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73 [215 Cal.Rptr.3d 835].)

- “[T]he trial court erred in concluding that the discovery rule did not pertain to the limitations period of section 335.1 for medical battery claims.” (*Daley v. Regents of University of California* (2019) 39 Cal.App.5th 595, 606 [252 Cal.Rptr.3d 273].)
- There is no doctrine of constructive or imputed suspicion arising from media coverage. “[Defendant]’s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation.” (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)
- “The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only ‘[o]nce the plaintiff *has* a suspicion of wrongdoing.’ ” (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)
- “Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant. [¶] However, when a plaintiff relies on the discovery rule or allegations of fraudulent concealment as excuses for an apparently belated filing of a complaint, ‘the burden of pleading and proving belated discovery of a cause of action falls on the plaintiff.’ ” (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)
- “[R]esolution of the statute of limitations issue is normally a question of fact . . . .” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)
- “More specifically, as to accrual, ‘once properly pleaded, belated discovery is a question of fact.’ ” (*Nguyen, supra*, 229 Cal.App.4th at p. 1552.)

### Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 493–507, 553–592, 673

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶¶ 5:108–5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, § 71.03[3] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[3] (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52 et seq. (Matthew Bender)



McDonald, California Medical Malpractice: Law and Practice §§ 7:1–7:7 (Thomson Reuters)

**457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding**

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**[Name of plaintiff] claims that even if [his/her/nonbinary pronoun/its] lawsuit was not filed by [insert date from applicable statute of limitations], [he/she/nonbinary pronoun/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits]. In order to establish the right to proceed, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] received timely notice that [name of plaintiff] was [e.g., seeking workers' compensation] instead of filing a lawsuit;**
- 2. That the facts of the two claims were so similar that an investigation of the [e.g., workers' compensation claim] gave or would have given [name of defendant] the information needed to defend the lawsuit; and**
- 3. That [name of plaintiff] was acting reasonably and in good faith by [e.g., seeking workers' compensation].**

**For [name of defendant] to have received timely notice, [name of plaintiff] must have filed the [e.g., workers' compensation claim] by [insert date from applicable statute of limitations] and the [e.g., claim] notified [name of defendant] of the need to begin investigating the facts that form the basis for the lawsuit.**

**In considering whether [name of plaintiff] acted reasonably and in good faith, you may consider the amount of time after the [e.g., workers' compensation claim] was [resolved/abandoned] before [he/she/nonbinary pronoun/it] filed the lawsuit.**

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*New December 2009; Revised December 2014*

**Directions for Use**

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative*

*Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

### Sources and Authority

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(e)(1), (f)(1).
- “The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is ‘designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.’ Where applicable, the doctrine will ‘suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.’ ” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)
- “The purpose of equitable tolling is to ‘ease[] the pressure on parties “concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue.” ’ It is intended to benefit the court system ‘by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.’ ” (*Long v. Forty Niners Football Co.* (2019) 33 Cal.App.5th 550, 555 [244 Cal.Rptr.3d 887], internal citation omitted.)
- “While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact.” (*Hopkins, supra*, 225 Cal.App.4th at p. 755.)
- “[E]quitable tolling, ‘[a]s the name suggests . . . is an equitable issue for court resolution.’ ” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)
- “While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. ‘[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.’ ” (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)
- “[CACI No. 457 is] appropriate for use when a trial court ‘empanel[s] an advisory jury to make preliminary factual findings,’ with respect to equitable

. . . tolling.” (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- “The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. ‘[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.’ ” (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)
- “Broadly speaking, the doctrine applies ‘ “[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.” ’ [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.” (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)
- “[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)
- “A major reason for applying the doctrine is to avoid ‘the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.’ ‘[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.’ ” (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)
- “[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since ‘duplicative proceedings are surely inefficient, awkward and laborious.’ ” (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)
- “ ‘ “The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this

means that the defendant in the first claim is the same one being sued in the second.” “The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second.” “The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California*, *supra*, 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended.” ’ ” (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- “The third requirement of good faith and reasonable conduct may turn on whether ‘a plaintiff delayed filing the second claim until the statute on that claim had nearly run . . .’ or ‘whether the plaintiff [took] affirmative actions which . . . misle[d] the defendant into believing the plaintiff was foregoing his second claim.’ ” (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)
- “Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: ‘It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.’ This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion.” (*McDonald, supra*, 45 Cal.4th at p. 101, internal citation omitted.)
- “The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count.” (*McDonald, supra*, 45 Cal.4th at p. 114.)
- “Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ‘“Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. . . . Equitable estoppel, however, . . . comes into play only after the limitations period has run and addresses . . . the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life . . . from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice.” ’ ” (*Lantzy, supra*, 31 Cal.4th at pp. 383–384.)
- “[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can

satisfy the three criteria for equitable tolling.” (*McDonald, supra*, 45 Cal.4th at p. 111.)

- “The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine.” (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)
- “Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced.” (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)
- “ ‘[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.’ A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address ‘two major policy considerations.’ The first is ‘protection of the class action device,’ which requires the court to determine whether the denial of class certification was ‘unforeseeable by class members,’ or whether potential members, in anticipation of a negative ruling, had already filed ‘ “protective motions to intervene or to join in the event that a class was later found unsuitable,” depriving class actions “of the efficiency and economy of litigation which is a principal purpose of the procedure.” ’ The second consideration is ‘effectuation of the purposes of the statute of limitations,’ and requires the court to determine whether commencement of the class suit ‘ “notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.” [Citation.] In these circumstances, . . . the purposes of the statute of limitations would not be violated by a decision to toll.’ ” (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482–483 [216 Cal.Rptr.3d 390], internal citations omitted.)
- “Section 340.6, subdivision (a), states that ‘in no event’ shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.” (*Laird, supra*, 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)
- “We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language.” (*Belton, supra*, 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)
- “[E]quitable tolling has never been applied to allow a plaintiff to extend the time

for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings.” (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

- “Plaintiffs cite no authority, and we are aware of none, that would allow a plaintiff in one case to equitably toll the limitation period based on the filing of a stranger’s lawsuit.” (*Reid v. City of San Diego* (2018) 23 Cal.App.5th 901, 916 [234 Cal.Rptr.3d 636].)
- “Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory.” (*Wassmann, supra*, 24 Cal.App.5th at pp. 853–854.)

### ***Secondary Sources***

4 Witkin, *California Procedure* (5th ed. 2008) *Actions*, § 760 et seq.

Turner et al., *California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations*, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 *California Torts*, Ch. 32, *Liability of Attorneys*, § 32.60[1][g.1] (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 345, *Limitation of Actions*, § 345.21 (Matthew Bender)

14 *California Points and Authorities*, Ch. 143, *Limitation of Actions*, § 143.46 (Matthew Bender)

**VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts**

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We answer the questions submitted to us as follows:

1. Did [name of plaintiff]’s claimed harm occur before [insert date from applicable statute of limitations]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Before [insert date from applicable statute of limitations], did [name of plaintiff] discover, or know of facts that would have caused a reasonable person to suspect, that [he/she/nonbinary pronoun/it] had suffered harm that was caused by someone’s wrongful conduct?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

[or]

2. Would a reasonable and diligent investigation have disclosed before [insert date from applicable statute of limitations] that [specify factual basis for cause of action] contributed to [name of plaintiff]’s harm?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

Signed: \_\_\_\_\_  
                                Presiding Juror

Dated: \_\_\_\_\_

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

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*New December 2007; Revised December 2010, May 2022*

**Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*. If the only issue is whether the plaintiff’s harm occurred before or after the limitation date,



omit question 2. If the plaintiff claims that the delayed-discovery rule applies to save the action, use the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, use the second option for question 2. If both delayed discovery and nondiscovery despite reasonable investigation are at issue, use both options and renumber them as question 2 and question 3.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, “claimed harm” refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

## 601. Negligent Handling of Legal Matter

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**To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/nonbinary pronoun/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney. [Name of plaintiff] was not harmed by [name of defendant]’s conduct if the same harm would have occurred anyway without that conduct.**

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*New September 2003; Revised June 2015, May 2020*

### Directions for Use

In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of “attorney.” (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829–830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)

The plaintiff must prove that *but for* the attorney’s negligent acts or omissions, the plaintiff would have obtained a more favorable judgment or settlement in the underlying action. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [135 Cal.Rptr.2d 629, 70 P.3d 1046].) The second sentence expresses this “but for” standard.

### Sources and Authority

- “If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749–750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)
- “In the legal malpractice context, the elements of causation and damage are particularly closely linked.” (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)
- “In a client’s action against an attorney for legal malpractice, the client must prove, among other things, that the attorney’s negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the ‘but for’ test, meaning that the harm or loss would not have occurred without the attorney’s malpractice? The answer is yes.” (*Viner*, *supra*, 30 Cal.4th at p. 1235.)
- “[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional’s malfeasance.” (*Mattco Forge Inc.*, *supra*, 52 Cal.App.4th at p. 834.)

- “ ‘Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* . . . .’ Conversely, ‘ “[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.’ ” ’ ” (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165–166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)
- “One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements.” (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506–1507 [33 Cal.Rptr.2d 219], original italics.)
- “ ‘The element of collectibility requires a showing of the debtor’s solvency. “[W]here a claim is alleged to have been lost by an attorney’s negligence, . . . to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent.*’ [Citation.]” The loss of a collectible judgment “by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage.” ’ ” (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)
- “Collectibility is part of the plaintiff’s case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate.” (*Wise, supra*, 220 Cal.App.4th at p. 1191.)
- “Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine.” (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)
- “Where the attorney’s negligence does not result in a total loss of the client’s claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney’s wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a \$3 million recovery for the client but the negligent attorney obtained only a \$2 million recovery, the client’s damage due to the attorney’s negligence would be \$1 million—the difference between what a competent attorney would have obtained and what the negligent attorney obtained.” (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)
- “[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case. It is particularly so in ‘settle and sue’ cases . . . .” (*Filbin, supra*, 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)
- “[W]e conclude the applicable standard of proof for the elements of causation

and damages in a ‘settle and sue’ legal malpractice action is the preponderance of the evidence standard. First, use of the preponderance of the evidence standard of proof is appropriate because it is the ‘default standard of proof in civil cases’ and use of a higher standard of proof ‘occurs only when interests “ ‘more substantial than mere loss of money’ ” are at stake.’ ” (*Masellis v. Law Office of Leslie F. Jensen* (2020) 50 Cal.App.5th 1077, 1092 [264 Cal.Rptr.3d 621].)

- “In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law.” (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- “For purposes of determining whether a more favorable outcome would have been obtained, the object of the exercise is not to ‘ “recreate what a particular judge or fact finder would have done. Rather, the [finder of fact’s] task is to determine what a reasonable judge or fact finder would have done . . . .” ’ ” (*O’Shea v. Lindenberg* (2021) 64 Cal.App.5th 228, 236 [278 Cal.Rptr.3d 654].)
- “If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury’s responsibility in the legal malpractice trial-within-a-trial.” (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357–358 [89 Cal.Rptr.3d 710].)

### **Secondary Sources**

1 Witkin, *California Procedure* (5th ed. 2008) Attorneys, §§ 319–322

Vapnek et al., *California Practice Guide: Professional Responsibility*, Ch. 6-E, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Levy et al., *California Torts*, Ch. 32, *Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

7 *California Forms of Pleading and Practice*, Ch. 76, *Attorney Professional Liability*, § 76.50 et seq. (Matthew Bender)

2A *California Points and Authorities*, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

## 724. Negligent Entrustment of Motor Vehicle

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**[Name of plaintiff] claims that [he/she/nonbinary pronoun] was harmed because [name of defendant] negligently permitted [name of driver] to use [name of defendant]’s vehicle. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of driver] was negligent in operating the vehicle;**
- 2. That [name of defendant] [owned the vehicle operated by [name of driver]/had possession of the vehicle operated by [name of driver] with the owner’s permission];**
- 3. That [name of defendant] knew, or should have known, that [name of driver] was incompetent or unfit to drive the vehicle;**
- 4. That [name of defendant] permitted [name of driver] to drive the vehicle; and**
- 5. That [name of driver]’s incompetence or unfitness to drive was a substantial factor in causing harm to [name of plaintiff].**

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*New September 2003; Revised December 2009*

### Directions for Use

For a definition of “negligence,” see CACI No. 401, *Basic Standard of Care*.

### Sources and Authority

- Permissive Use by Unlicensed Driver. Vehicle Code section 14606(a).
- Permissive Use by Unlicensed Minor. Vehicle Code section 14607.
- Rental to Unlicensed Driver. Vehicle Code section 14608(a).
- “ “[I]t is generally recognized that one who places or entrusts his [or her] motor vehicle in the hands of one whom he [or she] knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver’s disqualification, incompetency, inexperience or recklessness . . . .” ’ ” (*Flores v. Enterprise Rent-A-Car Co.* (2010) 188 Cal.App.4th 1055, 1063 [116 Cal.Rptr.3d 71].)
- “A rental car company may be held liable for negligently entrusting one of its cars to a customer. . . . In determining whether defendant was negligent in entrusting its car to [the driver], defendant’s conduct is to be measured by what an ordinarily prudent person would do in similar circumstances.” (*Osborn v. Hertz Corp.* (1988) 205 Cal.App.3d 703, 709 [252 Cal.Rptr. 613], internal citations omitted.)

- “Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care.” (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 421 [167 Cal.Rptr. 270], internal citations omitted.)
- “ ‘A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2010) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case . . . the two claims are functionally identical.’ ” (*McKenna v. Beesley* (2021) 67 Cal.App.5th 552, 566–567 [282 Cal.Rptr.3d 431], internal citation and footnote omitted.)
- “[I]f an employer admits vicarious liability for its employee’s negligent driving in the scope of employment, ‘the damages attributable to both employer and employee will be coextensive.’ Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee’s negligent driving, the universe of defendants who can be held responsible for plaintiff’s damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee.” (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1159 [126 Cal.Rptr.3d 443, 253 P.3d 535], internal citation omitted.)
- “[O]rdinarily, in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another and . . . this rule applies even where the third person’s conduct is made possible only because the defendant has relinquished control of his property to the third person, unless the defendant has reason to believe that the third person is incompetent to manage it.” (*Grafton v. Mollica* (1965) 231 Cal.App.2d 860, 863 [42 Cal.Rptr. 306].)
- “[T]he tort requires demonstration of actual knowledge of facts showing or suggesting the driver’s incompetence—not merely his lack of a license. . . . For liability to exist, knowledge must be shown of the user’s incompetence or inability safely to use the [vehicle].” (*Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 341 [244 Cal.Rptr. 789], internal citations omitted.)
- “Knowledge of possession of a temporary permit allowing a person to drive only if accompanied by a licensed driver is sufficient to put the entrustor ‘upon inquiry as to the competency of’ the unlicensed driver. . . . It is then for the jury to determine under the circumstances whether the entrustor is negligent in permitting the unlicensed driver to operate the vehicle.” (*Nault v. Smith* (1961) 194 Cal.App.2d 257, 267–268 [14 Cal.Rptr. 889], internal citations omitted.)

- “In cases involving negligent entrustment of a vehicle, liability ‘‘is imposed on [a] vehicle owner or permitter because of his own independent negligence and not the negligence of the driver.’’ ” (*Ghezavat v. Harris* (2019) 40 Cal.App.5th 555, 559 [252 Cal.Rptr.3d 887].)
- “[E]ntrustment of a vehicle to an intoxicated person is not negligence per se. A plaintiff must prove defendant had knowledge of plaintiff’s incompetence when entrusting the vehicle.” (*Blake v. Moore* (1984) 162 Cal.App.3d 700, 706 [208 Cal.Rptr. 703].)
- “[T]he mere sale of an automobile to an unlicensed and inexperienced person does not constitute negligence per se.” (*Perez v. G & W Chevrolet, Inc.* (1969) 274 Cal.App.2d 766, 768 [79 Cal.Rptr. 287].)
- “It is well-settled that where a company knows that an employee has no operator’s license that such knowledge is sufficient to put the employer on inquiry as to his competency; it is for the jury to determine under such circumstances whether the employer was negligent in permitting the employee to drive a vehicle.” (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 545 [55 Cal.Rptr. 741].)
- “[I]t has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it.” (*Richards v. Stanley* (1954) 43 Cal.2d 60, 63 [271 P.2d 23], internal citations omitted.)
- “[T]he mere fact of co-ownership does not prevent one co-owner from controlling use of the vehicle by the other co-owner. Thus, where . . . plaintiff alleges that one co-owner had power over the use of the vehicle by the other and that the negligent co-owner drove with the express or implied consent of such controlling co-owner, who knew of the driver’s incompetence, the basis for a cause of action for negligent entrustment has been stated.” (*Mettelka v. Superior Court* (1985) 173 Cal.App.3d 1245, 1250 [219 Cal.Rptr. 697].)

### ***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1372–1377

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-B, *Liability Arising From Operation Of Motor Vehicle*, ¶ 2:985 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 7D-D, *Liability Based On Negligent Entrustment*, ¶ 7:1332 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) Automobiles, § 4.38

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.21 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, § 82.11 (Matthew Bender)

California Civil Practice: Torts § 25:47 (Thomson Reuters)

## 1002. Extent of Control Over Premises Area

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**[Name of plaintiff] claims that [name of defendant] controlled the property involved in [name of plaintiff]’s harm, even though [name of defendant] did not own or lease it. A person controls property that the person does not own or lease when the person uses the property as if it were the person’s own. A person is responsible for maintaining, in reasonably safe condition, all areas that person controls.**

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*New September 2003; Revised May 2020*

### Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

### Sources and Authority

- “[A] defendant’s duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. ‘As long as the defendant exercised control over the land, the location of the property line would not affect the defendant’s potential liability.’ ” (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 445 [241 Cal.Rptr.3d 616], internal citation omitted.)
- “Even if a hazard located on publicly owned property is created by a third party, an abutting owner or occupier of private property will be held liable for injuries caused by that hazard if the owner or occupier has ‘ “dramati[cally] assert[ed]” ’ any of the ‘ “right[s] normally associated with ownership or . . . possession” ’ by undertaking affirmative acts that are consistent with being the owner or occupier of the property and that go beyond the ‘minimal, neighborly maintenance of property owned by another.’ ” (*Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 258 [269 Cal.Rptr.3d 377].)
- “In *Alcaraz* . . . , our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. . . . [¶] The *Alcaraz* court concluded that such evidence was ‘sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.’ ” (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197–198 [69 Cal.Rptr.2d 69], footnote and internal citations omitted.)
- “ “*The crucial element is control.*” [Citation.] ‘[W]e have placed major importance on the existence of possession and control as a basis for tortious



liability for conditions on the land.’ ” (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414 [82 Cal.Rptr.3d 735], original italics, internal citations omitted.)

### ***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1225, 1226

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.02–15.03 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:2 (Thomson Reuters)

**1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions**

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*[Name of plaintiff]* **claims that** *[he/she/nonbinary pronoun]* **was harmed by an unsafe concealed condition while employed by** *[name of plaintiff's employer]* **and working on** *[name of defendant]'s property*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of defendant]* **[owned/leased/occupied/controlled] the property;**
2. **That** *[name of defendant]* **knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**
3. **That** *[name of plaintiff's employer]* **neither knew nor could be reasonably expected to know of the unsafe concealed condition;**
4. **That the condition was not part of the work that** *[name of plaintiff's employer]* **was hired to perform;**
5. **That** *[name of defendant]* **failed to warn** *[name of plaintiff's employer]* **of the condition;**
6. **That** *[name of plaintiff]* **was harmed; and**
7. **That** *[name of defendant]'s conduct* **was a substantial factor in causing** *[name of plaintiff]'s harm*.

**An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person.**

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2011*

**Directions for Use**

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*. See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

### Sources and Authority

- “[T]he hirer as landowner may be independently liable to the contractor’s employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor.” (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)
- “[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible.” (*Kinsman, supra*, 37 Cal.4th at p. 678.)
- “A landowner’s duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, . . . the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor’s employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner’s failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee’s injury, may well result in liability.” (*Kinsman, supra*, 37 Cal.4th at pp. 677–678, internal citations omitted.)
- “The court also told the jury that [defendant] was liable if its negligent use or maintenance of the property was a substantial factor in harming [plaintiff] (see CACI Nos. 1000, 1001, 1003 & 1011). These instructions were erroneous because they did not say that these principles would only apply to [defendant] if the hazard was concealed.” (*Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338–339 [261 Cal.Rptr.3d 702].)

### Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶¶ 6:4, 6:9.12 (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08

(Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)

**1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control**

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**[Name of plaintiff] claims that [he/she/nonbinary pronoun] was harmed by an unsafe condition while employed by [name of contractor] and working on [specify nature of work that defendant hired the contractor to perform]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] retained some control over [name of contractor]’s manner of performance of [specify nature of contracted work];**
- 2. That [name of defendant] actually exercised [his/her/nonbinary pronoun/its] retained control over that work by [specify alleged negligence of defendant];**
- 3. That [name of plaintiff] was harmed; and**
- 4. That [name of defendant]’s negligent exercise of [his/her/nonbinary pronoun/its] retained control affirmatively contributed to [name of plaintiff]’s harm.**

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022*

**Directions for Use**

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 519, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor’s workers. (See *id.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff’s employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner’s providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

The hirer’s exercise of retained control must have “affirmatively contributed” to the

plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see *Sandoval, supra*, 12 Cal.5th at p. 277.) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3; see *Sandoval, supra*, 12 Cal.5th at p. 277.) “Affirmative contribution” means that there must be causation between the hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.

### Sources and Authority

- “A hirer ‘retains control’ where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. . . . So ‘retained control’ refers specifically to a hirer’s authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the ‘contracted work’—irrespective of whether it’s set out in a written contract or arises from an informal agreement. A hirer’s authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work.” (*Sandoval, supra*, 12 Cal.5th at pp. 274–275.)
- “We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (*Hooker, supra*, 27 Cal.4th at p. 202, original italics.)
- “Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not ‘“in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.”’ To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.” (*Hooker, supra*, 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)
- “Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury.” (*Sandoval, supra*, 12 Cal.5th at p. 276, original italics.)
- “Such affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)
- “‘Affirmative contribution’ means that the hirer’s exercise of retained control contributes to the injury in a way that isn’t merely derivative of the contractor’s contribution to the injury. Where the contractor’s conduct is the immediate cause

of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor’s injury-causing conduct.” (*Sandoval, supra*, 12 Cal.5th at p. 277, internal citation omitted.)

- “If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee’s injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control.” (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)
- “[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer’s negligent hiring of the contractor was a substantial factor in bringing about a contract worker’s injury, and yet negligent hiring is not affirmative contribution because the hirer’s liability is essentially derivative of the contractor’s conduct. Conversely, affirmative contribution does not itself require that the hirer’s contribution to the injury be substantial.” (*Sandoval, supra*, 12 Cal.5th at p. 278, internal citations omitted.)
- “A hirer’s failure to correct an unsafe condition, by itself, does not establish an affirmative contribution.” (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)
- “When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee’s injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation.” (*Tverberg, supra*, 202 Cal.App.4th at p. 1446, internal citations omitted.)
- “Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent’s injuries ‘not [by] active conduct but . . . in the form of an omission to act.’ Although it is undeniable that [owner]’s failure to equip its building with roof anchors contributed to decedent’s death, *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does not support plaintiffs’ suggestion that a passive omission of this type is actionable. . . . Subsequent Supreme Court decisions . . . have repeatedly

rejected the suggestion that the passive provision of an unsafe workplace is actionable. . . . Accordingly, the failure to provide safety equipment does not constitute an ‘affirmative contribution’ to an injury within the meaning of *McKown*.” (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594], original italics.)

- “[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor.” (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)
- “The *Privette* line of decisions establishes a presumption that an independent contractor’s hirer ‘delegates to that contractor its tort law duty to provide a safe workplace for the contractor’s employees.’ . . . [T]he *Privette* presumption affects the burden of producing evidence.” (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

### ***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)



## 1009D. Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment

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[Name of plaintiff] claims that [he/she/nonbinary pronoun] was harmed by an unsafe condition while employed by [name of plaintiff's employer] and working on [name of defendant]'s property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
  2. That [name of defendant] negligently provided unsafe equipment that contributed to [name of plaintiff]'s injuries;
  3. That [name of plaintiff] was harmed; and
  4. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.
- 

*Derived from CACI No. 1009B April 2009; Revised December 2011*

### Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant provided defective equipment. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe concealed conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

### Sources and Authority

- “[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer’s own negligence.” (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 937 [22 Cal.Rptr.3d 530, 102 P.3d 915].)
- “[W]here the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party’s own negligence that renders it liable, not that of the contractor.” (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225 [115 Cal.Rptr.2d 868, 38 P.3d 1094], internal citation omitted.)

***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08  
(Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property  
Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15  
(Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.24 (Matthew  
Bender)

## 1231. Implied Warranty of Merchantability—Essential Factual Elements

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*[Name of plaintiff]* **also claims that [he/she/nonbinary pronoun/it] was harmed by the [product] that [he/she/nonbinary pronoun/it] bought from [name of defendant] because the [product] did not have the quality that a buyer would expect. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of plaintiff] bought the [product] from [name of defendant];**
2. **That, at the time of purchase, [name of defendant] was in the business of selling these goods [or by [his/her/nonbinary pronoun/its] occupation held [himself/herself/nonbinary pronoun/itself] out as having special knowledge or skill regarding these goods];**
3. **That the [product] [insert one or more of the following:]**  
**[was not of the same quality as those generally acceptable in the trade;]**  
**[was not fit for the ordinary purposes for which such goods are used;]**  
**[did not conform to the quality established by the parties' prior dealings or by usage of trade;]**  
*[other ground as set forth in California Uniform Commercial Code section 2314(2);]*
4. **[That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [product] did not have the expected quality;]**
5. **That [name of plaintiff] was harmed; and**
6. **That the failure of the [product] to have the expected quality was a substantial factor in causing [name of plaintiff]'s harm.**

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*New September 2003*

### Directions for Use

This cause of action could also apply to products that are leased. If so, modify the instruction accordingly.

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57,

61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652–653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

### Sources and Authority

- Implied Warranty of Merchantability. California Uniform Commercial Code section 2314.
- Customary Dealings of Parties. California Uniform Commercial Code section 1303.
- “Merchant” Defined. California Uniform Commercial Code section 2104(1).
- “Goods” Defined. California Uniform Commercial Code section 2105(1).
- “Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. It does not ‘impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.’ ” (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citations omitted.)
- “[I]n cases involving personal injuries resulting from defective products, the theory of strict liability in tort has virtually superseded the concept of implied warranties.” (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 432 [79 Cal.Rptr. 369].)
- “Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability.” (*United States Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.)
- “[Plaintiff] comes within a well-recognized exception to the [privity] rule: he is a member of the purchaser’s family.” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- “Therefore, says plaintiff, . . . in view of modern industrial usage employe[e]s should be considered a member of the industrial ‘family’ of the employer—whether corporate or private—and to thus stand in such privity to the manufacturer as to permit the employe[e]s to be covered by warranties made to the purchaser-employer. [¶] We are persuaded that this position is meritorious.” (*Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339, 347 [5 Cal.Rptr. 863, 353 P.2d 575].)
- “A buyer who is damaged by a breach of implied warranty has two possible measures of those damages: one where the buyer has rightfully rejected or ‘justifiably revoked acceptance’ of the goods, and one where the buyer has accepted the goods.” (*Simgel Co., Inc. v. Jaguar Land Rover North America, LLC* (2020) 55 Cal.App.5th 305, 315–316 [269 Cal.Rptr.3d 364].)

*Secondary Sources*

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 51

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31–2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.24, 502.51, 502.200–502.214 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.63 et seq. (Matthew Bender)

## 1305B. Battery by Peace Officer (Deadly Force)—Essential Factual Elements

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A peace officer may use deadly force only when necessary in defense of human life. *[Name of plaintiff]* claims that *[name of defendant]* unnecessarily used deadly force on *[him/her/nonbinary pronoun/name of decedent]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* intentionally touched *[name of plaintiff/ decedent]* [or caused *[name of plaintiff/ decedent]* to be touched];
2. That *[name of defendant]* used deadly force on *[name of plaintiff/ decedent]*;
3. That *[name of defendant]*'s use of deadly force was not necessary to defend human life;
4. That *[name of plaintiff/ decedent]* was [harmed/killed]; and
5. That *[name of defendant]*'s use of deadly force was a substantial factor in causing *[name of plaintiff/ decedent]*'s [harm/death].

*[Name of defendant]*'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by *[name of defendant]* at the time, that deadly force was necessary *[insert one or both of the following:]*

[to defend against an imminent threat of death or serious bodily harm to *[name of defendant]* [or] [to another person][; or/.]]

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

- i. The felony threatened or resulted in death or serious bodily injury to another;
- ii. *[Name of defendant]* reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and
- iii. If practical under the circumstances, *[name of defendant]* made reasonable efforts to identify *[himself/herself/nonbinary pronoun]* as a peace officer and to warn that deadly force would be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of

death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist the peace officer unless the peace officer is using unreasonable force.]

“Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

A threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

“Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of [name of defendant] and [name of plaintiff/decedent] leading up to the use of deadly force. In determining whether [name of defendant]’s use of deadly force was necessary in defense of human life, you must consider [name of defendant]’s tactical conduct and decisions before using deadly force on [name of plaintiff/decedent] and whether [name of defendant] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to do so. [You must also consider whether [name of defendant] knew or had reason to know that the person against whom [he/she/nonbinary pronoun] used force was suffering from a physical, mental health, developmental, or intellectual disability [that may have affected the person’s ability to understand or comply with commands from the officer[s]].]

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by use of objectively reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer does, however, have a duty to use reasonable tactical repositioning or other deescalation tactics.]

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*New May 2021*

### **Directions for Use**

Use this instruction for a claim of battery using deadly force by a peace officer. If a plaintiff alleges battery by both deadly and nondeadly force, or if the jury must

decide whether the amount of force used was deadly or nondeadly, this instruction may be used along with the CACI No. 1305A, *Battery by Law Enforcement Officer (Nondeadly Force)—Essential Factual Elements*.

By its terms, Penal Code section 835a's deadly force provisions apply to "peace officers," a term defined by the Penal Code. (See Pen. Code, § 835a; see also Pen. Code, § 830 et seq. [defining "peace officer"].) That the defendant is a peace officer may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact on this issue, include the specific factual findings necessary for the jury to determine whether the defendant was acting as a peace officer.

In the paragraph after the essential factual elements, select either or both bracketed options depending on the asserted justification(s) for the use of deadly force.

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

In the "totality of the circumstances" paragraph, do not include the final optional sentence or its optional clause unless there is evidence of a disability or evidence of the person's ability to comprehend or comply with the officer's commands.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

### Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention . . ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra*, 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)



*Secondary Sources*

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

**1306. Sexual Battery—Essential Factual Elements (Civ. Code, § 1708.5)**

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**[Name of plaintiff] claims that [name of defendant] committed a sexual battery. To establish this claim, [name of plaintiff] must prove the following:**

1. **[(a) That [name of defendant] intended to cause a harmful [or offensive] contact with [name of plaintiff]’s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [name of plaintiff] resulted, either directly or indirectly;]**

**[OR]**

**[(b) That [name of defendant] intended to cause a harmful [or offensive] contact with [name of plaintiff] by use of [name of defendant]’s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [name of plaintiff] resulted, either directly or indirectly;]**

**[OR]**

**[(c) That [name of defendant] caused an imminent fear of a harmful [or offensive] contact with [[name of plaintiff]’s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [name of plaintiff] by use of [name of defendant]’s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [name of plaintiff] resulted, either directly or indirectly;]**

**[OR]**

**[(d) That [name of defendant] caused contact between a sexual organ, from which a condom had been removed, and [name of plaintiff]’s [sexual organ/anus/groin/buttocks/ [or] breast];]**

**[OR]**

**[(e) That [name of defendant] caused contact between [a/an] [sexual organ/anus/groin/buttocks/ [or] breast] and [name of plaintiff]’s sexual organ from which [name of defendant] had removed a condom;]**

**AND**

2. **That [name of plaintiff] did not [consent to the touching/verbally consent to the condom being removed]; and**
3. **That [name of plaintiff] was harmed [or offended] by [name of defendant]’s conduct.**

**[“Offensive contact” means contact that offends a reasonable sense of**

**personal dignity.]**

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*New October 2008; Revised May 2022*

**Directions for Use**

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word “OR” between them.

For sexual battery under Civil Code section 1708.5(d)(1) (defining “intimate part”), unconsented touching of a breast must involve the breast of a female. The instruction may require modification if there is a factual question on this issue.

Use the second bracketed alternative in element 2 only if option (d) or option (e) is at issue. (Compare Civ. Code, § 1708.5(a), (b), (c) with Civ. Code, § 1708.5(d), (e).) Modification of the instruction will be necessary if the plaintiff’s claim involves any of options (a)–(c) and option (d) or option (e) because the consent requirement is not the same.

Give the bracketed words “or offensive” in element 1 and “or offended” in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of “intent,” see CACI No. 1320, *Intent*.

**Sources and Authority**

- Sexual Battery. Civil Code section 1708.5.
- Consent as Defense. Civil Code section 3515.
- “A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a ‘harmful or offensive’ contact and the batteree suffer a ‘sexually offensive contact.’ Moreover, the section is interpreted to require that the batteree did not consent to the contact.” (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)
- “The element of lack of consent to the particular contact is an essential element of battery.” (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- “As a general rule, one who consents to a touching cannot recover in an action for battery. . . . However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act.” (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

**Secondary Sources**

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.27 (Matthew Bender)

California Civil Practice: Torts §§ 12:7–12:9, 12:36–12:39 (Thomson Reuters)

## 1401. False Arrest Without Warrant by Peace Officer—Essential Factual Elements

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[*Name of plaintiff*] **claims that [he/she/nonbinary pronoun] was wrongfully arrested by [name of defendant]. To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] arrested [name of plaintiff] without a warrant;**
  2. **That [name of plaintiff] was [actually] harmed; and**
  3. **That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**
- 

*New September 2003*

### Directions for Use

Give CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*, if applicable, immediately after this instruction.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 2:

If you find the above, then the law assumes that [*name of plaintiff*] has been harmed and [he/she/nonbinary pronoun] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is also entitled to additional damages if [he/she/nonbinary pronoun] proves the following:

The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read “actually” in the second element only if nominal damages are also being sought.

### Sources and Authority

- “Arrest” Defined. Penal Code section 834.
- Public Employee Liability for False Arrest. Government Code section 820.4.
- “Peace Officer” Defined. Penal Code section 830 et seq.
- “False arrest and false imprisonment are the same tort. False arrest is a way of committing false imprisonment.” (*Cox v. Griffin* (2019) 34 Cal.App.5th 440, 446, fn. 6 [246 Cal.Rptr.3d 185].)
- A person is liable for false imprisonment if he or she “ ‘authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest, without process, or participates in the unlawful arrest . . . .’ ” (*Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335], internal citation omitted.) Where a defendant “knowingly [gives] the police false

or materially incomplete information, of a character that could be expected to stimulate an arrest” . . . “such conduct can be a basis for imposing liability for false imprisonment.” (*Id.* at p. 942.)

- “It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest.” (*Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975].)
- “[T]he elements of the tort of false arrest are: defendant arrested plaintiffs without a warrant, plaintiffs were harmed, and defendant’s conduct was a substantial factor in causing the harm.” (*Carcamo v. Los Angeles County Sheriff’s Dept.* (2021) 68 Cal.App.5th 608, 616 [283 Cal.Rptr.3d 647].)
- “False imprisonment and malicious prosecution are mutually inconsistent torts and only one, if either, will lie in this case. In a malicious criminal prosecution, the detention was malicious but it was accomplished properly, i.e., by means of a procedurally valid arrest. In contrast, if the plaintiff is arrested pursuant to a procedurally improper warrant or warrantless arrest, the remedy is a cause of action for false imprisonment.” (*Cummings v. Fire Ins. Exch.* (1988) 202 Cal.App.3d 1407, 1422 [249 Cal.Rptr. 568].)

### ***Secondary Sources***

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 507–513

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment* (Matthew Bender)

California Civil Practice: Torts § 13:20 (Thomson Reuters)

**1402. False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest**

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**[Name of defendant] claims the arrest was not wrongful because [he/she/nonbinary pronoun] had the authority to arrest [name of plaintiff] without a warrant.**

**[If [name of defendant] proves that [insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence], then [name of defendant] had the authority to arrest [name of plaintiff] without a warrant.]**

[or]

**[If [name of defendant] proves that [insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed], then [name of defendant] had the authority to arrest [name of plaintiff] without a warrant.]**

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*New September 2003*

**Directions for Use**

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

**Sources and Authority**

- Arrest Without a Warrant. Penal Code section 836(a).
- Felonies and Misdemeanors. Penal Code section 17(a).
- "Peace Officers" Defined. Penal Code section 830 et seq.
- "An officer is not liable for false imprisonment for the arrest without a warrant

of a person whom he has reasonable grounds to believe is guilty of a crime.” (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507–508 [27 P.2d 423].)

- “[P]robable cause for arrest in a criminal proceeding is the same as probable cause in a civil case for damages alleging false arrest.” (*Carcamo v. Los Angeles County Sheriff’s Dept.* (2021) 68 Cal.App.5th 608, 620–621 [283 Cal.Rptr.3d 647].)
- “It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, for it is a serious matter to accuse someone of committing a crime and to arrest him without the protection of the warrant process.” (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975], footnote and internal citations omitted.)
- “We look to whether facts known to the arresting officer ‘at the moment the arrest was made’ ‘would persuade someone of ‘reasonable caution’ that the person to be arrested has committed a crime.’ ” (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 779 [225 Cal.Rptr.3d 356], internal citations omitted.)
- “If the facts that gave rise to the arrest are undisputed, the issue of probable cause is a question of law for the trial court. When, however, the facts that gave rise to the arrest are controverted, the trial court must instruct the jury as to what facts, if established, would constitute probable cause. ‘The trier of fact’s function in false arrest cases is to resolve conflicts in the evidence. Accordingly, where the evidence is conflicting with respect to probable cause, “ ‘it [is] the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause.’ ” . . . The jury then decides whether the evidence supports the necessary factual findings.’ ” (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535], internal citations omitted.)
- “The legal standard we apply to assess probable cause is an objective one in which the subjective motivations of the arresting officers have no role. But it is an overstatement to say that what is in the mind of an arresting officer is wholly irrelevant, for the objective test of reasonableness is simply a measure by which we assess whether the circumstances as subjectively perceived by the officer provide a reasonable basis for the seizure.” (*Cornell, supra*, 17 Cal.App.5th at p. 779, internal citations omitted.)
- “The arrests of plaintiffs were justified only if defendants can meet their burden to show the arresting officer had probable cause, which is objectively reasonable



cause to believe plaintiffs committed a crime. ‘California courts speak of “reasonable cause” and “probable cause” interchangeably.’ Can a law enforcement agency have objectively reasonable cause to believe plaintiffs committed a crime if deputies arrest them for violating a statute our Supreme Court declared void more than half a century ago? The answer is no.” (*Carcamo, supra*, 68 Cal.App.5th at 618.)

- “ ‘Presence’ is not mere physical proximity but is determined by whether the offense is apparent to the officer’s senses.” (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

### ***Secondary Sources***

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 509, 511

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 13:22–13:24 (Thomson Reuters)

**1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements**

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**[Name of plaintiff] claims that [he/she/nonbinary pronoun] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [name of victim]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] negligently caused [injury to/the death of] [name of victim];**
- 2. That when the [describe event, e.g., traffic accident] that caused [injury to/the death of] [name of victim] occurred, [name of plaintiff] was [virtually] present at the scene [through [specify technological means]];**
- 3. That [name of plaintiff] was then aware that the [e.g., traffic accident] was causing [injury to/the death of] [name of victim];**
- 4. That [name of plaintiff] suffered serious emotional distress; and**
- 5. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s serious emotional distress.**

**[Name of plaintiff] need not have been then aware that [name of defendant] had caused the [e.g., traffic accident].**

**Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.**

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*New September 2003; Revised December 2013, June 2014, December 2014, December 2015, May 2022*

**Directions for Use**

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of “negligent infliction of emotional distress” is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A “bystander” case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical*

*Injury—Direct Victim—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Include the optional language in element 2 only if the plaintiff claims virtual presence at the scene through technological means, and specify the technology used to assist the jury in understanding the concept of “virtual” presence. (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906].)

There is some uncertainty as to how the “event” should be defined in element 2 and then just exactly what the plaintiff must perceive in element 3. When the event is something dramatic and visible, such as a traffic accident or a fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].) And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant’s conduct as *negligent*, as opposed to *harmful*. (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324], original italics.)

But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843–844 [151 Cal.Rptr.3d 320].) In another observable-distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent’s acute respiratory distress and were aware that defendant’s *inadequate* response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489–490 [185 Cal.Rptr.3d 313], emphasis added.) It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically.

The explanation in the last paragraph of what constitutes “serious” emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p. 928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as “severe” emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747]; but see *Keys, supra*, 235 Cal.App.4th at p. 491 [finding last sentence of this instruction to be a correct description of the distress required].)

### Sources and Authority

- “California’s rule that plaintiff’s fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter.” (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738, fn. 4 [69 Cal.Rptr. 72, 441 P.2d 912].)
- “As an introductory note, we observe that plaintiffs . . . framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, ‘the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort . . . .’” (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- “In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.” (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)
- “[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant’s infliction of harm and the injuries suffered by the close relative.” (*Fortman, supra*, 212 Cal.App.4th at p. 836.)
- “Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a ‘plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative’, so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child’s] abuse, but with their senses technologically extended beyond the walls of their home.” (*Ko*,

*supra*, 58 Cal.App.5th at p. 1159, internal citation omitted.)

- “[A] plaintiff need not contemporaneously understand the defendant’s conduct as *negligent*, as opposed to *harmful*. But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim.” (*Bird, supra*, 28 Cal.4th at p. 920.)
- “*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. ‘This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.’ Particularly, a NIED claim may arise when . . . caregivers fail ‘to respond significantly to symptoms obviously requiring immediate medical attention.’ ” (*Keys, supra*, 235 Cal.App.4th at p. 489.)
- “The injury-producing event here was defendant’s lack of acuity and response to [decedent]’s inability to breathe, a condition the plaintiffs observed and were aware was causing her injury.” (*Keys, supra*, 235 Cal.App.4th at p. 490.)
- “*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the ‘event as causing harm to the victim.’ ” (*Fortman, supra*, 212 Cal.App.4th at p. 841, fn. 4.)
- “[W]e also reject [plaintiff]’s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement.” (*Fortman, supra*, 212 Cal.App.4th at pp. 843–844.)
- “Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” (*Thing, supra*, 48 Cal.3d at p. 668, fn. 10.)
- “[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury.” (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)
- “Although a plaintiff may establish presence at the scene through nonvisual sensory perception, ‘someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.’ ” (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- “[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child.” (*Wilks, supra*, 2 Cal.App.4th at p. 1271.)
- “ ‘[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress

engendered by the circumstances of the case.’ ” (*Molien, supra*, 27 Cal.3d at pp. 927–928.)

- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong, supra*, 189 Cal.App.4th at p. 1378.)
- “We have no reason to question the jury’s conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decendent]’s struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing*, that ‘[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.’ The instructions clarify that ‘Emotional distress includes suffering, anguish, fright, . . . nervousness, grief, anxiety, worry, shock . . . .’ Viewed through this lens there is no question that [plaintiffs’] testimony provides sufficient proof of serious emotional distress.” (*Keys, supra*, 235 Cal.App.4th at p. 491, internal citation omitted.)
- “[W]here a participant in a sport has expressly assumed the risk of injury from a defendant’s conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant’s express assumption of the risk against the bystanders’ NIED claims.” (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

### **Secondary Sources**

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1144–1158

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

**VF-1604. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander**

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We answer the questions submitted to us as follows:

1. Did [*name of defendant*] negligently cause [injury to/the death of] [*name of victim*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. When the [*describe event, e.g., traffic accident*] that caused [injury to/the death of] [*name of victim*] occurred, was [*name of plaintiff*] [virtually] present at the scene [through [*specify technological means*]]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was [*name of plaintiff*] then aware that the [*e.g., traffic accident*] was causing [injury to/the death of] [*name of victim*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] suffer serious emotional distress?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s serious emotional distress?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. What are [*name of plaintiff*]'s damages?

**[a. Past economic loss**

[lost earnings \$\_\_\_\_\_]

[lost profits \$\_\_\_\_\_]

[medical expenses \$\_\_\_\_\_]

[other past economic loss \$\_\_\_\_\_]

**Total Past Economic Damages: \$\_\_\_\_\_]****[b. Future economic loss**

[lost earnings \$\_\_\_\_\_]

[lost profits \$\_\_\_\_\_]

[medical expenses \$\_\_\_\_\_]

[other future economic loss \$\_\_\_\_\_]

**Total Future Economic Damages: \$\_\_\_\_\_]****[c. Past noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]****[d. Future noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]****TOTAL \$\_\_\_\_\_****Signed:** \_\_\_\_\_  
Presiding Juror**Dated:** \_\_\_\_\_**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*New September 2003; Revised April 2007, December 2010, June 2014, December 2016, May 2022***Directions for Use**

This verdict form is based on CACI No. 1621, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize “economic” and “noneconomic” damages,



especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

## 1800. Intrusion Into Private Affairs

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[*Name of plaintiff*] **claims that** [*name of defendant*] **violated** [*his/her/nonbinary pronoun*] **right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:**

1. **That** [*name of plaintiff*] **had a reasonable expectation of privacy in** [*specify place or other circumstance*];
2. **That** [*name of defendant*] **intentionally intruded in** [*specify place or other circumstance*];
3. **That** [*name of defendant*]'s **intrusion would be highly offensive to a reasonable person;**
4. **That** [*name of plaintiff*] **was harmed; and**
5. **That** [*name of defendant*]'s **conduct was a substantial factor in causing** [*name of plaintiff*]'s **harm.**

**In deciding whether** [*name of plaintiff*] **had a reasonable expectation of privacy in** [*specify place or other circumstance*], **you should consider, among other factors, the following:**

- (a) **The identity of** [*name of defendant*];
- (b) **The extent to which other persons had access to** [*specify place or other circumstance*] **and could see or hear** [*name of plaintiff*]; **and**
- (c) **The means by which the intrusion occurred.**

**In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:**

- (a) **The extent of the intrusion;**
- (b) [*Name of defendant*]'s **motives and goals; and**
- (c) **The setting in which the intrusion occurred.**

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*New September 2003; Revised June 2010*

### **Directions for Use**

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

### **Sources and Authority**

- “Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and

giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person’s name or likeness. . . . Prosser’s classification was adopted by the Restatement Second of Torts in sections 652A–652E. California common law has generally followed Prosser’s classification of privacy interests as embodied in the Restatement.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633].)

- “[The tort of intrusion] encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.” (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230–231 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citation omitted.)
- “The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection ‘are not unrelated’ under California law. (*Shulman, supra*, 18 Cal.4th 200, 227; accord, *Hill, supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal.Rptr.2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].)” (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286 [97 Cal.Rptr.3d 274, 211 P.3d 1063].)
- “[W]e will assess the parties’ claims and the undisputed evidence under the rubric of both the common law and constitutional tests for establishing a privacy violation. Borrowing certain shorthand language from *Hill, supra*, 7 Cal.4th 1, which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests.” (*Hernandez, supra*, 47 Cal.4th at p. 288.)
- “The cause of action . . . has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person. The first element . . . is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, ‘the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.’ ” (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914–915 [85 Cal.Rptr.2d 909, 978 P.2d 67], internal citations omitted.)
- “As to the first element of the common law tort, the defendant must have ‘penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data’ by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be ‘objectively reasonable.’ In *Sanders [supra]*, at p. 907] . . . , this court linked the

reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred.” (*Hernandez, supra*, 47 Cal.4th at pp. 286–287.)

- “Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion.” (*Sanders, supra*, 20 Cal.4th at pp. 917–918.)
- “The second common law element essentially involves a ‘policy’ determination as to whether the alleged intrusion is ‘highly offensive’ under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder’s motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, ‘California tort law provides no bright line on [“offensiveness”]; each case must be taken on its facts.’ ” (*Hernandez, supra*, 47 Cal.4th at p. 287, internal citations omitted.)
- “While what is ‘highly offensive to a reasonable person’ suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of ‘offensiveness’ which must be made by the court in discerning the existence of a cause of action for intrusion. . . . A court determining the existence of ‘offensiveness’ would consider the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.” (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1483–1484 [232 Cal.Rptr. 668].)
- “Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be ‘highly offensive’ to a reasonable person, and ‘sufficiently serious’ and unwarranted as to constitute an ‘egregious breach of the social norms.’ ” (*Hernandez, supra*, 47 Cal.4th at p. 295, internal citation omitted.)
- “[T]he extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.’ The impact on the plaintiff’s privacy rights must be more than ‘slight or trivial.’ ” (*Mezger v. Bick* (2021) 66 Cal.App.5th 76, 87 [280 Cal.Rptr.3d 720], internal citations omitted.)
- “[L]iability under the intrusion tort requires that the invasion be highly offensive to a reasonable person, considering, among other factors, the motive of the alleged intruder.” (*Sanders, supra*, 20 Cal.4th at p. 911, internal citations omitted.)
- “[T]he damages flowing from an invasion of privacy logically would include an award for mental suffering and anguish.” (*Miller, supra*, 187 Cal.App.3d at p. 1484, citing *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal.App.2d 82 [291 P.2d 194].)

***Secondary Sources***

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 756, 757, 762–765

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1887

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.02 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.30 (Matthew Bender)

California Civil Practice: Torts § 20:8 (Thomson Reuters)

**1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements (Civ. Code, § 1708.85)**

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**[Name of plaintiff] claims that [name of defendant] violated [his/her/nonbinary pronoun] right to privacy by distributing private sexually explicit materials. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] intentionally distributed by [specify means, e.g., posting online] [a] [photograph(s)/film(s)/videotape(s)/recording(s)]/[specify other reproduction] of [name of plaintiff];**
- 2. That [name of plaintiff] did not consent to the distribution of the [specify, e.g., photographs];**
- 3. That [name of defendant] knew, or reasonably should have known, that [name of plaintiff] had a reasonable expectation that the [e.g., photographs] would remain private;**
- 4. That the [e.g., photographs] [exposed an intimate body part of [name of plaintiff]V [or] showed [name of plaintiff] engaging in an act of [intercourse/oral copulation/sodomy/ [or] [specify other act of sexual penetration]]];**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

**[An “intimate body part” is any part of the genitals[, and, in the case of a female, also includes any portion of the breast below the top of the areola,] that is uncovered or visible through less than fully opaque clothing.]**

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*New December 2015; Revised May 2022*

**Directions for Use**

This instruction is for use for an invasion-of-privacy cause of action for the dissemination of sexually explicit materials. (See Civ. Code, § 1708.85(a).) It may not be necessary to include the last definitional paragraph as the court may rule as a matter of law that an image of an intimate body part has been distributed. (See Civ. Code, § 1708.85(b).)

Plaintiff may recover general or special damages as defined in subdivision (d) of Civil Code section 48a. (Civ. Code, § 1708.85(a).) “General damages” are damages for loss of reputation, shame, mortification and hurt feelings. (Civ. Code, § 48a(d)(1).) “Special damages” are essentially economic loss. (Civ. Code, § 48a(d)(2).)

### **Sources and Authority**

- Right of Action Against Distributor of Private Sexually Explicit Material. Civil Code section 1708.85
- General and Special Damages. Civil Code section 48a(d)(1), (2)

#### ***Secondary Sources***

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.36A (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25B (Matthew Bender)

**2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **breached the obligation of good faith and fair dealing because** *[name of defendant]* **failed to accept a reasonable settlement demand for a claim against** *[name of plaintiff]*. **To establish** *[name of plaintiff]*'s claim against *[name of defendant]*, *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of plaintiff]* **was insured under a policy of liability insurance issued by** *[name of defendant]*;
2. **That** *[name of claimant]* **made a claim against** *[name of plaintiff]* **that was covered by** *[name of defendant]*'s insurance policy;
3. **That** *[name of claimant]* **made a reasonable demand to settle** *[his/her/nonbinary pronoun]* **claim against** *[name of plaintiff]* **for an amount within policy limits;**
4. **That** *[name of defendant]* **failed to accept this settlement demand;**
5. **That** *[name of defendant]*'s failure to accept the settlement demand **was the result of unreasonable conduct by** *[name of defendant]*; **and**
6. **[That a judgment was entered against** *[name of plaintiff]* **for a sum of money greater than the policy limits.]**

*[or]*

**[That** *[name of defendant]*'s failure to accept the settlement demand **was a substantial factor in causing** *[name of plaintiff]*'s harm.]

**“Policy limits” means the highest amount of insurance coverage available under the policy for the claim against** *[name of plaintiff]*.

**A settlement demand for an amount within policy limits is reasonable if** *[name of defendant]* **knew or should have known at the time it failed to accept the demand that a potential judgment against** *[name of plaintiff]* **was likely to exceed the amount of the demand based on** *[name of claimant]*'s injuries or losses and *[name of plaintiff]*'s probable liability. **However, the demand may be unreasonable for reasons other than the amount demanded.**

**An insurance company's unreasonable conduct may be shown by its action or by its failure to act. An insurance company's conduct is unreasonable when, for example, it does not give at least as much consideration to the interests of the insured as it gives to its own**



interests.

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*New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021, May 2022*

### Directions for Use

This instruction is for use in an “excess judgment” case; that is, one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits. Use the first option for element 6 if the plaintiff is seeking only the amount of the excess judgment. Use the second option for element 6 if the plaintiff is seeking damages separate from or in addition to the excess judgment. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42].) If there has been both an excess judgment and other damages, modify element 6 as appropriate to address all damages involved in the case.

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. For example, if the plaintiff is the insured’s assignee, modify the instruction as needed to reflect the underlying facts and relationship between the parties.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

If it is alleged that a demand was made in excess of the policy limits and there is a claim that the defendant should have contributed the policy limits toward a settlement, then this instruction will need to be modified.

This instruction should also be modified if the insurer did not accept the policy-limits demand because of potential remaining exposure to the insured, such as a contractual indemnity claim or exposure to other claimants.

### Sources and Authority

- “[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)
- “Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.” (*Crisci v. Security Insurance*

*Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- “In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.” (*Crisci, supra*, 66 Cal.2d at p. 429.)
- “[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. . . . [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.” (*Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)
- “[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured’s interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.” (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128].)
- “The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.” (*Crisci, supra*, 66 Cal.2d at p. 431.)
- “The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer’s duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s gamble—on which only the insured might lose.” (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)
- “An insured’s claim for bad faith based on an alleged wrongful refusal to settle

first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure.” (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], internal citations omitted.)

- “An insurer’s duty to accept a reasonable settlement offer is not absolute. ‘ “[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured’s interests *may* require the insurer to settle the claim within the policy limits. An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.” ’ [¶] Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. ‘ [T]he crucial issue is . . . the basis for the insurer’s decision to reject an offer of settlement.’ ” (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 [276 Cal.Rptr.3d 13], original italics, internal citations omitted.)
- “A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. [¶] Simply failing to settle does not meet this standard.” (*Pinto, supra*, 61 Cal.App.5th at p. 688, internal citation omitted.)
- “To be liable for bad faith, an insurer must not only cause the insured’s damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured.” (*Pinto, supra*, 61 Cal.App.5th at p. 692.)
- “A bad faith claim requires ‘something beyond breach of the contractual duty itself, and that something more is ‘ “refusing, *without proper cause*, to compensate its insured for a loss covered by the policy . . . .” [Citation.] Of course, the converse of “without proper cause” is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.’ ” (*Graciano, supra*, 231 Cal.App.4th at p. 433, original italics.)
- “Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement.” (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)
- “The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal . . . .” (*Graciano, supra*, 231 Cal.App.4th at p. 434.)

- “Whether [the insurer] ‘refused’ the ‘offer,’ and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer’s terms, were questions for the jury.” (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)
- “A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. . . . Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable.” (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)
- “An insurer’s wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer’s misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment.” (*Howard, supra*, 187 Cal.App.4th at p. 527, internal citations omitted.)
- “ ‘An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless*, if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer’s breach of the express and implied obligations of the contract.’ Accordingly, contrary to the defendant’s suggestion, an insurer’s ‘good faith,’ though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer’s refusal to accept a reasonable settlement offer.” (*Johansen, supra*, 15 Cal.3d at pp. 15–16, original italics, footnotes and internal citation omitted.)
- “[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because ‘The insurer does not . . . insure the entire range of an insured’s well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.’ ” (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)
- “A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer.” (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)
- “An insurer that breaches its duty of reasonable settlement is liable for all the insured’s damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded.” (*Hamilton, supra*, 27 Cal.4th at p. 725, internal citations omitted.)
- “[I]nsurers do have a ‘selfish’ interest (that is, one that is peculiar to themselves)

in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request.” (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398–1399 [93 Cal.Rptr.3d 763].)

- “For bad faith liability to attach to an insurer’s failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no ‘opportunity to settle’ that an insurer may be taxed with ignoring.” (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)
- “[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. ‘[T]he crucial issue is . . . the basis for the insurer’s decision to reject an offer of settlement.’ ‘[M]ere errors by an insurer in discharging its obligations to its insured “ ‘does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer’s conduct must also have been *unreasonable.*’ ” ’ ” (*Pinto, supra*, 61 Cal.App.5th at p. 688, original italics, internal citations omitted.)
- “In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.” (*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [7 Cal.Rptr.2d 513, 521].)

### **Secondary Sources**

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 366–368

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.07[1]–[3] (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24  
(Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.195, 120.199,  
120.205, 120.207 (Matthew Bender)

**VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits**

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We answer the questions submitted to us as follows:

1. Was *[name of plaintiff]* insured under a policy of liability insurance issued by *[name of defendant]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did *[name of claimant]* make a claim against *[name of plaintiff]* that was covered by *[name of defendant]*'s insurance policy?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did *[name of claimant]* make a reasonable settlement demand to settle *[his/her/nonbinary pronoun]* claim against *[name of plaintiff]* for an amount within policy limits?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did *[name of defendant]* fail to accept this settlement demand?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was *[name of defendant]*'s failure to accept the settlement demand the result of unreasonable conduct by *[name of defendant]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. [Was a judgment entered against *[name of plaintiff]* for a sum of money greater than the policy limits?

\_\_\_\_\_ Yes \_\_\_\_\_ No]

[or]

[Was [name of defendant]’s failure to accept the settlement demand a substantial factor in causing harm to [name of plaintiff]?)

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are [name of plaintiff]’s damages?

[a. Amount of judgment entered against [name of plaintiff] \$\_\_\_\_\_]

[b. Past economic loss

[lost earnings \$\_\_\_\_\_]
[lost profits \$\_\_\_\_\_]
[medical expenses \$\_\_\_\_\_]
[other past economic loss \$\_\_\_\_\_]

Total Past Economic Damages: \$\_\_\_\_\_]

[c. Future economic loss

[lost earnings \$\_\_\_\_\_]
[lost profits \$\_\_\_\_\_]
[medical expenses \$\_\_\_\_\_]
[other future economic loss \$\_\_\_\_\_]

Total Future Economic Damages: \$\_\_\_\_\_]

[d. Past noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]

[e. Future noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]

TOTAL \$\_\_\_\_\_

Signed: \_\_\_\_\_ Presiding Juror

Dated: \_\_\_\_\_



**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*New May 2022*

### **Directions for Use**

This verdict form is based on CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Question 6 should be tailored to the facts of the case as presented in element 6 of CACI No. 2334.

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

**2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her/nonbinary pronoun]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

- 1. That *[name of defendant]* was **[an employer/*[other covered entity]*];****
- 2. That *[name of plaintiff]* **[was an employee of *[name of defendant]*/applied to *[name of defendant]* for a job/*[describe other covered relationship to defendant]*];****
- 3. **[That *[name of defendant]* **[discharged/refused to hire/*[other adverse employment action]*]] *[name of plaintiff]*];**  
**[or]**  
**[That *[name of defendant]* **subjected *[name of plaintiff]* to an adverse employment action;]**  
**[or]**  
**[That *[name of plaintiff]* **was constructively discharged;]**********
- 4. That *[name of plaintiff]*'s *[protected status—for example, race, gender, or age]* **was a substantial motivating reason for *[name of defendant]*'s **[decision to **[discharge/refuse to hire/*[other adverse employment action]*]] *[name of plaintiff]*/conduct];********
- 5. That *[name of plaintiff]* **was harmed; and****
- 6. That *[name of defendant]*'s **conduct was a substantial factor in causing *[name of plaintiff]*'s harm.****

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*New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020*

**Directions for Use**

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory

definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” Explained.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

### Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- “Race” and “Protective Hairstyles.” Government Code section 12926(w), (x).
- “[C]onceptually the theory of ‘[disparate] treatment’ . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. ‘This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’ ” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307

[115 Cal.Rptr.3d 453], internal citations omitted.)

- “The *McDonnell Douglas* framework was designed as ‘an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.’ ” (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)
- “At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff’s prima facie burden is ‘not onerous’, he must at least show ‘“actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion . . .’ . . .” . . .’ ” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- “If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though ‘rebuttable,’ is ‘legally mandatory.’ Thus, in a trial, ‘[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.’ [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)
- “The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant’s or the plaintiff’s explanation.” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- “To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a

plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action.” (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- “Although ‘[t]he specific elements of a prima facie case may vary depending on the particular facts,’ the plaintiff in a failure-to-hire case ‘[g]enerally . . . must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought . . . , (3) he [or she] suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive,’ such as that the position remained open and the employer continued to solicit applications for it.” (*Abed, supra*, 23 Cal.App.5th at p. 736.)
- “Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim.” (*Abed, supra*, 23 Cal.App.5th at p. 740, original italics.)
- “Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying.” (*Abed, supra*, 23 Cal.App.5th at p. 741.)
- “[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. ‘It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.’ . . . ‘[I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. . . . While the objective soundness of an employer’s proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with a *motive to discriminate illegally*. Thus, “legitimate” reasons . . . in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. . . .’ ” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)
- “The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]’s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two.” (*Swanson, supra*, 232 Cal.App.4th at p. 966.)
- “Evidence that an employer’s proffered reasons were pretextual does not

necessarily establish that the employer intentionally discriminated: ‘ “[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’ ” However, evidence of pretext is important: ‘ “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” ’ ” (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)

- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, . . . proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time.” (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)
- “We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a “but for” cause.” (*Harris, supra*, 56 Cal.4th at p. 229.)
- “In cases involving a comparison of the plaintiff’s qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer’s decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer’s assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.” (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)
- “While not all cases hold that ‘the disparity in candidates’ qualifications “must

be so apparent as to jump off the page and slap us in the face to support a finding of pretext”’ the precedents do consistently require that the disparity be substantial to support an inference of discrimination.” (*Reeves, supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)

- “In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the context of a summary judgment motion, a plaintiff’s weak comparator evidence ‘alone’ is insufficient to show pretext.” (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)
- “[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has ‘created only a weak issue of fact.’ However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by ‘nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.’ [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, ‘the task of disambiguating ambiguous utterances is for trial, not for summary judgment.’ Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury.” (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the “stray remarks doctrine”].)
- “[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: ‘Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered.’” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- “Discrimination on the basis of an employee’s foreign accent is a sufficient basis for finding national origin discrimination.” (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally

available in noncontractual actions . . . may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA . . . .” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

### ***Secondary Sources***

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1143–1147

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)



**2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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**[Name of plaintiff] claims that [name of individual defendant] subjected [him/her/nonbinary pronoun] to harassment based on [describe protected status, e.g., race, gender, or age] at [name of covered entity] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of covered entity];**
- [2. That [name of individual defendant] was an employee of [name of covered entity];]**
- 3. That [name of plaintiff] was subjected to harassing conduct because [he/she/nonbinary pronoun] was [protected status, e.g., a woman];**
- 4. That the harassing conduct was severe or pervasive;**
- 5. That a reasonable [e.g., woman] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 7. That [name of individual defendant] [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 8. That [name of plaintiff] was harmed; and**
- 9. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

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*Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, May 2022*

**Directions for Use**

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant’s status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507A, *Work Environment Harassment—Conduct*

*Directed at Plaintiff—Individual Defendant.*

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

For an employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” *Explained*, and CACI No. 2524, “*Severe or Pervasive*” *Explained*.

Modify element 3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

### Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff’s] protected status; (4) the harassment unreasonably interfered with [plaintiff’s] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment.” (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Under FEHA, an employee who harasses another employee may be held personally liable.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

### ***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56–2:56.50 (Thomson Reuters)

**2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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*[Name of plaintiff]* **claims that coworkers at *[name of covered entity]* were subjected to harassment based on *[describe protected status, e.g., race, gender, or age]* and that this harassment created a work environment for *[name of plaintiff]* that was hostile, intimidating, offensive, oppressive, or abusive.**

**To establish this claim, *[name of plaintiff]* must prove all of the following:**

- 1. That *[name of plaintiff]* was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] *[name of covered entity]*;**
- [2. That *[name of individual defendant]* was an employee of *[name of covered entity]*];**
- 3. That *[name of plaintiff]*, although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in *[his/her/nonbinary pronoun]* immediate work environment;**
- 4. That the harassing conduct was severe or pervasive;**
- 5. That a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**
- 6. That *[name of plaintiff]* considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward *[e.g., women]*;**
- 7. That *[name of individual defendant]* [participated in/assisted/ [or] encouraged] the harassing conduct;**
- 8. That *[name of plaintiff]* was harmed; and**
- 9. That the conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

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*Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2022*

**Directions for Use**

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is also an employee of the

covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant’s status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507B, *Work Environment Harassment—Conduct Directed at Others—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] [“[A]s long as the harassment occurs in a work-related context, the employer is liable”].)

For an employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

### Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).

- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “The plaintiff’s work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman’s perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers.” (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- “Harassment against others in the workplace is only relevant to the plaintiff’s case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff’s position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others.” (*Beyda, supra*, 65 Cal.App.4th at p. 520.)
- “To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by

a plaintiff who was not personally subjected to offensive remarks and touchings requires ‘an even higher showing’ than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must ‘establish that the sexually harassing conduct permeated [her] direct work environment.’ [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, ‘those incidents cannot affect . . . her perception of the hostility of the work environment.’ ” (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)
- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.” (*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

### **Secondary Sources**

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)



**2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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**[Name of plaintiff] claims that [he/she/nonbinary pronoun] was subjected to harassment based on sexual favoritism at [name of covered entity] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. “Sexual favoritism” means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences.**

**To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] was [an employee of/an applicant for a position with/a person providing services under a contract with/ an unpaid intern with/a volunteer with] [name of employer];**
- 2. That [name of individual defendant] was an employee of [name of covered entity];]**
- 3. That there was sexual favoritism in the work environment;**
- 4. That the sexual favoritism was severe or pervasive;**
- 5. That a reasonable [describe member of protected group, e.g., woman] in [name of plaintiff]’s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
- 6. That [name of plaintiff] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**
- 7. That [name of individual defendant] [participated in/assisted/ [or] encouraged] the sexual favoritism;**
- 8. That [name of plaintiff] was harmed; and**
- 9. That the conduct was a substantial factor in causing [name of plaintiff]’s harm.**

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*Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2022*

**Directions for Use**

This instruction is for use in a hostile work environment case involving sexual

favoritism when the defendant is also an employee of the covered entity. (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant’s status as an employee and include optional question 2 on the verdict form. See CACI No. VF-2507C, *Work Environment Harassment—Sexual Favoritism—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant’s circumstances.

For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*. For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, “*Harassing Conduct*” Explained, and CACI No. 2524, “*Severe or Pervasive*” Explained.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer’s strict liability for supervisor harassment. (*State Dep’t of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

### Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- “Employer” Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- “The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior.” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- “[T]he adjudicator’s inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance. To show such interference, ‘the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.’ It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to ‘make it more difficult to do the job.’ ” (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- “Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment.” (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “[S]exual favoritism by a manager may be actionable when it leads employees to believe that ‘they [can] obtain favorable treatment from [the manager] if they became romantically involved with him’, the affair is conducted in a manner ‘so indiscreet as to create a hostile work environment,’ or the manager has engaged in ‘other pervasive conduct . . . which created a hostile work environment.’ ” (*Miller, supra*, 36 Cal.4th at p. 465, internal citations omitted.)
- “[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state.” (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- “[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA).” (*Fiol v. Doellstedt* (1996) 50

Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- “A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer.”  
(*Fiol, supra*, 50 Cal.App.4th at p. 1331.)

### ***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

**2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))**

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**[Name of plaintiff] contends that [name of defendant] failed to engage in a good-faith interactive process with [him/her/nonbinary pronoun] to determine whether it would be possible to implement effective reasonable accommodations so that [name of plaintiff] [insert job requirements requiring accommodation]. In order to establish this claim, [name of plaintiff] must prove the following:**

- 1. That [name of defendant] was [an employer/[other covered entity]];**
- 2. That [name of plaintiff] [was an employee of [name of defendant]/ applied to [name of defendant] for a job/[describe other covered relationship to defendant]];**
- 3. That [name of plaintiff] had [a] [select term to describe basis of limitations, e.g., physical condition] that was known to [name of defendant];**
- 4. That [name of plaintiff] requested that [name of defendant] make reasonable accommodation for [his/her/nonbinary pronoun] [e.g., physical condition] so that [he/she/nonbinary pronoun] would be able to perform the essential job requirements;**
- 5. That [name of plaintiff] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/nonbinary pronoun] would be able to perform the essential job requirements;**
- 6. That [name of defendant] failed to participate in a timely good-faith interactive process with [name of plaintiff] to determine whether reasonable accommodation could be made;**
- [7. That [name of defendant] could have made a reasonable accommodation when the interactive process should have taken place;]**
- 8. That [name of plaintiff] was harmed; and**
- 9. That [name of defendant]’s failure to engage in a good-faith interactive process was a substantial factor in causing [name of plaintiff]’s harm.**

### Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] [if the employer's failure to participate in good faith causes a breakdown in the interactive process, liability follows]; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].) See also verdict form CACI No. VF-2513, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

### Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With

Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.

- An employee may file a civil action based on the employer’s failure to engage in the interactive process. (*Claudio, supra*, 134 Cal.App.4th at p. 243.)
- “Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith.” (*Gelfo, supra*, 140 Cal.App.4th at p. 54, internal citations omitted.)
- “While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242 [206 Cal.Rptr.3d 841].)
- “FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions.” (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 [184 Cal.Rptr.3d 9].)
- “The point of the interactive process is to find reasonable accommodation for a disabled employee, or an employee regarded as disabled by the employer, in order to *avoid* the employee’s termination. Therefore, a pretextual termination of a perceived-as-disabled employee’s employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process.” (*Moore, supra*, 248 Cal.App.4th at pp. 243–244, original italics.)
- “FEHA’s reference to a ‘known’ disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer’s attention, it is based on the employer’s own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability.” (*Gelfo, supra*, 140 Cal.App.4th at p. 61, fn. 21.)
- “Typically, the employee must initiate the process ‘unless the disability and resulting limitations are obvious.’ ” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)
- “Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. ‘Both employer and employee have the obligation “to keep communications open” and neither has “a right to obstruct the process.” [Citation.] “Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties’ breakdown in communication, and responsibility for the breakdown lies with the party who

fails to participate in good faith.” [Citation.]’ ” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971–972 [181 Cal.Rptr.3d 553].)

- “[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. ‘If anything,’ it argues, ‘it was [employee] who failed to engage in a good faith interactive process.’ [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]’s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties’ efforts and good faith is factual, the claim is properly left for the jury’s consideration.” (*Gelfo, supra*, 140 Cal.App.4th at p. 62, fn. 23.)
- “None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. . . . To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision.” (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)
- “[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. ‘An employee may file a civil action based on the employer’s failure to engage in the interactive process.’ Failure to engage in this process is a separate FEHA violation independent from an employer’s failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, ‘it cannot be known whether an alternative job would have been found.’ The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned.” (*Wysinger, supra*, 157 Cal.App.4th at pp. 424–425, internal citations omitted.)
- “We disagree . . . with *Wysinger*’s construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra*, 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee.” (*Nadaf-Rahrov, supra*, 166 Cal.App.4th at pp. 984–985.)
- “We synthesize *Wysinger, Nadaf-Rahrov*, and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a



reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ‘ “[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. . . . ’ ” However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: ‘Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.’ ” (*Scotch, supra*, 173 Cal.App.4th at pp. 1018–1019.)

- “Well-reasoned precedent supports [defendant’s] argument that, in order to succeed on a cause of action for failure to engage in an interactive process, ‘an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred.’ ” (*Shirvanyan, supra*, 59 Cal.App.5th at p. 96.)

### ***Secondary Sources***

- 8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1048  
Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2280–9:2285, 9:2345–9:2347 (The Rutter Group)
- 1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79
- 2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[3][b] (Matthew Bender)
- 11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)
- 1 California Civil Practice: Employment Litigation, § 2:50 (Thomson Reuters)

**VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of covered entity*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was [*name of individual defendant*] an employee of [*name of covered entity*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Was [*name of plaintiff*] subjected to harassing conduct because [*he/she/nonbinary pronoun*] was [*protected status, e.g., a woman*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the harassment severe or pervasive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would a reasonable [*e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] consider the work environment to be

hostile, intimidating, offensive, oppressive, or abusive?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of individual defendant*] [participate in/assist/ [or] encourage] the harassing conduct?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

- [a. Past economic loss

[lost earnings	\$_____]
[lost profits	\$_____]
[medical expenses	\$_____]
[other past economic loss	\$_____]

Total Past Economic Damages: \$\_\_\_\_\_]

- [b. Future economic loss

[lost earnings	\$_____]
[lost profits	\$_____]
[medical expenses	\$_____]
[other future economic loss	\$_____]

Total Future Economic Damages: \$\_\_\_\_\_]

- [c. Past noneconomic loss, including [physical pain/mental suffering:]

\$\_\_\_\_\_]

- [d. Future noneconomic loss, including [physical pain/mental suffering:]

\$\_\_\_\_\_]

TOTAL \$\_\_\_\_\_

Signed: \_\_\_\_\_  
 Presiding Juror

Dated: \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022*

### Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522A.

Modify question 3 if the plaintiff was not actually a member of the protected class, but alleges harassment because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

**VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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We answer the questions submitted to us as follows:

1. Was *[name of plaintiff]* [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] *[name of covered entity]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Was *[name of individual defendant]* an employee of *[name of covered entity]*?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Did *[name of plaintiff]* personally witness harassing conduct that took place in *[his/her/nonbinary pronoun]* immediate work environment?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the harassment severe or pervasive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would a reasonable *[describe member of protected group, e.g., woman]* in *[name of plaintiff]*'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.



[d. **Future noneconomic loss, including [physical pain/mental suffering:]** \$\_\_\_\_\_]  
**TOTAL \$\_\_\_\_\_**

**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022*

**Directions for Use**

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522B.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

**VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))**

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We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of covered entity*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- [2. Was [*name of individual defendant*] an employee of [*name of covered entity*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

3. Was there sexual favoritism in the work environment?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was the sexual favoritism severe or pervasive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of plaintiff*] consider the work environment to be



hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of individual defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]’s damages?

[a. Past economic loss

[lost earnings	\$_____]
[lost profits	\$_____]
[medical expenses	\$_____]
[other past economic loss	\$_____]

Total Past Economic Damages: \$\_\_\_\_\_]

[b. Future economic loss

[lost earnings	\$_____]
[lost profits	\$_____]
[medical expenses	\$_____]
[other future economic loss	\$_____]

Total Future Economic Damages: \$\_\_\_\_\_]

[c. Past noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]

[d. Future noneconomic loss, including [physical

pain/mental suffering:]

\$\_\_\_\_\_]

TOTAL \$\_\_\_\_\_

Signed: \_\_\_\_\_

Presiding Juror

Dated: \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021, May 2022*

### Directions for Use

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Include optional question 2 only if optional element 2 is included in CACI No. 2522C.

Depending on the facts of the case, other factual scenarios for employer liability can be substituted in question 7, as in element 7 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

**VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))**

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We answer the questions submitted to us as follows:

1. Was *[name of defendant]* **[an employer/*[other covered entity]*]**?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

2. Was *[name of plaintiff]* **[an employee of *[name of defendant]*/an applicant to *[name of defendant]* for a job/*[other covered relationship to defendant]*]**?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

3. Did *[name of plaintiff]* have **[a]** *[select term to describe basis of limitations, e.g., physical condition]* **[that limited *[insert major life activity]*]**?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

4. Did *[name of plaintiff]* request that *[name of defendant]* make reasonable accommodation for *[his/her/nonbinary pronoun]* *[e.g., physical condition]* so that *[he/she/nonbinary pronoun]* would be able to perform the essential job requirements?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

**If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. Was *[name of plaintiff]* willing to participate in an interactive process to determine whether reasonable accommodation could be made so that *[he/she/nonbinary pronoun]* would be able to perform the essential job requirements?

\_\_\_\_\_ Yes      \_\_\_\_\_ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 6. Did [name of defendant] fail to participate in a timely, good-faith interactive process with [name of plaintiff] to determine whether reasonable accommodation could be made?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- [7. Could [name of defendant] have made a reasonable accommodation when the interactive process should have taken place?

\_\_\_\_\_ Yes \_\_\_\_\_ No

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

- 8. Was [name of defendant]’s failure to participate in a good-faith interactive process a substantial factor in causing harm to [name of plaintiff]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

[If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 9. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$\_\_\_\_\_]

[lost profits \$\_\_\_\_\_]

[medical expenses \$\_\_\_\_\_]

[other past economic loss \$\_\_\_\_\_]

Total Past Economic Damages: \$\_\_\_\_\_]

[b. Future economic loss

[lost earnings \$\_\_\_\_\_]

[lost profits \$\_\_\_\_\_]

[medical expenses \$\_\_\_\_\_]

[other future economic loss \$\_\_\_\_\_]  
**Total Future Economic Damages: \$\_\_\_\_\_]**  
**[c. Past noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]**  
**[d. Future noneconomic loss, including [physical pain/mental suffering:] \$\_\_\_\_\_]**  
**TOTAL \$\_\_\_\_\_]**

**Signed:** \_\_\_\_\_  
**Presiding Juror**

**Dated:** \_\_\_\_\_

**After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.**

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*New April 2009; Revised December 2009, December 2010, December 2016, May 2022*

**Directions for Use**

This verdict form is based on CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

Select a term to use throughout to describe the source of the plaintiff’s limitations. It may be a statutory term such as “physical disability,” “mental disability,” or “medical condition.” (See Gov. Code, § 12940(a).) Or it may be a general term such as “condition,” “disease,” or “disorder.” Or it may be a specific health condition such as “diabetes.”

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit “that limited [*insert major life activity*]” in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Bracketed question 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] [“the availability of a reasonable accommodation is an essential element of an interactive process claim”] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings section 12940(n) claim bears burden of

proving a reasonable accommodation was available before employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury’s finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; see *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Do not include the transitional language following question 8 and question 9 if the only damages claimed are also claimed under Government Code section 12940(m) on reasonable accommodation. Use CACI No. VF-2509, *Disability Discrimination—Reasonable Accommodation*, or CACI No. VF-2510, *Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*, to claim these damages.

If specificity is not required, users do not have to itemize all the damages listed in question 9 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

## 2600. Violation of CFRA Rights—Essential Factual Elements

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*[Name of plaintiff]* **claims that** *[name of defendant]* **[refused to grant [him/her/nonbinary pronoun] [family care/medical] leave] [refused to return [him/her/nonbinary pronoun] to the same or a comparable job when [his/her/nonbinary pronoun] [family care/medical] leave ended] [other violation of CFRA rights]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That *[name of plaintiff]* was eligible for [family care/medical] leave;**
- 2. That *[name of plaintiff]* [requested/took] leave *[insert one of the following:]***

**[for the birth of *[name of plaintiff]*'s child or bonding with the child;]**

**[for the placement of a child with *[name of plaintiff]* for adoption or foster care;]**

**[to care for *[name of plaintiff]*'s [child/parent/spouse/domestic partner/grandparent/grandchild/sibling] who had a serious health condition;]**

**[for *[name of plaintiff]*'s own serious health condition that made [him/her/nonbinary pronoun] unable to perform the functions of [his/her/nonbinary pronoun] job with *[name of defendant]*;]**

**[for *[specify qualifying military exigency related to covered active duty or call to covered active duty of a spouse, domestic partner, child, or parent, e.g., [name of plaintiff]'s spouse's upcoming military deployment on short notice]*;]**
- 3. That *[name of plaintiff]* provided reasonable notice to *[name of defendant]* of [his/her/nonbinary pronoun] need for [family care/medical] leave, including its expected timing and length. [If *[name of defendant]* notified [his/her/nonbinary pronoun/its] employees that 30 days' advance notice was required before the leave was to begin, then *[name of plaintiff]* must show that [he/she/nonbinary pronoun] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she/nonbinary pronoun] gave notice as soon as possible];**
- 4. That *[name of defendant]* [refused to grant *[name of plaintiff]*'s request for [family care/medical] leave/refused to return *[name of plaintiff]* to the same or a comparable job when [his/her/nonbinary pronoun] [family care/medical] leave ended/other violation of CFRA rights];**

5. That [name of plaintiff] was harmed; and
6. That [name of defendant]’s [decision/conduct] was a substantial factor in causing [name of plaintiff]’s harm.

*New September 2003; Revised October 2008, May 2021*

### Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer’s refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

The second-to-last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. (Gov. Code, § 12945.2(b)(4)(C).) If there is a dispute concerning the existence of a “serious health condition,” the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2(b)(12).) If there is no dispute concerning the relevant individual’s condition qualifying as a “serious health condition,” it is appropriate for the judge to instruct the jury that the condition qualifies as a “serious health condition.”

The last bracketed option in element 2 requires a qualifying exigency for military family leave related to the covered active duty or call to covered active duty of the employee’s spouse, domestic partner, child, or parent in the Armed Forces of the United States. That phrase is defined in the Unemployment Insurance Code. (See Unemp. Ins. Code, § 3302.2.)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days’ advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

### Sources and Authority

- California Family Rights Act. Government Code section 12945.2.
- “Employer” Defined. Government Code section 12945.2(b)(3).
- “Parent” Defined. Government Code section 12945.2(b)(10) (Assem. Bill 1033; Stats. 2021, ch. 327) [adding parent-in-law to the definition of parent].
- “Serious Health Condition” Defined. Government Code section 12945.2(b)(12).
- “An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee’s timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave.” (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations)



omitted, superseded on other grounds by statute.)

- “A CFRA interference claim ‘consists of the following elements: (1) the employee’s entitlement to CFRA leave rights; and (2) the employer’s interference with or denial of those rights.’” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)
- “[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. ‘Interference’ claims prevent employers from wrongly interfering with employees’ approved leaves of absence, and ‘retaliation’ or ‘discrimination’ claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights.” (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)
- “An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee’s entitlement to CFRA-qualifying leave. A CFRA interference claim ‘consists of the following elements: (1) the employee’s entitlement to CFRA leave rights; and (2) the employer’s interference with or denial of those rights.’” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)
- “The right to reinstatement is unwaivable but not unlimited.” (*Richey, supra*, 60 Cal.4th at p. 919.)
- “It is not enough that [plaintiff’s] mother had a serious health condition. [Plaintiff’s] participation to provide care for her mother had to be ‘warranted’ during a ‘period of treatment or supervision . . . .’” (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)
- “[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant’s hospital, not her ability to do her essential job functions ‘generally’ . . . .” (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

### **Secondary Sources**

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment*

*Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

## 2754. Reporting Time Pay—Essential Factual Elements

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**[Name of plaintiff] claims that [name of defendant] scheduled or otherwise required [him/her/nonbinary pronoun] to [report to work/report to work for a second shift] but when [name of plaintiff] reported to work, [name of defendant] [failed to put [name of plaintiff] to work/furnished a shortened [workday/shift]]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] was [a/an] [employer/[specify other covered entity]];**
- 2. That [name of plaintiff] was an employee of [name of defendant];**
- 3. That [name of defendant] required [name of plaintiff] to report to work for one or more [workdays/second shifts];**
- 4. That [name of plaintiff] reported for work; and**
- 5. That [name of defendant] [failed to put [name of plaintiff] to work/ furnished less than [half of the usual day’s work/two hours of work on a second shift]].**

**If you find that [name of plaintiff] has proved all of the above elements, you must determine the amount of wages [name of defendant] must pay to [name of plaintiff]. For each workday when an employee reports to work, as required, but is either not put to work or furnished with less than half the usual day’s hours, the employer must pay wages for half the usual or scheduled day’s hours at the employee’s regular rate of pay (and in no event for less than two hours or more than four hours).**

**[Name of plaintiff]’s regular rate of pay in this case is [specify amount].**

**[For each occasion when an employee is required to report for a second shift in the same workday but is furnished less than two hours of work, the employer must pay wages for two hours at the employee’s regular rate of pay.]**

**“Workday” means any consecutive 24-hour period beginning at the same time each calendar day.**

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*New November 2021; Revised May 2022*

### **Directions for Use**

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant’s failure to pay reporting time under section 5 of the Industrial Welfare Commission’s wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040,

subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 5, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 5. If the case involves both first and second shifts, the instruction will need to be modified.

Element 1 may be omitted if there is no dispute regarding the defendant’s status as an employer.

Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic reporting to work before the start of a potential shift. (See *Ward v. Tilly’s, Inc.* (2019) 31 Cal.App.5th 1167, 1171 [243 Cal.Rptr.3d 461].)

Include the bracketed next to last paragraph only if the plaintiff claims that the defendant required the plaintiff to report for work a second time in a single workday.

### Sources and Authority

- “Employee” and “Employer” Defined. Title 8 California Code of Regulations sections 11010–11160.
- “Person” Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections 11010–11160 (subd. 5 of each section).
- “We conclude that the on-call scheduling alleged in this case triggers Wage Order 7’s reporting time pay requirements. As we explain, on-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the defendant] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage.” (*Ward, supra*, 31 Cal.App.5th at p. 1171.)
- “[W]e conclude, contrary to the trial court, that an employee need not necessarily physically appear at the workplace to ‘report for work.’ Instead, ‘report[ing] for work’ within the meaning of the wage order is best understood as presenting oneself *as ordered*. ‘Report for work,’ in other words, does not have a single meaning, but instead is defined by the party who directs the manner in which the employee is to present himself or herself for work—that is, by the employer. [¶] As thus interpreted, the reporting time pay requirement operates as follows. If an employer directs employees to present themselves for work by physically appearing at the workplace at the shift’s start, then the reporting time requirement is triggered by the employee’s appearance at the jobsite. But if the employer directs employees to present themselves for work by logging on to a computer remotely, or by appearing at a client’s jobsite, or by setting out on a trucking route, then the employee ‘reports for work’ by doing

those things. And if, as plaintiff alleges in this case, the employer directs employees to present themselves for work by telephoning the store two hours prior to the start of a shift, then the reporting time requirement is triggered by the telephonic contact.” (*Ward, supra*, 31 Cal.App.5th at p. 1185, original italics.)

### ***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 432

1 Wilcox, California Employment Law, Ch. 1, *Overview of Wage and Hour Laws*, § 1.05; Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

**3053. Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements (42 U.S.C. § 1983)**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **retaliated against** *[him/her/nonbinary pronoun]* **because** *[he/she/nonbinary pronoun]* **exercised** *[his/her/nonbinary pronoun]* **right to speak as a private citizen about a matter of public concern. To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **[That** *[name of plaintiff]* **was speaking as a private citizen and not as a public employee when** *[he/she/nonbinary pronoun]* *[describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting];]*
2. **That** *[name of defendant]* *[specify retaliatory acts, e.g., terminated plaintiff's employment];*
3. **That** *[name of plaintiff]'s* *[e.g., speech to the city council]* **was a substantial motivating reason for** *[name of defendant]'s* **decision to** *[e.g., terminate plaintiff's employment];*
4. **That** *[name of plaintiff]* **was harmed; and**
5. **That** *[name of defendant]'s* **conduct was a substantial factor in causing** *[name of plaintiff]'s* **harm.**

**If** *[name of plaintiff]* **proves all of the above,** *[name of defendant]* **is not liable if** *[he/she/nonbinary pronoun/it]* **proves either of the following:**

6. **That** *[name of defendant]* **had an adequate employment-based justification for treating** *[name of plaintiff]* **differently from any other member of the general public; or**
7. **That** *[name of defendant]* **would have** *[specify adverse action, e.g., terminated plaintiff's employment]* **anyway for other legitimate reasons, even if** *[he/she/nonbinary pronoun/it]* **also retaliated based on** *[name of plaintiff]'s* **protected conduct.**

**In deciding whether** *[name of plaintiff]* **was speaking as a public citizen or a public employee (element 1), you should consider whether** *[his/her/nonbinary pronoun]* *[e.g., speech]* **was within** *[his/her/nonbinary pronoun]* **job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]**

### Directions for Use

This instruction is for use in a claim by public employees who allege that they suffered an adverse employment action in retaliation for their private speech on an issue of public concern. Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S.Ct. 1951, 164 L.Ed.2d 689].) For a claim by a private citizen who alleges retaliation, see CACI No. 3050, *Retaliation—Essential Factual Elements*.

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra*, 547 U.S. at p. 424.)

Note that there are two causation elements. The protected speech must have caused the employer's adverse action (element 3), and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, "*Adverse Employment Action*" *Explained* (under FEHA).

### Sources and Authority

- “[C]itizens do not surrender their First Amendment rights by accepting public employment.’ Moreover, ‘[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,’ because ‘government employees are often in the best position to know what ails the agencies for which they work.’ At the same time, ‘[g]overnment employers, like private employers, need a significant degree of control over their employees’ words and actions.’ Accordingly, government employees may be subject to some restraints on their speech ‘that would be unconstitutional if applied to the general public.’ ” (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860–861, internal citations omitted.)
- “First Amendment retaliation claims are governed by the framework in *Eng*. See 552 F.3d at 1070–1072. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse

employment action even absent the protected speech. ‘[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff’s case.’ ” (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

- “In a First Amendment retaliation case, an adverse employment action is an act that is reasonably likely to deter employees from engaging in constitutionally protected speech.” (*Greisen v. Hanken* (9th Cir. 2019) 925 F.3d 1097, 1113.)
- “*Pickering* [v. *Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” (*Garcetti, supra*, 547 U.S. at p. 418, internal citations omitted.)
- “In the forty years since *Pickering*, First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering*’s tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation.” (*Eng, supra*, 552 F.3d at p. 1070.)
- “Whether speech is on a matter of public concern is a question of law, determined by the court . . . The speech need not be entirely about matters of public concern, but it must ‘substantially involve’ such matters. ‘[S]peech warrants protection when it “seek[s] to bring to light actual or potential wrongdoing or breach of public trust.” ’ ” (*Greisen, supra*, 925 F.3d at p. 1109.)
- “Public employees’ expression is on a matter of public concern if it ‘relat[es] to any matter of political, social, or other concern to the community,’ and not ‘upon matters *only* of personal interest.’ Some subjects *both* affect a public employee’s personal interests *and* implicate matters of public concern. *Rendish* [v. *City of Tacoma* (9th Cir. 1997) 123 F.3d 1216, 1223] held that unlawful discrimination



is such a matter, recognizing that ‘the public has an interest in unlawful discrimination’ in City government, and that employee speech about such discrimination therefore involves matters of public concern even if it arises out of a personal dispute. [¶ . . . ¶] Th[is] rule applies to both administrative and judicial proceedings seeking to ‘bring to light potential or actual discrimination’ by government officials, and controls even when the plaintiff seeks only private relief for the vindication of her own rights. This precedent clearly establishes that speech by public employees about unlawful discrimination in the workplace is inherently speech on a matter of public concern.” (*Ballou v. McElvain* (9th Cir. 2022) 29 F.4th 413, \_\_\_, 2022 U.S. App. LEXIS 8038, \*33, original italics, internal citations and footnotes omitted.)

- “[Defendant] may avoid liability if he shows that a ‘final decision maker’s independent investigation and termination decision, responding to a biased subordinate’s initial report of misconduct, . . . negate[s] any causal link’ between his retaliatory motive and the adverse employment action. This is because a final decision maker’s wholly independent investigation and decision establish that ‘the employee’s protected speech was not a but-for cause of the adverse employment action.’ ” (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)
- “Whether an individual speaks as a public employee is a mixed question of fact and law. ‘First, a factual determination must be made as to the “scope and content of a plaintiff’s job responsibilities.” ’ ‘Second, the “ultimate constitutional significance” of those facts must be determined as a matter of law.’ ” (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted.)
- “An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee’s job duties include interacting with the public.” (*Barone, supra*, 902 F.3d at p. 1100.)
- “[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” (*Garcetti, supra*, 547 U.S. at p. 424.)
- “To show that retaliation was a substantial or motivating factor behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action were proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the

employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for the adverse action were false and pretextual.” (*Anthoine v. N. Cent. Counties Consortium* (9th Cir. 2010) 605 F.3d 740, 750.)

- “[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074–76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee’s speech is insulated from employer discipline under the First Amendment. . . . The guiding principles are: [¶] 1. ‘First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.’ [¶] 2. ‘Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment . . . . When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee’s preparation of that report is typically within his job duties . . . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee’s regular job duties involve investigating such conduct.’ [¶] 3. ‘Third, we conclude that when a public employee speaks in direct contravention to his supervisor’s orders, that speech may often fall outside of the speaker’s professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a ‘practical’ matter, within the employee’s job duties notwithstanding any suggestions to the contrary in the employee’s formal job description.’ ” (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)
- “Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a ‘substantial factor’—or, to put it in other words, that it was a ‘motivating factor’ in the [defendant]’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s re-employment even in the absence of the protected conduct.” (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)
- “Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has

‘adequate justification’ to restrict the employee’s speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted.” (*Eng, supra*, 552 F.3d at pp. 1071–1072, internal citations omitted.)

- “Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a ‘wholesale deterrent to a broad category of expression’ rather than ‘a post hoc analysis of one employee’s speech and its impact on that employee’s public responsibilities’ is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech’s ‘“necessary impact on the actual operation” of the Government.’ [U]nlike an adverse action taken in response to actual speech,’ a prospective restriction ‘chills potential speech before it happens.’ The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to ‘an isolated disciplinary action.’ ” (*Moonin, supra*, 868 F.3d at p. 861, internal citations omitted.)

### ***Secondary Sources***

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law §§ 894, 895

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03  
(Matthew Bender)

### 3055. Rebuttal of Retaliatory Motive

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[Name of defendant] **claims that [he/she/nonbinary pronoun/it] [specify alleged retaliatory conduct, e.g., arrested plaintiff] because [specify nonretaliatory reason for the adverse action].**

**If [name of plaintiff] proves that retaliation was a substantial or motivating factor for [name of defendant]’s [specify alleged retaliatory conduct], you must then consider if [name of defendant] would have taken the same action even in the absence of [name of plaintiff]’s constitutionally protected activity.**

**To succeed on this defense, [name of defendant] must prove that [he/she/nonbinary pronoun/it] would have [specify alleged retaliatory conduct, e.g., arrested plaintiff] on the basis of [specify the defendant’s stated nonretaliatory reason for the adverse action], regardless of retaliation for [name of plaintiff]’s [specify constitutionally protected activity].**

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New May 2021

#### Directions for Use

This instruction sets forth a defendant’s response to a plaintiff’s claim of retaliation. See CACI No. 3050, *Retaliation—Essential Factual Elements*. The defendant bears the burden of proving the nonretaliatory reason for the allegedly retaliatory conduct. (See *Nieves v. Bartlett* (2019) \_\_\_ U.S. \_\_\_ [139 S.Ct. 1715, 1725, 204 L.Ed.2d 1].)

In retaliatory arrest and prosecution cases, use this instruction only if the court has determined the absence of probable cause or that an exception to the no-probable-cause requirement applies because the plaintiff presented objective evidence that otherwise similarly situated individuals not engaged in the same sort of constitutionally protected activity were not arrested or prosecuted. (See *Nieves, supra*, 139 S.Ct. at p. 1727 [stating exception to no-probable-cause requirement when otherwise similarly situated individuals were not arrested for the same conduct].)

#### Sources and Authority

- “[I]f the plaintiff establishes the absence of probable cause, ‘then the *Mt. Healthy* test governs: The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation.’ ” (*Nieves, supra*, 139 S.Ct. at p. 1725.)
- “Under *Mt. Healthy*, once a petitioner has made a showing of a First Amendment retaliation claim, ‘the burden shifts to the government to show that it “would have taken the same action even in the absence of the protected conduct.” ’ The Government ‘must show more than that they “could have”

punished the plaintiffs in the absence of the protected speech; instead, “the burden is on the defendants to show” through evidence that they “*would have*” punished the plaintiffs under those circumstances.’ ” (*Bello-Reyes v. Gaynor* (9th Cir. 2021) 985 F.3d 696, 702, original italics, internal citations omitted.)

### ***Secondary Sources***

4 Witkin & Epstein, California Criminal Law (4th ed. 2020) Pretrial, § 367

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 511

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894–895

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.15 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

**3071. Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements (Civ. Code, § 56.20(b))**

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**[Name of plaintiff] claims that [name of defendant] discriminated against [him/her/nonbinary pronoun] because [he/she/nonbinary pronoun] refused to authorize disclosure of [his/her/nonbinary pronoun] medical information to [name of defendant]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of defendant] asked [name of plaintiff] to sign an authorization so that [name of defendant] could obtain medical information about [name of plaintiff] from [his/her/nonbinary pronoun] health care providers;**
- 2. That [name of plaintiff] refused to sign the authorization;**
- 3. That [name of defendant] [specify retaliatory acts, e.g., terminated plaintiff's employment];**
- 4. That [name of plaintiff]'s refusal to sign the authorization was a substantial motivating reason for [name of defendant]'s decision to [e.g., terminate plaintiff's employment];**
- 5. That [name of plaintiff] was harmed; and**
- 6. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

**Even if [name of plaintiff] proves all of the above, [name of defendant]'s conduct was not unlawful if [name of defendant] proves that the lack of the medical information made it necessary to [e.g., terminate plaintiff's employment].**

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*New June 2015; Revised May 2020*

**Directions for Use**

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release the employee's medical information to the employer. (Civ. Code, § 56.20(b).) However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid.*)

Give this instruction if an employee claims that the employer retaliated against the employee for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define

“medical information.” (See Civ. Code, § 56.05(i) [“medical information” defined].)

The statute requires that the employer’s retaliatory act be “due to” the employee’s refusal to release the medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release must be a “motivating reason” for the retaliation. (See *Kao, supra*, 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, “*Substantial Motivating Reason*” Explained.)

### Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.
- Employee’s Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).
- “An employer ‘discriminates’ against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee’s *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21).” (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal.Rptr.2d 696, 927 P.2d 1200], original italics.)
- “[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was ‘the motivating reason for [his] discharge,’ [defendant] ‘nevertheless avoids liability by showing that . . . its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.’ ” (*Kao, supra*, 229 Cal.App.4th at p. 453.)

### Secondary Sources

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 540

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202 (Matthew Bender)

## 3701. Tort Liability Asserted Against Principal—Essential Factual Elements

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[*Name of plaintiff*] **claims that** [*he/she/nonbinary pronoun*] **was harmed by** [*name of agent*]'s [*insert tort theory, e.g., negligence*].

[*Name of plaintiff*] **also claims that** [*name of defendant*] **is responsible for the harm because** [*name of agent*] **was acting as** [*his/her/nonbinary pronoun/its*] [*agent/employee/[insert other relationship, e.g., partner]*] **when the incident occurred.**

**If you find that** [*name of agent*]'s [*insert tort theory*] **harmed** [*name of plaintiff*], **then you must decide whether** [*name of defendant*] **is responsible for the harm.** [*Name of defendant*] **is responsible if** [*name of plaintiff*] **proves both of the following:**

1. **That** [*name of agent*] **was** [*name of defendant*]'s [*agent/employee/[insert other relationship]*]; **and**
2. **That** [*name of agent*] **was acting within the scope of** [*his/her/nonbinary pronoun*] [*agency/employment/[insert other relationship]*] **when** [*he/she/nonbinary pronoun*] **harmed** [*name of plaintiff*].

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*New September 2003*

### Directions for Use

The term “name of agent,” in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal’s liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent’s wrongful acts. (See 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 173.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see CACI No. 3703, *Legal Relationship Not Disputed*.

This instruction may not apply if employer liability is statutory, such as under the Fair Employment and Housing Act.

### Sources and Authority

- “Agent” Defined. Civil Code section 2295.
- “‘An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.’ ‘An agent for a particular



act or transaction is called a special agent. All others are general agents.’ ‘An agency relationship “may be implied based on conduct and circumstances.” ’ ” (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262 [225 Cal.Rptr.3d 305], internal citations omitted.)

- “The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee’s willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts.” (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations and footnote omitted.)
- “It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent’s powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract.” (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1178 [201 Cal.Rptr.3d 390].)
- “The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer’s enterprise creates inevitable risks as a part of doing business.” (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)
- “Respondeat superior is based on a ‘deeply rooted sentiment’ that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities.” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)
- “[The Supreme Court has] articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim’s losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.” (*Mary M., supra*, 54 Cal.3d at p. 209.)
- “[A] principal is charged only with the knowledge of an agent acquired while the agent was acting in that role and within the scope of his or her authority as an agent.” (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1099 [223 Cal.Rptr.3d 458].)
- “[A] relationship of agency always ‘contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.’ ” (*RSB Vineyards, LLC, supra*, 15 Cal.App.5th at p. 1100.)
- “[A] principal may be liable for the wrongful conduct of its agent, even if that conduct is criminal, in one of three ways: (1) if the ‘principal directly

authorizes . . . [the tort or] crime to be committed” ’; (2) if the agent commits the tort ‘in the scope of his employment and in performing service on behalf of the principal’, ‘regardless of whether the wrong is authorized or ratified by [the principal];, and even if the wrong is criminal; or (3) if the principal ratifies its agent’s conduct ‘after the fact by . . . voluntar[ily] elect[ing] to adopt the [agent’s] conduct . . . as its own’ ” (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 969 [202 Cal.Rptr.3d 414], internal citations omitted.)

- “The employee need not have intended to further the employer’s interest for the employer to be liable if there is a ‘causal nexus’ between the intentional tort and the employee’s work. The connection or causal nexus required for respondeat superior liability is the tort must have been engendered by or arise from the work. The required connection has been described as (1) ‘the incident leading to injury must be an “outgrowth” of the employment’; (2) ‘the risk of tortious injury is ‘ “ ‘inherent in the working environment’ ” ’; (3) the risk of tortious injury is ‘ “ ‘typical of or broadly incidental to the enterprise [the employer] has undertaken’ ” ’ or (4) ‘the tort was, in a general way, foreseeable from the employee’s duties.’ ” (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1015 [253 Cal.Rptr.3d 1], internal citations omitted.)
- “[W]here recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal.” (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 550 [2 Cal.Rptr. 279, 348 P.2d 887].)
- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M., supra*, 54 Cal.3d at p. 209.)

### **Secondary Sources**

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 173–178

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶ 2:600 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03–8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers’ Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, § 248.14 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.20 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 3:1–3:4 (Thomson Reuters)

### **3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements**

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*[Name of plaintiff]* **claims that** *[he/she/nonbinary pronoun]* **was harmed by** *[name of physician]*'s *[insert tort theory, e.g., negligence]*.

*[Name of plaintiff]* **also claims that** *[name of hospital]* **is responsible for the harm because** *[name of physician]* **was acting as its** *[agent/employee/[insert other relationship]]* **when the incident occurred.**

**If you find that** *[name of physician]*'s *[insert tort theory]* **harmed** *[name of plaintiff]*, **then you must decide whether** *[name of hospital]* **is responsible for the harm.** *[Name of hospital]* **is responsible if** *[name of plaintiff]* **proves both of the following:**

- 1. That** *[name of hospital]* **held itself out to the public as a provider of care; and**
- 2. That** *[name of plaintiff]* **looked to** *[name of hospital]* **for services, rather than selecting** *[name of physician]* **for services.**

**A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an** *[agent/employee]* **of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. You must take into consideration** *[name of plaintiff]*'s **condition at the time and decide whether any notice provided was adequate to give a reasonable person in** *[name of plaintiff]*'s **condition notice of the disclaimer.**

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*New November 2021; Revised May 2022*

#### **Directions for Use**

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct as an ostensible agent.

#### **Sources and Authority**

- Agency Is Actual or Ostensible. Civil Code section 2298.
- “Ostensible Agency” Defined. Civil Code section 2300.
- “Ostensible Authority” Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- “Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: ‘(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance

on that apparent agency relationship by the plaintiff.’ Generally, the first element is satisfied ‘when the hospital “holds itself out” to the public as a provider of care,’ ‘unless it gave the patient contrary notice.’ Nonetheless, a hospital’s ‘contrary notice’ may be insufficient ‘to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.’ Reliance upon an apparent agency is demonstrated ‘when the plaintiff “looks to” the hospital for services, rather than to an individual physician.’ Ultimately, ‘there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.’ ” (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- “It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency.” (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)
- “[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital.” (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)
- “Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital’s agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact.” (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)
- “Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason

to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician.” (*Wicks, supra*, 49 Cal.App.5th at p. 884.)

***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 1–4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

## 3726. Going-and-Coming Rule—Business-Errand Exception

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**In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee’s conduct is within the scope of the employee’s employment from the time the employee starts on the errand until the employee returns from the errand or until the employee completely abandons the errand for personal reasons.**

**In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:**

- a. The intent of the employee;**
- b. The nature, time, and place of the employee’s conduct;**
- c. The work the employee was hired to do;**
- d. The incidental acts the employer should reasonably have expected the employee to do;**
- e. The amount of freedom allowed the employee in performing the employee’s duties; [and]**
- f. The amount of time consumed in the personal activity [./; and]**
- g. [specify other factors, if any].**

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*New September 2003; Revised June 2014, June 2017; Revised and Renumbered from CACI No. 3724 November 2017; Revised May 2020*

### **Directions for Use**

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the “special errand” or “special mission” exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; see *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632–633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a “special errand” or a “special mission” for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435–436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may

consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907 [162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation*, should not be given].)

### Sources and Authority

- “An offshoot of the doctrine of respondeat superior is the so-called “going and coming rule.” Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. . . . This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. . . .” (*Jeewarat, supra*, 177 Cal.App.4th at p. 435.)
- “The *special-errand* exception to the going-and-coming rule is stated as follows: “If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.”’” (*Moradi, supra*, 219 Cal.App.4th at p. 906, original italics.)
- “When an employee is engaged in a ‘special errand’ or a ‘special mission’ for the employer it will negate the ‘going and coming rule.’ . . . The employer is ‘liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. . . .’” (*Jeewarat, supra*, 177 Cal.App.4th at p. 436, internal citations omitted.)
- “The term ‘special errand’ is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the ‘special errand’ can also be part of the employee’s regular duties. Thus, we have chosen to use the term ‘business errand’ throughout this opinion, as it is more precise and descriptive.” (*Sumrall, supra*, 10 Cal.App.5th at p. 968 fn.1, internal citation omitted.)
- “[T]he jury’s instruction on the business errand exception explains it concisely: . . . .” (*Sumrall, supra*, 10 Cal.App.5th at p. 969, quoting this instruction.)
- “It is not necessary that the employee is directly engaged in his job duties; included also are errands that incidentally or indirectly benefit the employer. It is essential, however, that the errand be either part of the employee’s regular duties or undertaken at the specific request of the employer.” (*Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452–453 [224 Cal.Rptr.3d 319], internal citation omitted.)
- “[T]he mere fact that a trip may be related to an employee’s job does not impose liability on the employer. . . . [T]o bring an employee’s trip within the special

errand exception, the employer must request or at least expect it of the employee.” (*Morales-Simental, supra*, 16 Cal.App.5th at p. 455, internal citation omitted.)

- “[Plaintiffs] assert that [employee], as a supervisory employee tasked with hiring, had authority to act on [employer]’s behalf and, in essence, request himself to complete a special errand connected to that task. This argument finds no support in the extensive body of going and coming case law, and we decline plaintiffs’ invitation to expand the special errand exception in the manner they suggest. What they propose is an invitation to self-serving pretense by anyone with a plausible claim to supervisory authority.” (*Morales-Simental, supra*, 16 Cal.App.5th at p. 456.)
- “[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee’s conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. . . . While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law.” (*Moradi, supra*, 219 Cal.App.4th at p. 907, original italics.)
- “Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand.” (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)
- “Plaintiffs contend an employee’s attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case.” (*Jeewarat, supra*, 177 Cal.App.4th at p. 436.)



- “An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip.” (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)
- “Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. . . . ‘These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer’s special request, his imposition of an unusual condition, removes the transit from the employee’s choice or convenience and places it within the ambit of the employer’s choice or convenience, restoring the employer-employee relationship.’ ” (*Zhu v. Workers’ Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038–1039 [219 Cal.Rptr.3d 630].)
- “[W]here an employee is required by the employment to work at both the employer’s premises and at home, he is in the course of employment while traveling between the employer’s premises and home.” (*Zhu, supra*, 12 Cal.App.5th at p. 1040.)

### ***Secondary Sources***

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 192–195

Finley, California Summary Judgment and Related Termination Motions § 1:1 et seq. (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers’ Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, §§ 248.11, 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.28 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:10 (Thomson Reuters)

**3905A. Physical Pain, Mental Suffering, and Emotional Distress  
(Noneconomic Damage)**

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[Insert number, e.g., “1.”] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[insert other damages]].

**No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.**

**[To recover for future [insert item of pain and suffering], [name of plaintiff] must prove that [he/she/nonbinary pronoun] is reasonably certain to suffer that harm.**

**For future [insert item of pain and suffering], determine the amount in current dollars paid at the time of judgment that will compensate [name of plaintiff] for future [insert item of pain and suffering]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

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*New September 2003; Revised April 2008, December 2009, December 2011, May 2022*

**Directions for Use**

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.)

The amount that the jury is to award should already encompass the idea of today’s dollars for tomorrow’s loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

For actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022), the survival action statute allows for recovery of a decedent’s noneconomic damages for pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34(b).) (See CACI No. 3919, *Survival Damages*.) Insert only the bracketed terms that apply in a survival action, and modify the instruction to make clear that the damages are for the decedent’s pre-death pain, suffering, or disfigurement.

### Sources and Authority

- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).
- “One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement.” (*Pearl v. City of Los Angeles* (2019) 36 Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)
- “In general, courts have not attempted to draw distinctions between the elements of ‘pain’ on the one hand, and ‘suffering’ on the other; rather, the unitary concept of ‘pain and suffering’ has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the ‘impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.’ ” (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)
- “[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person’s bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy.” (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)
- “ “ “[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,’ ” and a ‘ “jury is entrusted with vast discretion in determining the amount of damages to be awarded . . . .” [Citation.] ’ ” (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].)
- “Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. ‘For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.’ ” (*Duarte v. Zachariah* (1994) 22

Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- “The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain.” (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)
- “We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff’s damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant’s actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required.” (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)
- “The law in this state is that the testimony of a single person, *including the plaintiff*, may be sufficient to support an award of emotional distress damages.” (*Knutson, supra*, 25 Cal.App.5th at p. 1096, original italics.)
- “[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant’s negligence was a cause of plaintiff’s injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law.” (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)
- “ ‘To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.’ ” (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- “To avoid confusion regarding the jury’s task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value.” (*Salgado, supra*, 19 Cal.4th at pp. 646–647.)
- “[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional

tort.” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- “[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]’s act of intentionally striking [plaintiff]’s dog] with a bat.” (*Plotnik, supra*, 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)
- “Furthermore, ‘the *negligent* infliction of emotional distress—*anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with property rights [citations].’ Thus, if [defendant]’s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property.” (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)*
- “[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant’s breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests.” (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

### ***Secondary Sources***

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:10 (Thomson Reuters)

**3919. Survival Damages (Code Civ. Proc., § 377.34)**

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**If you decide that [name of plaintiff] has proved [his/her/nonbinary pronoun] claim against [name of defendant] for the death of [name of decedent], you must also decide the amount of damages that [name of decedent] sustained before death and that [he/she/nonbinary pronoun] would have been entitled to recover because of [name of defendant]’s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].**

[Name of plaintiff] may recover the following damages:

- [1. The reasonable cost of reasonably necessary medical care that [name of decedent] received;]**
- [2. The amount of [income/earnings/salary/wages] that [he/she/nonbinary pronoun] lost before death;]**
- [3. The reasonable cost of health care services that [name of decedent] would have provided to [name of family member] before [name of decedent]’s death;]**
- [4. [Specify other recoverable economic damage.];]**
- [5. The [pain/ [,or] suffering/ [,or] disfigurement] [name of decedent] suffered before [his/her/nonbinary pronoun] death.]**

**You may not award damages for any loss for [name of decedent]’s shortened life span attributable to [his/her/nonbinary pronoun] death.**

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*New May 2019; Revised November 2019, May 2020; Revised and Renumbered from CACI No. 3903Q May 2022*

**Directions for Use**

Give this instruction if a deceased person’s estate claims survival damages for harm that the decedent incurred in the decedent’s lifetime. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent’s death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent’s death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent’s death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages)*, as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Though damages for pain, suffering, or disfigurement are generally not recoverable in a survival action (except at times in an elder abuse case), Code of Civil Procedure section 337.34(b) permits the recovery of these noneconomic damages by the decedent's personal representative or successor in interest for those actions or proceedings filed on or after January 1, 2022, and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022). (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.)

For actions or proceedings covered by section 337.34(b), and depending on the case, include item 5 (an item of noneconomic damages) and give CACI No. 3905, *Items of Noneconomic Damage*, with a version of CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, that includes only pain, suffering, or disfigurement. Note that many Sources and Authority below do not recognize the availability of noneconomic damages as a result of this temporary change in law. (Sen. Bill 447; Stats. 2021, ch. 448.)

### Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.
- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).
- “In California, ‘a cause of action for or against a person is not lost by reason of the person’s death’ and no ‘pending action . . . abate[s] by the death of a party . . .’ In a survival action by the deceased plaintiff’s estate, the damages recoverable expressly exclude ‘damages for pain, suffering, or disfigurement.’ They do, however, include all ‘loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.’ Thus, under California’s survival law, an estate can recover not only the deceased plaintiff’s lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages.” (*County of Los Angeles, supra*, 21 Cal.4th at pp. 303–304, internal citations omitted.)
- “The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See . . . CACI No. 3903E [“Loss of Ability to Provide Household Services (Economic Damage)”].)” (*Williams v. The Pep Boys Manny*

*Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- “The second category requires more discussion. That consists of the reasonable value of 24-hour nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, ‘to the extent his children were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent’s] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.’ . . . The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ‘“lost years” damages,’ representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not ‘sustained or incurred before death,’ as required by section 377.34. We conclude that [defendant] has the better argument.” (*Williams, supra*, 27 Cal.App.5th at p. 238, original italics.)
- “By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action.” (*Williams, supra*, 27 Cal.App.5th at p. 239, original italics.)
- “In survival actions, . . . damages are narrowly limited to ‘the loss or damage that the decedent sustained or incurred before death’, which by definition excludes future damages. For a trial court to award ‘“lost years” damages’ in a survival action—that is, damages for ‘loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened’—would collapse this fundamental distinction and render the plain language of 377.34 meaningless.” (*Williams, supra*, 27 Cal.App.5th at p. 240, original italics, internal citations omitted.)
- “The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court’s award of damages for the value of Decedent’s lost pension benefits and Social Security benefits.” (*Williams, supra*, 27 Cal.App.5th at p. 240, fn. 21.)
- “[T]here is at least one exception to the rule that damages for the decedent’s predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met.” (*Quiroz, supra*, 140 Cal.App.4th at p. 1265.)

### **Secondary Sources**

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*,



§ 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

### 3963. Affirmative Defense—Employee’s Duty to Mitigate Damages

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**[Name of defendant] claims that if [name of plaintiff] is entitled to any damages, they should be reduced by the amount that [name of plaintiff] could have earned from other employment. To succeed, [name of defendant] must prove all of the following:**

- 1. That employment substantially similar to [name of plaintiff]’s former job was available to [him/her/nonbinary pronoun];**
- 2. That [name of plaintiff] failed to make reasonable efforts to seek [and retain] this employment; and**
- 3. The amount that [name of plaintiff] could have earned from this employment.**

**In deciding whether the employment was substantially similar, you should consider, among other factors, whether:**

- (a) The nature of the work was different from [name of plaintiff]’s employment with [name of defendant];**
- (b) The new position was substantially inferior to [name of plaintiff]’s former position;**
- (c) The salary, benefits, and hours of the job were similar to [name of plaintiff]’s former job;**
- (d) The new position required similar skills, background, and experience;**
- (e) The job responsibilities were similar; [and]**
- (f) The job was in the same locality; [and]**
- (g) [insert other relevant factor(s)].**

**[In deciding whether [name of plaintiff] failed to make reasonable efforts to retain comparable employment, you should consider whether [name of plaintiff] quit or was discharged from that employment for a reason within [his/her/nonbinary pronoun] control.]**

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*New September 2003; Revised February 2007, December 2014; Revised and Renumbered from CACI No. 2407 November 2018*

#### **Directions for Use**

This instruction may be given for any claim in which the plaintiff seeks to recover damages for past and future lost earnings from an employer for a wrongful termination of employment, for example in violation of public policy (see CACI No. 2400 et seq.) or under the Fair Employment and Housing Act (see CACI No. 2500

et seq.), when there is evidence that the employee’s damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff’s failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502–1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250–255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

### Sources and Authority

- “The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee’s rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages.” (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181–182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] [“Plaintiff concedes that the trial court was entitled to deduct her actual earnings”]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)
- “We respectfully disagree with *Villacorta*[, *supra*, 221 Cal.App.4th 1425]. Neither *Parker* nor *Rabago-Alvarez* supports *Villacorta*’s holding that earned wages from an inferior job do not mitigate economic damages for wrongful termination.” (*Martinez v. Rite Aid Corp.* (2021) 63 Cal.App.5th 958, 974–975 [278 Cal.Rptr.3d 310].)
- “[B]efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived . . . .” (*Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 454 [177 Cal.Rptr.3d 145].)
- “The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort.” (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)
- “[W]e conclude that the trial court should not have deducted from plaintiff’s recovery against defendant the amount that the court found she might have

earned in employment which was substantially inferior to her position with defendant.” (*Rabago-Alvarez, supra*, 55 Cal.App.3d at p. 99.)

- “[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages which otherwise would have been awarded to the employee under the terms of the original employment agreement.” (*Stanchfield, supra*, 37 Cal.App.4th at pp. 1502–1503.)
- “The location of the new job is one of the factors to consider in determining whether the new job is inferior.” (*Villacorta, supra*, 221 Cal.App.4th at p. 1432.)
- “There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California.” (*California School Employees Assn., supra*, 30 Cal.App.3d at pp. 253–254, internal citations omitted.)
- “The court could reasonably admit the evidence of other available jobs and leave the question of their substantial similarity to the jury.” (*Kao, supra*, 229 Cal.App.4th at p. 454.)
- “[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail.” (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

### **Secondary Sources**

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:492, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

## 4000. Conservatorship—Essential Factual Elements

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**[Name of petitioner] claims that [name of respondent] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [name of petitioner] must prove beyond a reasonable doubt both of the following:**

- 1. That [name of respondent] [has a mental disorder/is impaired by chronic alcoholism]; and**
  - 2. That [name of respondent] is gravely disabled as a result of the [mental disorder/chronic alcoholism].**
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*New June 2005; Revised June 2016, May 2022*

### Directions for Use

Give CACI No. 4002, “*Gravely Disabled*” *Explained*, with this instruction.

### Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- “Gravely Disabled” Defined. Welfare and Institutions Code section 5008(h).
- “The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program.” (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)
- “LPS Act commitment proceedings are subject to the due process clause because significant liberty interests are at stake. But an LPS Act proceeding is civil. ‘[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.’ Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings.” (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)
- “The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a ‘gravely disabled’ person is incapable of providing for his basic needs either alone or

with help from others.” (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- “The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)
- “[T]he trial court erred in accepting counsel’s waiver of [conservatee]’s right to a jury trial . . . .” (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)
- “ ‘The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.’ An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment.” (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382–383 [199 Cal.Rptr.3d 689].)
- “We . . . hold that capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship.” (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 703 [280 Cal.Rptr.3d 298, 489 P.3d 296].)
- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis, supra*, 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra*, 11 Cal.5th at p. 717.)
- “The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified.” (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)
- “Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. . . . Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act’s reach, according to the argument presented in this appeal.” (*Conservatorship of Symington, supra*, 209 Cal.App.3d at p. 1469.)

- “The party seeking imposition of the conservatorship must prove the proposed conservatee’s grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury.” (*Conservatorship of Susan T.*, *supra*, 8 Cal.4th at p. 1009, internal citation omitted.)
- “Although there is no private right of action for a violation of section 5152, ‘aggrieved individuals can enforce the [LPS] Act’s provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]’ ” (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

### ***Secondary Sources***

15 Witkin, Summary of California Law (11th ed. 2017) Wills and Probate, § 1007

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.30 et seq. (Matthew Bender)

## 4002. “Gravely Disabled” Explained

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The term “gravely disabled” means that a person is presently unable to provide for the person’s basic needs for food, clothing, or shelter because of [a mental health disorder/impairment by chronic alcoholism]. [The term “gravely disabled” does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following:*] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[*insert other*]] [is/are] not enough, by [itself/themselves], to find that [*name of respondent*] is gravely disabled. [He/She/Nonbinary pronoun] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]

[If you find [*name of respondent*] will not take [his/her/nonbinary pronoun] prescribed medication without supervision and that a mental disorder makes [him/her/nonbinary pronoun] unable to provide for [his/her/nonbinary pronoun] basic needs for food, clothing, or shelter without such medication, then you may conclude [*name of respondent*] is gravely disabled.

In determining whether [*name of respondent*] is gravely disabled, you may consider evidence that [he/she/nonbinary pronoun] did not take prescribed medication in the past. You may also consider evidence of [his/her/nonbinary pronoun] lack of insight into [his/her/nonbinary pronoun] mental condition.]

In considering whether [*name of respondent*] is gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.

In determining whether [*name of respondent*] is gravely disabled, you may consider whether [he/she/nonbinary pronoun] is unable or unwilling to voluntarily accept meaningful treatment.

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*New June 2005; Revised January 2018, May 2019, May 2020, May 2022*

### Directions for Use

This instruction provides the definition of “gravely disabled” from Welfare and Institutions Code section 5008(h)(1)(A), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code



section 1370. A different instruction will be required if this standard is alleged.

The next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent's mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

### Sources and Authority

- “Gravely Disabled” Defined. Welfare and Institutions Code section 5008(h).
- “The enactment of the LPS and with it the substitution of ‘gravely disabled’ for ‘in need of treatment’ as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term ‘gravely disabled’ is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter.” (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)
- “[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled.” (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)
- “The stricter criminal standard is used because the threat to the conservatee’s individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions.” (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)
- “Bizarre or eccentric behavior, even if it interferes with a person’s normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival.” (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)
- “Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), ‘a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person’s basic personal needs for food, clothing, or shelter.’ ” (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 460.)
- “While [third person] may not have shown that he could manage appellant’s mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, ‘[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person’s mental health symptoms completely. Rather,

the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis.”

(*Conservatorship of Jesse G.*, *supra*, 248 Cal.App.4th at p. 463 fn. 4.)

- “We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)
- “[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled.” (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)
- “[T]he pivotal issue is whether [respondent] was ‘presently’ gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- “[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted.” (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- “A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee’s current status.” (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)
- “[T]he definition of ‘ “[g]ravely disabled minor” ’ from section 5585.25 is not part of the LPS Act, but is found in the Children’s Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies ‘only to the initial 72 hours of mental health evaluation and treatment provided to a minor. . . . Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the . . . [LPS Act].’ (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she ‘would be unable to provide for [her] basic personal needs’ if she had to so provide.” (*Conservatorship of M.B.*, *supra*, 27 Cal.App.5th at p. 107.)
- “Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the

needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no treatment that would enable the person to ‘survive safely in freedom.’ ”

(*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

### ***Secondary Sources***

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

**4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))**

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*[Name of plaintiff]* claims *[he/she/nonbinary pronoun/it]* was harmed because *[name of debtor]* **[transferred property/incurred an obligation]** to *[name of defendant]* in order to avoid paying a debt to *[name of plaintiff]*. **[This is called “actual fraud.”]** To establish this claim against *[name of defendant]*, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* has a right to payment from *[name of debtor]* for *[insert amount of claim]*;
2. That *[name of debtor]* **[transferred property/incurred an obligation]** to *[name of defendant]*;
3. That *[name of debtor]* **[transferred the property/incurred the obligation]** with the intent to hinder, delay, or defraud one or more of *[his/her/nonbinary pronoun/its]* creditors;
4. That *[name of plaintiff]* was harmed; and
5. That *[name of debtor]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that *[name of debtor]* had a desire to harm *[his/her/nonbinary pronoun/its]* creditors. *[Name of plaintiff]* need only show that *[name of debtor]* intended to remove or conceal assets to make it more difficult for *[his/her/nonbinary pronoun/its]* creditors to collect payment.

**[It does not matter whether *[name of plaintiff]*'s right to payment arose before or after *[name of debtor]* **[transferred property/incurred an obligation].]****

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*New June 2006; Revised June 2013, June 2016*

**Directions for Use**

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferee's intent is required. (See Civ. Code, § 3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., “a lien on the property.”

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a “determinate sum of money.” (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., “the person for whose benefit the transfer was made”) (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of intent. The Sixth District Court of Appeal has stated: “Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)” (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: “In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence.” (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

### Sources and Authority

- Uniform Voidable Transactions Act. Civil Code section 3439 et seq.
- “Claim” Defined for UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under UVTA. Civil Code section 3439.07.
- “The UFTA permits defrauded creditors to reach property in the hands of a transferee.” (*Mejia, supra*, 31 Cal.4th at p. 663.)
- “The UVTA, formerly known as the Uniform Fraudulent Transfer Act, ‘permits defrauded creditors to reach property in the hands of a transferee.’ ‘A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.’ . . . The purpose of the voidable transactions statute is ‘to prevent

debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach . . . .” ( *Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 [234 Cal.Rptr.3d 824], internal citations omitted.)

- “Under the UFTA, ‘a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor’s assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.’” ( *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121–122 [173 Cal.Rptr.3d 356], internal citations omitted.)
- “[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor’s conveyance of that exempt property to a third person is not fraudulent.” ( *Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)
- “A transfer is not voidable against a person ‘who took in good faith and for a reasonably equivalent value or against any subsequent transferee.’” ( *Filip, supra*, 129 Cal.App.4th at p. 830, internal citations omitted.)
- “We hold that under the UVTA, physically relocating personal property and transmitting or transporting sale proceeds out of state, then transmuted them into a different legal form, may constitute a direct or indirect mode of parting with assets or one’s interest in those assets. As such, [plaintiff] adequately alleged a ‘transfer’ under the UVTA. In this posture the trier of fact must now determine if grantor’s title is but, ‘a mere cloak under which is hidden the hideous skeleton of deceit . . . .’” ( *Nagel v. Westen* (2021) 59 Cal.App.5th 740, 749 [274 Cal.Rptr.3d 21].)
- “[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked’; they ‘may also be attacked by, as it were, a common law action.’” ( *Wisden, supra*, 124 Cal.App.4th at p. 758, internal citation omitted.)
- “Case law has established the remedies specified in the UVTA are cumulative and not the exclusive remedy for fraudulent conveyances. ‘They may also be attacked by, as it were, a common law action.’ By its terms the UVTA was intended to supplement, not replace, common law principles relating to fraud.” ( *Berger v. Varum* (2019) 35 Cal.App.5th 1013, 1019 [248 Cal.Rptr.3d 51].)
- “[E]ven if the Legislature intended that all fraudulent conveyance claims be

brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted.” (*Wisden, supra*, 124 Cal.App.4th at p. 758, internal citation omitted.)

- “Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer.” (*Filip, supra*, 129 Cal.App.4th at p. 834, internal citations omitted.)
- “In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors.” (*Economy Refining & Service Co. v. Royal Nat’l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)
- “There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other.” (*Filip, supra*, 129 Cal.App.4th at p. 834.)
- “ ‘A well-established principle of the law of fraudulent transfers is, “A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential.” ’ ” (*Berger, supra*, 35 Cal.App.5th at p. 1020.)
- “It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.” (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)
- “[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for . . . ‘the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment*, which the [UFTA] does not allow.’ (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages.” (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)
- “Certain cases, while not awarding consequential damages, have recognized the availability of such damages.” (*Berger, supra*, 35 Cal.App.5th at p. 1021.)

### **Secondary Sources**

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 5(III)-B, *Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05



**4304. Termination for Violation of Terms of  
Lease/Agreement—Essential Factual Elements**

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**[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to perform [a] requirement(s) under [his/her/nonbinary pronoun/its] [lease/rental agreement/sublease]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] [owns/leases] the property;**
- 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant];**
- 3. That under the [lease/rental agreement/sublease], [name of defendant] agreed [insert required condition(s) that were not performed];**
- 4. That [name of defendant] failed to perform [that/those] requirement(s) by [insert description of alleged failure to perform];**
- 5. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days' written notice to [either [describe action to correct failure to perform] or] vacate the property; [and]**
- [6. That [name of defendant] did not [describe action to correct failure to perform]; and]**
- [7. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days' written notice to vacate the property; and]**
- 8. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**

**[[Name of defendant]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

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*New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020, November 2021*

**Directions for Use**

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in element 8 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either “lease” or “rental agreement” in

the opening paragraph and in element 3, “owns” in element 1, and “rented” in element 2. Commercial documents are usually called “leases” while residential documents are often called “rental agreements.” Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease” in the opening paragraph and in element 3, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord’s failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

The Tenant Protection Act of 2019 and/or local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) [“just cause” requirement for termination of certain residential tenancies], (b) [“just cause” defined].) This instruction should be modified accordingly if applicable. For example, the Tenant Protection Act of 2019 requires a separate three-day notice to quit after the initial three-day notice to cure that is expressed in element 5. (See Civ. Code, § 1946.2(c).)

Element 7 applies only to a just cause eviction under the Tenant Protection Act of 2019, which governs certain residential real property tenancies of specified durations. (See *id.*, subd. (a) [stating occupancy requirement of 12 months of continuous tenancy, or, if any tenants have been added to the lease, after all tenants have lived at the property for a year or if the original tenant has lived there for 24

months or more], subd. (c) [“Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy”].)

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

### Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Dual Notice Requirement for Certain Residential Tenancies. Civil Code section 1946.2(c).
- Conversion of Unlawful Detainer to Ordinary Civil Action If Possession No Longer at Issue. Civil Code section 1952.3(a).
- “[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord’s claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law

otherwise would accord him under the proceeding.” (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- “It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession.” (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days’ notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman, supra*, 172 Cal.App.2d at p. 29.)
- “The law sensibly recognizes that although every instance of noncompliance with a contract’s terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as ‘material,’ ‘substantial,’ or ‘total.’ ” (*Superior Motels, Inc., supra*, 195 Cal.App.3d at p. 1051, internal citations omitted.)
- “‘[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.’ This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation.” (*Boston LLC, supra*, 245 Cal.App.4th at p. 81, internal citation omitted.)
- “‘Normally the question of whether a breach of an obligation is a material breach . . . is a question of fact,’ however ‘“if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law.” ’ ” (*Boston LLC, supra*, 245 Cal.App.4th at p. 87.)
- “As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation.” (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)
- “Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action.” (*Salton Community Services Dist., supra*, 256 Cal.App.2d at p. 529.)
- “If the tenant gives up possession of the property after the commencement of an

unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- “Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor’s right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained.” (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- “Given the detailed requirements for payment instructions in section 1161, subdivision 2, the lack of specific notice requirements concerning return of the property to the owner in subdivisions 2, 3, and 4 is noteworthy. Rather, these subdivisions only require the notice to demand ‘possession of the property’ (§ 1161, subs. 2 & 3) or ‘possession of the demised premises’ (§ 1161, subd. 4). Had the Legislature sought to require more detailed instructions in the notice on how to restore possession of the property to the owner, the particularized requirements in subdivision 2 shows it knew how to do so. As such, the absence of any such requirements in the notice appears to be intentional.” (*Lee v. Kotyluk* (2021) 59 Cal.App.5th 719, 730 [274 Cal.Rptr.3d 29].)
- “Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter’s residence or usual place of business *and* sending a copy through the mail to the tenant’s *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required.” (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- “In the cases discussed . . . , a finding of proper service turned on a party’s acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed.” (*Liebovich, supra*, 56 Cal.App.4th at p. 518.)
- “[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , ‘[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.’ ” (*Palm Property Investments, LLC, supra*, 194 Cal.App.4th at p. 1425.)

***Secondary Sources***

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch.12-G, *Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch.7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34.182 (Thomson Reuters)

**4421. Affirmative Defense—Statute of Limitations—Three-Year Limit (Civ. Code, § 3426.6)**

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*[Name of defendant]* **claims that** *[name of plaintiff]*'s lawsuit was not filed within the time set by law. To succeed on this defense, *[name of defendant]* **must prove that the claimed misappropriation of** *[name of plaintiff]*'s trade secrets occurred before *[insert date three years before date of filing]*.

**However, the lawsuit was still filed on time if** *[name of plaintiff]* **proves that before** *[insert date three years before date of filing]*, **[he/she/nonbinary pronoun/it] did not discover, nor with reasonable diligence should have discovered, facts that would have caused a reasonable person to suspect that** *[name of defendant]* **had misappropriated** *[name of plaintiff]*'s *[select short term to describe, e.g., information]*.

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*New April 2009*

**Directions for Use**

Give this instruction if the California Uniform Trade Secrets Act statute of limitations is at issue. (See Civ. Code, § 3426.6.) In an action in which the defendant is or was a customer of the initial misappropriator, modifications may be required. (See *Cypress Semiconductor Corp. v. Superior Court* (2008) 163 Cal.App.4th 575 [77 Cal.Rptr.3d 685].)

It is not necessary that the plaintiff know the identity of the defendant in order to trigger the duty to discover. (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 587.) Therefore, “[*name of defendant*]” in the last sentence will need to be modified if inquiry notice may have been triggered against an actual, but unidentified, misappropriator. (See *Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 585.)

This instruction places the burden on the plaintiff to prove that it did not know nor have any reason to suspect the misappropriation earlier than three years before filing. (See Civ. Code, § 3426.6.) This is the rule for the burden of proof under the nonstatutory delayed-discovery rule. (See *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1030 [98 Cal.Rptr.2d 661]; CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Certain statutes that have their own delayed discovery language (as does Civil Code section 3426.6) have been construed to place the burden on the defendant to prove that the plaintiff knew or should have suspected the facts giving rise to the cause of action earlier than the limitation date. (See, e.g., *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing Code Civ. Proc., § 340.6 on legal malpractice]; CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.) No court has construed Civil Code section 3426.6 to transfer the burden of

proof on delayed discovery to the defendant, so presumably the burden of proof remains with the plaintiff under the nonstatutory rule.

### Sources and Authority

- Statute of Limitations. Civil Code section 3426.6.
- “The unanimous conclusion of courts considering the issue—i.e., from federal courts construing section 3426.6—is that it is the first discovered (or discoverable) misappropriation of a trade secret which commences the limitation period.” (*Glue-Fold, Inc.*, *supra*, 82 Cal.App.4th at p. 1026.)
- “The statute is triggered when the plaintiff knows or has reason to know the third party has knowingly acquired, used, or disclosed its trade secrets.” (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th 585.)
- “[T]he misappropriation that triggers the running of the statute is that which the plaintiff suspects, not that which may or may not actually exist.” (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 587.)
- “[A] plaintiff may have more than one *claim* for misappropriation, each with its own statute of limitations, when more than one defendant is involved. This is different from saying that each *misappropriation* gives rise to a separate claim, which is what section 3426.6 precludes.” (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 583, original italics.)
- “A *misappropriation* within the meaning of the UTSA occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation of a trade secret arises for a given plaintiff against a given defendant only once, at the time of the initial misappropriation, subject to the discovery rule provided in section 3426.6. Each new misuse or wrongful disclosure is viewed as augmenting a single claim of continuing misappropriation rather than as giving rise to a separate claim.” (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 223 [127 Cal.Rptr.2d 169, 57 P.3d 647], original italics.)
- “It [is appropriate] to construe section 3426.6 as meaning that a cause of action for misappropriation against a third party defendant accrues with the plaintiff’s discovery of that defendant’s misappropriation. Any continuing misappropriation by that defendant constitutes a single claim.” (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 583.)
- “If someone steals a trade secret and then sells it to a third party, when does the statute of limitations begin to run on any misappropriation claim the trade secret owner might have against the third party? . . . We conclude that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the *plaintiff* has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party’s actual state of mind does not affect the running of the statute.” (*Cypress Semiconductor Corp.*, *supra*, 163 Cal.App.4th at p. 579, original italics.)



- “We conclude that the trial court erred in ruling, under the stipulated facts, that the statute of limitations did not begin to run until August 2003, when [defendant] actually learned that the DynaSpice program contained [plaintiff]’s trade secrets. Rather, the question is: When did [plaintiff] first have any reason to suspect that a . . . customer [of the initial misappropriator] had obtained or used DynaSpice knowing, *or with reason to know*, that the software contained [plaintiff]’s trade secrets?” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 588, original italics.)
- “[I]t is not necessary that the plaintiff be able to identify the person or persons causing the harm. Since the identity of the defendant is not an element of a cause of action, the failure to discover the identity of the defendant does not postpone accrual of the cause of action. ‘ “Although never fully articulated, the rationale for distinguishing between ignorance” of the defendant and “ignorance” of the cause of action itself “appears to be premised on the commonsense assumption that once the plaintiff is aware of” the latter, he “normally” has “sufficient opportunity,” within the “applicable limitations period,” “to discover the identity” of the former.’ In this case, therefore, the statute began to run when [plaintiff] had any reason to suspect that the CSI customers knew or should have known that they had acquired [plaintiff]’s trade secrets.” (*Cypress Semiconductor Corp., supra*, 163 Cal.App.4th at p. 587, internal citations omitted.)

### ***Secondary Sources***

13 Witkin, *Summary of California Law* (11th ed. 2017) Equity, § 91

Gaab & Reese, *California Practice Guide: Civil Procedure Before Trial—Claims & Defenses*, Ch. 11(I)-D ¶¶ 11:250–11:252 (The Rutter Group)

3 Levy et al., *California Torts*, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.55 (Matthew Bender)

49 *California Forms of Pleading and Practice*, Ch. 565, *Unfair Competition*, § 565.274 (Matthew Bender)

Matthew Bender *Practice Guide: California Unfair Competition and Business Torts*, Ch. 8, *Trade Secrets*, 8.28

**4560. Recovery of Payments to Unlicensed Contractor—Essential Factual Elements (Bus. & Prof. Code, § 7031(b))**

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**[Name of plaintiff] claims that [name of defendant] did not have a valid contractor’s license during all times when [name of defendant] was [performing services/supervising construction] for [name of plaintiff]. To establish this claim and recover all compensation paid for these services, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] [[engaged/hired]/ [or] contracted with] [name of defendant] to perform services for [name of plaintiff];**
- 2. That a valid contractor’s license was required to perform these services; and**
- 3. That [name of plaintiff] paid [name of defendant] for services that [name of defendant] performed.**

**[[Name of plaintiff] is not entitled to recover all compensation paid if [name of defendant] proves that at all times while [performing/supervising] these services, [he/she/nonbinary pronoun/it] had a valid contractor’s license as required by law.]**

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*New June 2016; Revised November 2020, May 2021*

**Directions for Use**

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) Modify the instruction if the plaintiff claims the defendant did not perform services or supervise construction, but instead agreed to be solely responsible for completion of construction services. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 940 [29 Cal.Rptr.2d 669].) For a case brought by a licensed contractor or an allegedly unlicensed contractor for payment for services performed, give CACI No. 4562, *Payment for Construction Services Rendered—Essential Factual Elements*. (See Bus. & Prof. Code, § 7031(a), (e).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Omit the final bracketed paragraph if the issue of licensure is not contested.

A corporation qualifies for a contractor’s license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus. & Prof.

Code, § 7068(b)(3).) The plaintiff may attack a contractor’s license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385–387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

### Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).
- Proof of Licensure. Business and Professions Code section 7031(d).
- “Contractor” Defined. Business and Professions Code section 7026.
- “The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business.” (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)
- “Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. ‘Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .’ ” (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)
- “The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial.” (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518, fn. 2.)
- “[T]he courts may not resort to equitable considerations in defiance of section 7031.” (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)
- “In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that ‘a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract’ unless the

substantial compliance doctrine applies.” (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- “It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLB’s civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction.” (*White, supra*, 178 Cal.App.4th at p. 520.)
- “In most cases, a contractor can establish valid licensure by simply producing ‘a verified certificate of licensure from the Contractors’ State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.’ [Contractor] concedes that if this was the only evidence at issue, ‘then—perhaps—the issue could be decided by the court without a jury.’ But as [contractor] points out, the City was challenging [contractor]’s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO.” (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518.)
- “[T]he determination of whether [contractor] held a valid class A license involved questions of fact. ‘[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.’ ” (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518.)
- “We conclude the authorization of recovery of ‘all compensation paid to the unlicensed contractor for performance of any act or contract’ means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided.” (*White, supra*, 178 Cal.App.4th at pp. 520–521, original italics, internal citation omitted.)
- “[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor’s lack of a license, and the other party’s bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture.” (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)
- “Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of ‘sophisticated’ persons. Reading that limitation into the statute would be inconsistent with its purpose of ‘detering unlicensed persons from engaging in the contracting business.’ ” (*Phoenix*

*Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 849 [219 Cal.Rptr.3d 775].)

- “By entering into the agreements to ‘improve the Property’ and to be ‘*solely responsible*’ for completion of infrastructure improvements—including graded building pads, storm drains, sanitary systems, streets, sidewalks, curbs, gutters, utilities, street lighting, and traffic signals—[the plaintiff] was clearly contracting to provide construction services in exchange for cash payments by [the defendants]. The mere execution of such a contract is an act ‘in the capacity of a contractor,’ and an unlicensed person is barred by section 7031, subdivision (a), from bringing claims based on the contract. [¶] . . . [¶] . . . Section 7026 plainly states that both the person who provides construction services himself and one who does so ‘through others’ qualifies as a ‘contractor.’ The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract.” (*Vallejo Development Co.*, *supra*, 24 Cal.App.4th at pp. 940–941, original italics.)
- “[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required.” (*Phoenix Mechanical Pipeline, Inc.*, *supra*, 12 Cal.App.5th at p. 853.)
- “A third party’s agreement to assume a contractor’s duties under a construction contract without a license is akin to the execution of a construction contract without a license, something the California Supreme Court has explained does not trigger section 7031 forfeiture. Such an assumption is neither an act for which the assignee may seek compensation under the contract, nor an act that can be fairly characterized as ‘carrying out the contract.’ It thus cannot constitute ‘“performance of that . . . contract.”’ ” (*Manela v. Stone* (2021) 66 Cal.App.5th 90, 105–106 [281 Cal.Rptr.3d 28].)
- “Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: ‘[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.’ ” (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)
- “[I]t is clear that the disgorgement provided in section 7031(b) is a penalty. It deprives the contractor of any compensation for labor and materials used in the construction while allowing the plaintiff to retain the benefits of that construction. And, because the plaintiff may bring a section 7031(b) disgorgement action regardless of any fault in the construction by the unlicensed

contractor, it falls within the Supreme Court’s definition of a penalty: ‘a recovery “ ‘without reference to the actual damage sustained.’ ” ’ Accordingly, we hold that [Code Civ. Proc., §] 340, subdivision (a), the one-year statute of limitations, applies to disgorgement claims brought under section 7031(b).” (*Eisenberg Village of Los Angeles Jewish Home for the Aging v. Suffolk Construction Company, Inc.* (2020) 53 Cal.App.5th 1201, 1212 [268 Cal.Rptr.3d 334], internal citation and footnote omitted.)

- “[W]e hold that the discovery rule does not apply to section 7031(b) claims. Thus, the ordinary rule of accrual applies, i.e., the claim accrues “ ‘when the cause of action is complete with all of its elements.’ ” In the case of a section 7031(b) claim, the cause of action is complete when an unlicensed contractor completes or ceases performance of the act or contract at issue.” (*Eisenberg Village of Los Angeles Jewish Home for the Aging, supra*, 53 Cal.App.5th at pp. 1214–1215, internal citation omitted.)

### ***Secondary Sources***

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

## 4900. Adverse Possession

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**[Name of plaintiff] claims that [he/she/nonbinary pronoun] is the owner of [briefly describe property] because [he/she/nonbinary pronoun] has obtained title to the property by adverse possession. In order to establish adverse possession, [name of plaintiff] must prove that for a period of five years, all of the following were true:**

- 1. That [name of plaintiff] exclusively possessed the property;**
- 2. That [name of plaintiff]’s possession was continuous and uninterrupted;**
- 3. That [name of plaintiff]’s possession of the property was open and easily observable, or was under circumstances that would give reasonable notice to [name of defendant];**
- 4. That [name of plaintiff] did not recognize, expressly or by implication, that [name of defendant] had any ownership rights in the land;**
- 5. That [name of plaintiff] claimed the property as [his/her/nonbinary pronoun] own under [either] [color of title/ [or] a claim of right]; and**
- 6. That [name of plaintiff] timely paid all of the taxes assessed on the property during the five-year period.**

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*New November 2019*

### Directions for Use

Use this instruction for a claim that the plaintiff has obtained title of property by adverse possession. A claimant for a prescriptive easement is entitled to a jury trial. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124 [21 Cal.Rptr.2d 127]; see CACI No. 4901, *Prescriptive Easement*.) Presumably the same right would apply to a claim for adverse possession. (See *Kendrick v. Klein* (1944) 65 Cal.App.2d 491, 496 [150 P.2d 955] [whether occupancy amounted to adverse possession is question of fact].)

By statute, the taxes must have been paid by “the party or persons, their predecessors and grantors.” (Code Civ. Proc., § 325(b).) Revise element 6 if the taxes were paid by someone other than the plaintiff.

### Sources and Authority

- Adverse Possession. Code of Civil Procedure section 325.
- Color of Title: Occupancy Under Written Instrument or Judgment. Code of Civil Procedure section 322.

- Occupancy Under Claim of Right. Code of Civil Procedure section 324.
- “There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the *use* of land, the other with *possession*; although the elements of each are similar, the requirements of proof are materially different.” (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032 [232 Cal.Rptr.3d 247], original italics.)
- “In an action to quiet title based on adverse possession the burden is upon the claimant to prove every necessary element: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) It must be hostile to the owner’s title. (3) The holder must claim the property as his own, under either color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The holder must pay all the taxes levied and assessed upon the property during the period.” (*Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 421 [24 Cal.Rptr. 856, 374 P.2d 824].)
- “The elements of an adverse possession claim consist of the following: (1) actual possession by the plaintiff of the property under claim of right or color of title; (2) the possession consists of open and notorious occupation of the property in such a manner as to constitute reasonable notice to the true owner; (3) the possession is adverse and hostile to the true owner; (4) the possession is uninterrupted and continuous for at least five years; and (5) the plaintiff has paid all taxes assessed against the property during the five-year period.” (*Bailey v. Citibank, N.A.* (2021) 66 Cal.App.5th 335, 351 [280 Cal.Rptr.3d 546].)
- “ ‘The elements necessary to establish title by adverse possession are tax payment and open and notorious use or possession that is continuous and uninterrupted, hostile to the true owner and under a claim of title,’ for five years. [Citation.]” (*McLear-Gary v. Scott* (2018) 25 Cal.App.5th 145, 152 [235 Cal.Rptr.3d 443].)
- “Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land. As the American Law of Property states in the context of adverse possession: ‘In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.’ One text proposes that because the phrase ‘ “claim of right” ’ has caused so much trouble by suggesting the need for an intent or state of mind, it would be better if the phrase and the notions it has spawned were forgotten.” (*Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450 [17 Cal.Rptr.3d 135], internal citations omitted.)
- “Because of the taxes element, it is more difficult to establish adverse possession than a prescriptive easement. The reason for the difference in relative difficulty is



that a successful adverse possession claimant obtains ownership of the land (i.e., an estate), while a successful prescriptive easement claimant merely obtains the right to *use* the land in a particular way (i.e., an easement).” (*Hansen, supra*, 22 Cal.App.5th at p. 1033, original italics.)

- “The requirement of “hostility” . . . means, not that the parties must have a dispute as to the title during the period of possession, but that the claimant’s possession must be adverse to the record owner, “unaccompanied by any recognition, express or inferable from the circumstances of the right in the latter.” . . . “Title by adverse possession may be acquired through [sic] the possession or use commenced under mistake.” ’ ’” (*Kunza v. Gaskell* (1979) 91 Cal.App.3d 201, 210–211 [154 Cal.Rptr. 101].)
- “Adverse possession under [Code of Civil Procedure] section 322 is based on what is commonly referred to as color of title. In order to establish a title under this section it is necessary to show that the claimant or ‘those under whom he claims, entered into possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property . . . for five years . . . .’ ” (*Sorensen v. Costa* (1948) 32 Cal.2d 453, 458 [196 P.2d 900].)
- “The requirements of possession are more stringent where the possessor acts under mere claim of right than when he occupies under color of title. In the former case, the land is deemed to have been possessed and occupied only where it has (a) been protected by a substantial inclosure, or (b) usually cultivated or improved.” (*Brown v. Berman* (1962) 203 Cal.App.2d 327, 329 [21 Cal.Rptr. 401], internal citations omitted; see Code Civ. Proc., § 325.)
- “It is settled too that the burden of proving all of the essential elements of adverse possession rests upon the person relying thereon and it cannot be made out by inference but only by clear and positive proof.” (*Mosk v. Summerland Spiritualist Asso.* (1964) 225 Cal.App.2d 376, 382 [37 Cal.Rptr. 366].)

### ***Secondary Sources***

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 223 et seq.  
10 California Real Estate Law and Practice, Ch. 360, *Adverse Possession*, § 360.20  
(Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 13, *Adverse Possession*, § 13.12  
(Matthew Bender)

1 California Points and Authorities, Ch. 13, *Adverse Possession*, §§ 13.10, 13.20  
(Matthew Bender)

6 Miller & Starr California Real Estate 4th (2015) § 18:1 et seq. (Ch. 18, *Real Property*) (Thomson Reuters)

Smith-Chavez, et al., California Civil Practice, Real Property Litigation § 13:1 et seq. (Thomson Reuters)

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