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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 14, 2012

Title
Jury Instructions: Additions, Revisions, Revocations, and Renumbering of Civil Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair

Agenda Item Type
Action Required

Effective Date
December 14, 2012

Date of Report
October 26, 2012

Contact
Bruce Greenlee, 415-865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of the proposed additions and revisions to, and revocations and renumbering of, the *Judicial Council of California Civil Jury Instructions (CACI)*. These changes will keep *CACI* current with statutory and case authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 14, 2012, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new, revised, revoked, and renumbered instructions will be published in the official 2013 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached at pages 69-190.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council voted to approve the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI.* This is the 21st release of *CACI.*

The council approved *CACI* release 20 at its June 2012 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation and renumbering of, the following 42 instructions and verdict forms: 100,106, 107, 113, 202, 205, 208, 211, 213, 214, 215, 216, 306, 325, 380, 1730, 1821, VF-1804, 2334, 2440, 2441, 2508, 2511, 2560, 2561, VF-2512, 2620, 2720, 2721, 2730, 3001, 3015, 3066, VF-3035, 3205, 4107, 4120, 5002, 5003, 5004, 5014, and 5015. Of these, 31 are revised, 8 are newly drafted, and 3 are proposed to be revoked. Of the revised instructions and verdict forms, 3 (CACI Nos. 3001, 3066, and VF-3035) are also proposed to be renumbered.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 47 additional instructions under a delegation of authority from the council to RUPRO.[2] RUPRO has also approved the renumbering of the Civil Rights series. The new Civil Rights series correlation table showing old and new numbers is attached to this report at pages 66-68.

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant changes recommended to the council.

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave RUPRO the authority to delegate to the Advisory Committee on Civil Jury Instructions the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

New instructions

The committee proposes adding eight new instructions, six of which pertain to employment and labor law. A trial judge requested an instruction on the Uniform Electronic Transactions Act. (Civ. Code, § 1633.1 et seq.) In response, the committee proposes new CACI No. 380, *Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act*.

The same judge also requested an instruction on the "cat's paw" doctrine, an employment law rule that does not absolve a decision maker who was without animus if he or she relied on information provided by a supervisor who did act from animus. The committee proposes new CACI No. 2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*. The causation requirement in this instruction is discussed further below.

Several new cases alerted the committee to statutes for which new instructions would be useful. Two cases involved whistle-blower statutes. *Cordero-Sacks v. Housing Authority of the City of Los Angeles*[3] involved a claim under the whistle-blower protection statute of the False Claims Act.[4] In *Mize-Kurzman v. Marin Community College,*[5] the court specifically noted the lack of a CACI instruction under the whistle-blower protection statute in the Labor Code.[6] The committee proposes new instructions CACI No. 2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements,* and CACI No. 2730, *Whistleblower Protection—Essential Factual Elements,* in response to these cases.

Two other recent cases involved the exemptions to overtime in the various Industrial Welfare Commission wage orders.[7] The committee proposes two new instructions, CACI Nos. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption,* in response to these cases.

In *Haligowski v. Superior Court*,[8] the court considered Military and Veterans Code section 394, which prohibits employment discrimination against members of the military. The committee proposes new CACI No. 2441, *Discrimination Against Member of Military—Essential Factual Elements,* as an instruction under this statute.

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[3] *Cordero-Sacks v. Housing Authority of the City of Los Angeles* (2011) 200 Cal.App.4th 1267.

[4] Gov. Code, § 12653(b).

[5] *Mize-Kurzman v. Marin Community College* (2012) 202 Cal.App.4th 832.

[6] Lab. Code, § 1102.5.

[7] See *Harris v. Superior Court* (2011) 53 Cal.4th 170; *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001.

[8] *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983.

Finally, two new cases addressed the defamation-related cause of action for slander of title.[9] The committee proposes new CACI No. 1730, *Slander of Title—Essential Factual Elements,* in response to these cases.

Revoked instructions

The committee proposes that three instructions be revoked in this release. The committee determined that CACI No. 214, *Admissions by Silence,* is unnecessary and is covered by CACI No. 213, *Adoptive Admissions*.

CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship,* is no longer a correct statement of law because of a 2012 statutory change amending Government Code section 12940(*l*)(1).[10] Undue hardship for the purposes of religious accommodation is now to be determined in the same manner that undue hardship for purposes of disability discrimination is determined. See CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. In its next release cycle, the committee will consider whether CACI No. 2561 should be restored and revised or whether a cross-reference to CACI No. 2545 is sufficient.

Finally, the committee proposes revoking CACI No. 3015, *Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest.* A recent U.S. Ninth Circuit Court of Appeals case[11] clarified that notwithstanding prior Ninth Circuit authority to the contrary on which the instruction had been based,[12] the U.S. Supreme Court has held that the determination of whether there was probable cause to arrest is to be made by the court, not the jury.[13] One commentator disagreed with the committee's analysis on this matter, as discussed below.

Harmonization with CALCRIM: Pretrial, evidence, and concluding instructions

In 2011, RUPRO requested that the CACI and CALCRIM (*Judicial Council of California Criminal Jury Instructions*) advisory committees consider whether those pretrial, evidence, and concluding instructions that need not be different in civil and criminal cases could be harmonized so that CACI and CALCRIM would be the same on these topics. RUPRO received reports from the two committees and elected to drop the harmonization initiative for 2012. The CACI committee, however, chose to go through the process of comparing comparable CACI and CALCRIM instructions to see whether CACI, in some situations, could be improved by incorporating CALCRIM language.

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[9] See *Cyr v. McGovran* (2012) 206 Cal.App.4th 645; *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656.

[10] Stats. 2012, ch. 287 (A.B. 1964).

[11] *Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126.

[12] See *Torres v. City of L.A.* (2008) 540 F.3d 1031; *McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1007–1008.

[13] See *Hunter v. Bryant* (1991) 502 U.S. 224.

This process has resulted in the proposed revisions to the 100 (Pretrial), 200 (Evidence), and 5000 (Concluding) instructions presented in this release. The committee did not endeavor to achieve total harmonization with CALCRIM. Instead, the initiative was simply to look to CALCRIM for possible improvements to CACI.

In addition to the CALCRIM harmonization initiative, the committee received a request from the civil trial judges of the Superior Court of Sacramento County for various revisions to these instructions, including a request to minimize duplicative language. Revisions to these instructions are to some extent also responsive to the Sacramento proposal.

Right against self-incrimination (CACI No. 216)

A commentator objected to the proposed changes to CACI No. 216, to be retitled *Exercise of Right Not to Incriminate Oneself.* The committee proposes reshaping this instruction from one protecting a witness's right "not to testify concerning certain matters" to one limited to the Fifth Amendment right not to incriminate oneself. The revised instruction now labels this as an "absolute constitutional right" that may not "influence [the jury's] decision in any way." In support of this instruction, the committee relies on Evidence Code section 913, which provides (emphasis added):

> (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and *the trier of fact may not draw any inference therefrom as to the credibility of the witness* or as to any matter at issue in the proceeding.
>
> (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, *shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness* or as to any matter at issue in the proceeding.

The commentator argues that Evidence Code section 913 does not apply in a civil proceeding and that a party to a civil case has no privilege against self-incrimination. Instead, he says, case law permits the jury to draw an adverse inference from a party's invocation of the right against self-incrimination.

The commentator cited several California cases that do contain language that at first glance would seem to indicate that the commentator is correct.[14] The commentator believes that the Fifth Amendment privilege is limited to criminal defendants by Evidence Code section 930.[15]

[14] See *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414; *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709.

The committee did not find the commentator's authorities to be persuasive. The committee disagreed with the commentator's view that Evidence Code section 913 does not apply in a civil case. The committee believes that section 913 not only supports, but that section 913(b) compels, this instruction.

Evidence Code section 930 says that the privilege may be invoked in a criminal case. It does not say that it cannot be invoked in a civil case. Further, the Law Revision Commission Comments to Evidence Code section 913 note that "it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege." Also, the fact that there may not be constitutional protection from adverse inferences from a refusal to testify in a civil case would not abrogate section 913. None of the cases that the commentator cited discusses the applicability of section 913.

Right of privacy: Damages for use of name or likeness (CACI Nos. 1821, VF-1804)

In *Orthopedic Systems Inc. v. Schlein,*[16] the court resolved an issue that the original CACI drafters had noted as unresolved. The court held that a plaintiff suing for misappropriation of name or likeness may recover both statutory damages of $750 and any profits earned by the defendant that had not otherwise been taken into account in computing the plaintiff's actual damages. [17] In response, the committee proposes revisions to CACI No. 1821, now titled *Damages for Use of Name or Likeness*, and CACI No. VF-1804, *Privacy—Use of Name or Likeness*.

The intent of the revisions is to better guide the jury through the process of awarding damages when lost profits are at issue. CACI No. 1821 presents a two-step process. First, the jury must determine the plaintiff's actual damages, not considering the disgorgement of any profits that the defendant wrongfully earned. If actual damages less than $750 are found, the jury is to enter $750 as the total actual damages.

The jury is then to consider lost profits that "are not taken into account in computing the actual damages."[18] The Directions for Use now clarify that any actual damages that the plaintiff claims for lost profits must be different from the profits that he or she seeks to disgorge from the defendant. In other words, if the plaintiff would have earned the same profits sought to be disgorged from the defendant, the jury should not include them with actual damages but should compute them separately after actual damages have been determined. CACI No. VF-1804 now contains additional questions to lead the jury through this process.

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[15] "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

[16] *Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547.

[17] See Civ.Code, § 3344(a).

[18] *Ibid.*

Fair Employment and Housing Act—Intent to retaliate (CACI No. 2505)

In a recent case, the court criticized CACI No. 2505, *Retaliation—Essential Factual Elements,* in dicta and urged "the Judicial Council to redraft the retaliation instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA."[19] The committee seriously considered this criticism and suggestion but has declined to revise the instruction. The committee unanimously disagreed with the court in *Joaquin* that CACI No. 2505 currently lacks an element for retaliatory intent. Element 3 requires that the plaintiff's protected activity have been "a motivating reason" for the defendant's adverse employment action. For example, the element might read that the plaintiff's filing of a discrimination complaint was a motivating reason for the defendant's decision to demote him. The element captures the defendant's intent to retaliate against the plaintiff for exercise of protected activity. The committee has explained its position in the Directions for Use to the instruction.

***Adverse Action Made by Decision Maker Without Animus (Cat's Paw)* (CACI No. 2511; new)**

The proposed draft of CACI No. 2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw),* that was posted for public comment provided that the plaintiff must prove that the decision maker would not have taken an adverse employment action against the plaintiff had the supervisor not "[*specify acts on which decision-maker relied*]." A commentator objected that this created a "but for" test for causation, when the proper test should be "motivating reason" as defined in CACI No. 2507, *"Motivating Reason" Explained*.[20] The committee agreed with the commentator's position and has revised the causation element.

The original language was taken from *Reeves v. Safeway Stores, Inc.*,[21] in which the court said:

> "[P]laintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation."[22]

But as the commentator pointed out, *Reeves* relied on *Clark v. Claremont Univ. Ctr.*[23] *Clark* is one of the cases cited in support of CACI No. 2507. Under *Clark* and other cases, as long as the

[19] *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231.

[20] CACI No. 2507 defines "motivating reason" as follows: "A 'motivating reason' is a reason that contributed to the decision to take certain action, even though other reasons also may have contributed to the decision."

[21] *Reeves v. Safeway Stores, Inc,* (2004) 121 Cal.App.4th 95, 100.

[22] *Id.* at p. 108.

[23] *Clark v. Claremont Univ. Ctr.* (1992) 6 Cal.App.4th 639.

prohibited motive played any role in the decision, there is liability. *Clark* simply required that the discriminatory animus of one part of the decision-making process must have "influenced the decision-making process and thus allowed discrimination to infect the ultimate decision." It did not impose a heightened "but for" causation standard on these multi-actor decision-making fact patterns.

Although the term *cat's paw* is not used in *Clark,* the issue is present. There were various stages of tenure review. The court said (emphasis added):

> "In proving causation, a plaintiff who was denied tenure 'need not prove intentional discrimination at every stage of the review process. It is true that University guidelines and witness testimony support [Claremont's] claim that each successive evaluator performed a de novo review of [Clark's] candidacy. Nevertheless, it is also uncontroverted that at each stage of the process the evaluator had available and considered the reports and recommendations of each previous evaluator. … *Hence it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.*' "[24]

Therefore, the committee believes that *Clark* states the correct rule of causation in a cat's paw case.[25]

Probable cause to arrest under Title 42 United States Code section 1983 (CACI No. 3015; revoked)

As noted above, the committee proposes revoking CACI No. 3015 because the question of whether on undisputed facts officers had probable cause to arrest is to be resolved by the court, not by the jury. One commentator disagreed with this proposal to revoke the instruction.

According to the commentator, the authorities closest on point do not justify the elimination of this instruction. He argues that absence of probable cause is an essential element of the cause of action (see CACI No. 3021, renumbered from CACI No. 3014,*Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*) and is necessary to establish a Fourth Amendment violation. Qualified immunity, in contrast, is an affirmative defense. The probable cause inquiry differs from the qualified immunity inquiry.

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[24] *Clark, supra,* 6 Cal.App.4th at pp. 665–666.

[25] The committee notes that a recent case that is still not final upheld CACI No. 2507 and its causation standard. See *Alamo v. Practice Management Information Corp.* (2012) 210 Cal.App.4th 95, 105−109. The court in *Alamo* noted that "elsewhere in the *Reeves* opinion, the court suggested that an employer may be liable for retaliation under FEHA if the employee presents 'sufficient proof to establish that retaliatory animus on the part of one or more contributors to the decision was *a substantial contributing factor* in bringing about his dismissal.' " *Id.* at p. 108, quoting *Reeves, supra,* 121 Cal.App.4th at p. 113, original italics. This issue may ultimately be decided by the California Supreme Court. See *Harris v. City of Santa Monica* (S181004), review granted April 22, 2010.

According to the commentator, the cases that the committee cites in support of revoking the instruction[26] do not implicitly overrule *McKenzie v. Lamb,*[27] on which this instruction is predicated, because of the difference between probable cause as an element and qualified immunity as a defense. The Ninth Circuit authorities involving the existence of qualified immunity are distinguishable from the prior Ninth Circuit cases involving the existence of probable cause where qualified immunity is not at issue. Absent some authority that the prior Ninth Circuit opinions have been overruled, the commentator believes that probable cause is an issue of fact for the jury to decide if the court has not decided as a matter of law that qualified immunity applies.

The committee agrees that neither *Hunter* nor *Conner* expressly disapproves or overrules *McKenzie*. And the committee also agrees that for some purposes, there is a distinction between qualified immunity cases and those that are decided on whether there was a constitutional violation without reaching the qualified immunity step. But the committee does not believe that the distinction is relevant with regard to probable cause to arrest.

In *Hunter* and *Conner*, the issue was immunity, but if the officers had probable cause, then they were immune. The court makes the probable-cause determination as a matter of law. Immunity is the conclusion based on the court's finding probable cause. The only role for the jury is to resolve disputed facts over what information the officers had at the time of arrest. So the fact that *Hunter* and *Conner* are resolved on immunity grounds and *McKenzie* is not is irrelevant to the roles of court and jury.

Bane Act (CACI No. 3066)

A recent case, *Shoyoye v. County of Los Angeles,*[28] brought the committee's attention to its instruction on the Bane Act,[29] CACI No. 3066, *Bane Act—Essential Factual Elements* (renumbered from CACI No. 3025). The Bane Act prohibits interference by threats, intimidation, or coercion with the exercise of one's constitutional or other legal rights.[30]

The committee considered at some length a question unresolved in *Shoyoye*, whether a plaintiff must allege violence or threats of violence in order to maintain an action under the Bane Act.[31] While it may be argued that the Act should reach intimidation or coercion involving threatened acts short of violence,[32] the Act contains a provision that speech alone is not sufficient to

[26] *Hunter v. Bryant* (1991) 502 U.S. 224; *Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126.

[27] *McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1008.

[28] *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947.

[29] Civ. Code, § 52.1.

[30] *Id.*, § 52.1(a).

[31] *Shoyoye, supra*, 203 Cal.App.4th at p. 959.

[32] For example, a threat to call immigration if a person exercises a right under the Labor Code.

constitute a violation unless it involves a credible threat of violence.[33] Ultimately, the committee elected to present the question as unresolved in the Directions for Use. The committee did, however, make a number of changes to the instruction to bring its language more in line with the statute.

Song-Beverly Consumer Warranty Act: Action for unreasonable delay (CACI No. 3205)

The Song-Beverly Consumer Warranty Act (lemon law) provides a right of action against a product manufacturer or dealer if repairs under warranty are not commenced within a reasonable time and completed within 30 days.[34] In December 2011, the Judicial Council approved a new instruction on this right, CACI No. 3205, *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements*.

Song-Beverly provides a specific scheme for remedies when repairs are unsuccessful after a reasonable number of repair opportunities.[35] These remedies involve the manufacturer's or dealer's obligation to repurchase or replace the product after reasonable repair efforts have failed. An attorney who represents defendants in Song-Beverly cases requested clarification in the Directions for Use that the remedies of repurchase and reimbursement are not available for unreasonable delay. He reported that courts have entertained claims for these remedies under claims for unreasonable delay. The committee agreed and posted a proposed revision for public comment. The revision clarified that the instruction assumed that the repairs were ultimately successful, and that damages were limited to those caused by the delay.

The committee received 18 comments from the Song-Beverly plaintiffs' bar objecting to this proposed revision.[36] The objectors pointed out that there was no statutory basis for the committee's conclusions about successful repairs and limited remedies.

While the objectors concurred that the remedies of repurchase or replacement under section 1793.2(d) are not available under the unreasonable-delay cause of action, they claimed that the consumer is entitled to recover restitution of the purchase price of the product if he or she revokes acceptance. They reached this conclusion through Civil Code section 1794. Section 1794(b)(1) permits a buyer to reject or revoke acceptance and then recover damages under section 2711 of Commercial Code. This later section in turn allows recovery of "so much of the price as has been paid."[37]

The committee agreed that no statutory or case law supported its view that the unreasonable-delay cause of action assumes that repairs have been successful, and that damages are limited to

[33] Civ. Code, § 52.1(j).

[34] *Id.*, § 1793.2(b).

[35] *Id.*, § 1793.2(d).

[36] One attorney sent in a lengthy comment; the others mostly simply endorsed or reproduced that attorney's letter.

[37] Cal. U. Comm. Code, § 2711(1).

those caused by the delay. It has removed these statements from its proposed final revision. The committee, however, continues to believe that that is how the statute would be construed if presented to an appellate court.

Song-Beverly includes a very specific process and remedies for unsuccessful repairs after a reasonable number of repair opportunities. Therefore, it seems far more likely that the unreasonable-delay cause of action is limited to delayed repairs that were ultimately successful.

Further, the committee doubts that the Commercial Code remedies are available for unreasonable delay. Commercial Code section 2711 applies "[w]here the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance." The committee doubts that this language encompasses the situation in which the dealer calls the consumer and says, "Your car is finally ready. All fixed. Sorry it took so long." The committee doubts that the buyer is then entitled so say, "No, you keep the car; just give me my money back."

The committee has elected in the Directions for Use to treat the remedies for unreasonable delay as "uncertain." It also states that the proposition that Commercial Code remedies are available is "questionable."

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 23 to August 31, 2012. Comments were received from 31 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 13–65.

Of the comments received, 18 addressed the proposed changes to CACI No. 3205, *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements*, which is a cause of action under the Song Beverly Consumer Warranty Act, discussed above. Other comments involving complex legal arguments are also addressed above.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. The proposed new, revised, revoked, and renumbered instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments, at pages 13-65
2. Correlation Table to renumbered civil rights instructions, at pp. 66-68
3. Full text of new and revised *CACI* instructions, at pages 69–190

CACI 12-02
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Advisory Committee Response
100. *Preliminary Admonitions*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The proposed revisions essentially reorder existing material within the instruction; however, the admonitions that the evidence being only that which is received while the court is in session have been moved to CACI 106, where repetition has been deleted. The "you must decide this case based . . . on the law that I give you" language has been deleted but still appears in firmer form in CACI 5000. The change is reasonable and helpful. It does not change the substance of the instruction. It does not appear controversial.	No response is necessary.
	Hon. Alan G. Perkins, Judge, Sacramento County Superior Court	I think the third paragraph of the existing instruction is poorly written. It is redundant in its multiple descriptions of various prohibited types of internet and electronic devices. Many of the described items work through the Internet and it makes it appear that the judge reading the instruction does not really understand all these things. I think we can do better by being more simple and concise. Suggested revision: This prohibition is not limited to face-to-face conversations. It also extends to all forms of communication including electronic communications. Do not use anything ~~any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries,~~ to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty. In summary, do not express any thought you have about this case to anyone.	The committee regularly receives proposals for even more specificity with regard to juror electronic communications and research. The committee prefers retaining its current approach of mentioning a broad range of methods of electronic communication without mentioning specific products or applications.
	State Bar Litigation	The committee agrees with the proposal with the following suggested revisions:	The committee does not see any benefit to adding "in the courtroom."

CACI 12-02
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Advisory Committee Response
	Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	It would be helpful to emphasize that the jury must consider only the evidence presented at trial. To this end, we suggest that the last sentence in the seventh paragraph of the instruction be set out in a new paragraph and that the words "in the courtroom" be added as follows: "It is important that all jurors see and hear the same evidence <u>in the courtroom</u> at the same time."	"Evidence" is not presented anywhere else.
		For the same reason, the committee suggests retaining, rather than deleting, the second sentence in the penultimate paragraph, stating, "And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom."	This deletion was made in response to a request from the civil judges of the Sacramento superior court for less repetition. The committee agreed that needless repetition should be eliminated, and therefore does not agree with the comment.
106 and 5002, *Evidence*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	Regarding "**You must decide what the facts are in this case <u>only</u> from the evidence you see or hear during the trial.":** Addition of the word "only" may inadvertently convey to jurors that they cannot use common sense, life experiences, etc. as part of deliberations.	The committee sees little likelihood that the inclusion of the word "only" will defer jurors from using common sense.
	California Judges Association, by Jordan Posamentier, Legislative Counsel	The change is to essentially reorder the first paragraph. Deciding what the facts are only from the evidence in the trial has the new emphasis. The change is reasonable and helpful. It does not change the substance of the instruction. It does not appear controversial.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by	The committee suggests combining the first two sentences of the first paragraph as follows for greater clarity and to make it clear that although anything may be admitted in evidence, the jury should consider only those matters that are actually admitted in evidence:	The committee prefers two sentences to splicing them together with a comma.

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	Commentator	Summary of Comment	Advisory Committee Response
	Reuben A. Ginsberg, Chair	"You must decide what the facts are in this case only from the evidence you see or hear during the trial, which is [s]worn testimony, documents, ~~or~~ and anything else that I admitted into evidence. ~~Sworn testimony, documents, or and anything else may be admitted into evidence.~~"	
107 and 5003. *Witnesses*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	While CELA agrees that it makes sense to include the witness bias language within CACI 113 (*Bias*), it should remain in CACI 107 and 5003 (*Witnesses*). As a practical matter, it is common that courts will instruct with certain of the 100 series instructions at the outset of the case but refuse to repeat those instructions when the concluding instructions are given before or after closing argument. Removing this language from 5003 will often mean that the jury is not reminded of the importance of deciding the case without regard to bias as it begins its deliberations. For a concept as important as bias-free decision-making, it is critical that the jurors be given this instruction as their deliberations are about to begin. As such, CELA submits it makes more sense to leave the language within CACI 107 and 5003 (whether or not it is also included in CACI 113).	The committee agreed with the comment with regard to CACI No. 5003, the concluding instruction, and has restored this language on bias. The committee does not think that it needs to be restored to CACI No. 107 as both 107 and CACI No. 113 are pretrial instructions.
113. *Bias*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The change is to add "you must not be biased," language formerly in CACI 107. The change is reasonable and helpful. It does not change the substance of the instruction. It does not appear controversial.	No response is necessary.
202. *Direct and Indirect Evidence*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The revisions make the instruction easier to read and understand without making substantive changes.	No response is necessary.
	William B.	I like the new proposed CACI 202. It gives a good example	No response is necessary.

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	Smith, Abramson Smith Waldsmith, San Francisco	re the jet plane. There are many analogies, but that one works just fine.	
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that the term "circumstantial evidence" is more familiar to lay jurors than "indirect evidence," and we believe that the instruction should define "circumstantial evidence" rather than define "indirect evidence" and then state that "indirect evidence" is also known as "circumstantial evidence."	The committee believes that the term "indirect" evidence is more understandable to lay jurors than "circumstantial" evidence.
		We also suggest that this cherry pie example would be better understood and more engaging than the jet plane example in the proposal. "For example, if a witness testifies he saw Johnny eating a cherry pie, that testimony is direct evidence that Johnny ate a cherry pie. … For example, if a witness testifies that she saw an empty pie plate and saw cherry pie filling on Johnny's face, that testimony is circumstantial evidence that Johnny ate a cherry pie."	The committee agreed with commentator William B. Smith, above. There are many examples, and the one about the jet plane works just fine.
		We believe that first sentence of the third paragraph ("As far as the law is concerned, it makes no difference whether evidence is direct or indirect.") is potentially misleading and that the second sentence of that paragraph ("You may choose to believe or disbelieve either kind.") specifies the point to be made.	The committee does not find the first sentence misleading.
		We also suggest showing gender balance by referring first to "he" and later to "she."	The committee agreed with the comment and has made the change.
205. *Failure to Explain or Deny Evidence*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The revisions make the instruction more neutral. The instruction currently says that failure to explain or deny may suggest that evidence is true. This might inadvertently nudge jurors to accept the truth of the evidence presented. The revisions would leave it up to jurors to decide the meaning and importance of a failure to explain or deny.	The committee understands the comment as approving of the revisions to the instruction. As such, no further response is necessary.
	California	The proposed changes undermine the evidentiary principle	The committee believes that the

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	Commentator	Summary of Comment	Advisory Committee Response
	Employment Lawyers Association, by David M. deRobertis and Ellen Lake	that they purport to instruct on- i.e., that a failure to explain adverse evidence may suggest that the evidence is unfavorable to the party who failed to explain it. CACI 205 is supposed to instruct on the principle codified in Evidence Code section 413, which permits the drawing of inferences against a party from the party's failure to explain or deny evidence. (*People v. Saddler* (1979) 24 Cal.3d 671, 678.) The current language properly captured the essence of Evidence Code section 413 by informing the jury that the failure to explain or deny unfavorable evidence may suggest that the evidence is true. This language did not direct the jury that it must reach that conclusion; it simply informed the jury that it 'may" reach that conclusion. Thus, it captured the rule of section 413 without coercing the jury to draw the inference.	commentator has mischaracterized Evidence Code section 413. The section does not say that a failure to explain or deny might suggest that the evidence is true. It says that the jury "may consider" that failure. *People v. Saddler* says that Evidence Code 413 "permits the drawing of inferences against a party from the party's failure to explain or deny evidence." The committee believes that the statutory language "may consider" is the same as "permits the drawing of inferences" as expressed in *People v. Saddler*.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that "could reasonably be expected to have done so" is cumbersome and potentially unclear, and that language similar to the language used in the proposed revisions to CACI No. 213, item 3 ("would . . . naturally") is preferable.	The committee does not believe that this language is cumbersome or unclear.
		We also believe that there is ample authority for the proposition that the failure to explain unfavorable evidence supports an inference that the evidence is true (e.g., *Lumpkin v. Friedman* (1982) 131 Cal.App.3d 450, 456; *Westinghouse Credit Corporation v. Wolfer* (1970) 10 Cal.App.3d 63, 70; *Breland v. Traylor Engineering & Mfg. Co.* (1942) 52 Cal.App.2d 415, 426) and believe that the jury should be so instructed.	The committee does not agree with the comment. None of the three cases cited really support it. *Lumpkin* and *Breland* are about a failure to produce evidence, not the failure to explain or deny evidence. *Westinghouse* has nothing to do with evidence. The committee believes that the instruction should follow the language of Evidence Code section 413.
		We suggest adding to the Sources and Authority citations to cases supporting the inference described above, such as the cases cited above.	The cases cited above do not support the inference.

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	Commentator	Summary of Comment	Advisory Committee Response
		The citation to 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, should be to section 115 rather than section 116.	The commentator is correct and this error has been corrected.
208. *Deposition as Substantive Evidence*	California Judges Association, by Jordan Posamentier, Legislative Counsel	These revisions only slightly modify the instruction so as to accommodate different presentations of deposition, such as a video recording.	The committee understands the comment as approving of the revisions to the instruction. As such, no further response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal but suggests that the name of the deponent be added to the instruction to assist the jury in relating the instruction to the evidence presented at trial.	The committee agreed and has made this change
		We believe that the citation to 3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, should be to sections 153-162 rather than sections 153-163.	The commentator is correct and this error has been corrected.
211. *Prior Conviction of a Felony*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The revisions simply add brackets to make it easy to remove language if a felony conviction is used for another purpose.	The committee understands the comment as approving of the revisions to the instruction. As such, no further response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal but suggests that the Directions for Use should also state that the instruction should be modified to describe another purpose for which the evidence was admitted if the evidence was admitted for a purpose other than to attack the witness's credibility.	The committee essentially agreed with the comment, but has added an optional sentence "[You also may consider the evidence for the purpose of [*specify*].]" to the text of the instruction rather than the suggested addition to the Directions for Use.
213. *Adoptive Admissions*	California Judges Association, by Jordan Posamentier, Legislative	The revisions substantially change the instruction so as to lay out clearly the elements in a way that makes them easier to follow and understand. It also appears to be a more accurate statement of the law.	No response is necessary.

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	Commentator	Summary of Comment	Advisory Committee Response
	Counsel		
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The instruction seems to be limited to oral statements; it should encompass written statements as well by revising the second element as follows: 2. [*Name of party against whom the statement was offered*] [heard/<u>read</u>] the statement;"	The proposed revision would not fit with element 1, which requires that the statement have been made in the party's presence.
		We believe that the first paragraph of the Directions for Use does not accurately state the appropriate rule of law, which is that the instruction should be given if the court finds that there is substantial evidence to support each required condition, which is always the rule and need not be stated in the Directions for Use. Moreover, a jury question would arise not only if the evidence is conflicting evidence, but also is the evidence could give rise to conflicting inferences. We believe that this paragraph serves no useful purpose and would delete it.	The committee agreed with the comment and has deleted the paragraph.
215. Exercise of a Communication Privilege	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	Given the addition of the "absolute" qualifier to the right not to disclose privileged materials, the "Directions for Use" should clarify that the "absolute" right only applies if, indeed, the privilege attaches and has not been waived. The categorical statement that a party "has an absolute right not to disclose" privileged information "is not an entirely accurate statement of law. There are many circumstances in which privilege attaches in the first instance, but is waived (expressly or impliedly). Given this fact, the "Directions for Use" should include language making clear that the absolute right not to disclose only applies if the court determines that the matter is privileged and no waiver has occurred.	The committee agreed with the comment and has made the change.
	California Judges Association, by Jordan Posamentier,	These revisions specifically identifies a witness or party who exercises privilege, and is rearranged to make the instruction more understandable.	No response is necessary.

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	Legislative Counsel		
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that use of the word "absolute"("[*Name of party/witness*] has an absolute right not to disclose…") is potentially misleading and that this qualifier serves no useful purpose in this instruction. Accordingly, we would delete the word "absolute."	The committee believes that "absolute" is helpful to the jury and is preferable plain language to the current "legal right."
216. *Exercise of Right Not to Incriminate Oneself*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The proposed instruction misstates the law in the context of a civil case. A party to a civil case has no "privilege" against self-incrimination. Instead, case law permits the jury to draw an adverse inference from a party's invocation of the right against self-incrimination. The United States Supreme Court has repeatedly held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when he or she refuses to testify in response to probative evidence offered against him or her. (*Baxter v. Palmigiano* (1976) 425 U.S. 308, 318; see also *Mitchell v. US.* (1999) 526 U.S. 314, 327–328 [recognizing rule that civil litigant may invoke privilege against self-incrimination, "though at the risk of suffering an adverse inference or even a default" from doing so"]. California courts have recognized these same principles. (See, e.g., *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 425 ["The self-incrimination privilege is not applicable to matters that will subject a witness to civil liability .... Whereas the Fifth Amendment privilege may be invoked by a civil litigant, it does not provide for protection against civil penalties."]; *Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 885–886 ["[I]t is even permissible for the trier of fact to draw adverse inference	The committee disagreed with the commentator's view that Evidence Code section 913 does not apply in a civil case. This response is developed further in the committee's report to the Judicial Council.

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		from the invocation of the Fifth Amendment in a civil proceeding."]; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 ["[W]hile the privilege of a criminal defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it."]. In fact, a specific California statute confirms that the right against self-incrimination is limited to criminal cases: "To the extent that such privilege exists under the Constitution of the United States or the State of California, *a defendant in a criminal case* has a privilege not to be called as a witness and not to testify." (Evid. Code §930 (italics added). Nor does Evidence Code section 913's rule barring comment on the exercise of a "privilege" justify this instruction. This statute presumes that the underlying privilege applies in the proceeding at hand. However, because there is no right to invoke the Fifth Amendment in a civil case without consequence under Evidence Code section 930, the federal constitution, and California decisional authority, section 913 does not apply in this context.	
	California Judges Association, by Jordan Posamentier, Legislative Counsel	The revision changes the instruction's title and is more accurate and direct than the previous version of the instruction regarding the nature of the constitutional right.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that use of the word "absolute" ("[*Name of party/witness*] has an absolute constitutional right not to give testimony that might tend to incriminate [himself/herself]") is potentially misleading and that this qualifier serves no useful purpose in this instruction. Accordingly, we would delete the word "absolute."	The committee believes that because Evidence Code section 913 applies, "absolute" is entirely appropriate.
		We believe that the first sentence of the second paragraph of	As the paragraph goes on to explain, the

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	Commentator	Summary of Comment	Advisory Committee Response
		the Directions for Use ("Therefore, the issue of a witness' invocation of the Fifth Amendment right not to self-incriminate is raised outside the presence of the jury, and the jury is not informed of the matter. ") seems to contradict the premise of this instruction, which is that right against self-incrimination may be invoked at trial. We therefore would delete this sentence.	privilege invocation might happen anyway by surprise, in which case Evidence Code section 913(b) requires this instruction.
306. *Unformalized Agreement*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Revisions cogently clarify existing language. They appear to be well thought out.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions, which are generally consistent with the suggestions in our prior comment letter.	No response is necessary.
325. *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Revisions add language clearly consistent with existing law, and it is a brief and clear modification.	No response is necessary.
	Orange County Bar Association, by Dimetria A. Jackson, President	The proposed modification of the instruction is agreed to; it is noted that the "Directions for Use" comments actually bring the comments into better conformance with California law by eliminating the prior comment that CACI 325 could "only" be given if a separate cause of action for breach of the covenant of good faith and fair dealing had been plead.	No response is necessary.
	State Bar Litigation	The committee would revise the Directions for Use as follows to make it clear that this instruction should be given	The committee agreed and has made this change.

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	Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	in addition to CACI No. 303 (i.e., two separate instructions given), rather than combined with that instruction (i.e., one combined instruction given), in an appropriate case: "This instruction should be given only if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be ~~combined with~~ given in addition to CACI No. 303, Breach of Contract—Essential Factual Elements, if breach of contract on other grounds is also alleged. For discussion of element 3, see the Directions for Use to CACI No. 303."	
380. *Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Revisions comprise a new instruction regarding contracts entered into "electronically" per a new section of the Civil Code. The terms "electronically" signed and "electronic signature" are vague, and the definition provided in the Sources and Authority does not resolve the ambiguity. Currently, there are computer programs designed to add an "electronic signature" to a document. Do the drafters intend that level of rigor to be required, or would something else suffice? Without clarification, this language could cause trouble in case filings.	In response to this comment and others, the committee has removed all references to "electronic signature" from the instruction itself and has added discussion to the Directions for Use, with a suggestion of modifying the instruction if electronic signature is at issue.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal with the following suggested revisions: We suggest the following revisions to the instruction for greater clarity, so as not to limit its use to two-party contracts, and to avoid any implication that an electronic signature is necessary to the formation of a contract by electronic means: "…If ~~both~~ the parties agree, they can form a binding contract ~~may be formed~~ using an electronic records ~~and signatures~~."	The committee has changed "both" to "the" and also framed the sentence in the active voice. As noted above, references to "electronic signature" have been removed and addressed in the Directions for Use.
		We suggest the following revision to the first sentence of the	The committee agreed with the comment

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	Commentator	Summary of Comment	Advisory Committee Response
		second paragraph of the Directions for Use to more accurately describe the instruction itself. "The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract."	and has added "[some of]" as optional additional language for use if not all of the terms are via electronic records.
		The first sentence of the third paragraph of the Directions for Use seems to suggest that whether the parties agreed to form a contract using electronic records and whether they agree to use electronic signatures are one and the same issue. But we believe that these are two distinct issues. Moreover, we believe that this sentence serves no useful purpose, so we would delete it.	As noted above, the committee has removed all references to electronic signatures from the text of the instruction.
1730. . *Slander of Title—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	CJA supports the revisions to 1730. It is a new instruction setting forth prima facie elements of slander of title for real or personal property. The instruction elements are consistent with the law in this area.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that the language "good and clear title" in elements 3 and 4 may be unfamiliar to many jurors and may create uncertainty. "Clear title" in particular may suggest that the property is free of liens, which the authorities cited in the Sources and Authority do not seem to require. Accordingly, we suggest modifying elements 3 and 4 to replace "good and clear title to" with "own."	The committee agreed with the comment and has revised elements 3 and 4 to remove reference to "good and clear" title.
		The word "would" in element 5 seems to suggest a degree of certainty as to the foreseeability of harm that does not seem to be required according to the cases cited in the Sources and Authority. We suggest substituting other language connoting a lower threshold such as "could" or "was likely to."	The committee agreed with the comment and has changed "would" to "might."
		Element 5 refers to "a third person," while element 6 refers to "a third party." We believe that these terms should be the same for greater clarity. We also believe that these terms are	The committee agreed on both points and has changed the instruction to refer to "someone else."

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	Commentator	Summary of Comment	Advisory Committee Response
		somewhat legalistic and that "another person" may be better understood by lay jurors.	
		The second paragraph of the Directions for Use includes the sentence, "The defendant has the burden of proving privilege as an affirmative defense." This seems inconsistent with requiring the plaintiff to prove implied malice in element 4 in order to overcome the privilege. We suggest revising the Directions for Use to correct this apparent inconsistency.	The commentator is looking at an earlier draft of the instruction, not the draft that was posted for comment. Element 4 requiring the plaintiff to prove malice was removed in the final draft. Nevertheless, there is no inconsistency, though the point is complex. The defendant must raise facts bringing the privilege into play. Once it is in play, the plaintiff must prove malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203.)
		There is an apparent discrepancy between the elements stated in the first two bullet points in the Sources and Authority, which do not include actual malice (neither does the instruction), and the third bullet point, which requires actual malice. We suggest revising the Directions for Use or the Sources and Authority in some manner to explain this apparent inconsistency.	The committee agreed that there is an inconsistency, but it cannot be harmonized because courts have not always framed the privilege and malice requirements fully and correctly. The committee believes that the discussion in the Directions for Use explains the apparent inconsistency. The Sources and Authority are a research aid. Case excerpts are selected based on whether one researching the subject of the instruction would want to know about the case and the language. Selection does not connote that the committee agrees with all statements of law contained in all excerpts.
1821, VF-1804. *Damages for Use of Name or Likeness*	California Judges Association, by Jordan Posamentier, Legislative	CJA supports the revisions to the instruction and verdict form. The revisions are mostly in the Directions for Use and explain that computation of damages from the defendant's wrongful profits should be made separately from the plaintiff's actual damages. The verdict form matches the	No response is necessary.

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	Commentator	Summary of Comment	Advisory Committee Response
	Counsel	revised Directions for Use to have the jury calculate profits, if any, that the defendant received that were not included under actual damages, i.e., past and future economic loss. These revisions are consistent with the law and the clarification of damages in this area.	
1821. *Damages for Use of Name or Likeness*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposal eliminates the reference to a $750 minimum damages award from the instruction and adds language to the Directions for Use on modifying the instruction to provide for such an award. The committee believes that this language in the Directions for Use should make it clear that the jury should be instructed to award $750 in damages only if it finds that the plaintiff has proved his or her claim: "If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 <u>if the plaintiff has proved his or her claim</u>."	The committee has revised the instruction to advise that "the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 <u>if it finds liability</u>."
		We believe that the items of damages identified in this instruction should correspond more closely with those listed on the verdict form. The instruction lists some items of damages ("Humiliation, embarrassment, and mental distress" and harm to reputation) and refers to "other item(s) of claimed harm." Meanwhile, the verdict form (VF-1804) identifies certain items of past and future economic loss—"lost earnings," "lost profits," "medical expenses," "other past economic loss," and "other future economic loss"—and items of past and future noneconomic loss—"humiliation/embarrassment/mental distress/physical pain." We suggest adding "physical pain" to the items of damages listed in the instruction and would also add "(e.g., lost earnings, lost profits, medical expenses") after "other item(s) of claimed harm."	The committee agreed that the instruction and verdict form should match as much as possible. However, it does not believe that "physical pain" is a likely item of damages in a misuse-of-name case. Instead, it has modified both the instruction and the verdict form to refer to "mental distress including any physical symptoms." Similarly, the committee believes that lost earnings and medical expenses would be unlikely in such a case. Further, the plaintiff would only have recoverable lost profits in a rare case in which the plaintiff's lost profits are different from the profits that the

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	Commentator	Summary of Comment	Advisory Committee Response
			defendant wrongfully earned and that can be disgorged. If the plaintiff's lost profits are the same as the defendant's wrongful profits, the computation should not be done under actual damages.
		The committee suggests adding to the Directions for Use for this instruction a cross-reference to the damages instructions (CACI Nos. 3900 et seq.) because those instructions elaborate on some of the items of damages in this instruction. In particular, lost earnings and lost profits are defined in CACI Nos. 3903C (lost earnings) and 3903N (lost profits), which we believe should be given with this instruction when those items of damages are sought.	The committee does not believe that CACI No. 3903N should be given. The second part of the instruction substitutes for 3903N. The instruction does not mention lost earnings so there would be no need to give 3903C either.
		The last sentence of the second paragraph of the Directions for Use explains when to use the bracketed language "that have not already been taken into account in computing the above damages" in the paragraph of the instruction beginning "In addition," but in doing so mistakenly refers to this as "the last full paragraph" of the instruction. We would describe this instead as the paragraph introducing the second part of the instruction.	The language referenced in the comment is not in the instruction. The sentence refers to "the paragraph that introduces the second part of the instruction."
		This sentence also states that the bracketed language should be given if the plaintiff's lost profits are included in the damages award, but at the time the instruction is given no one will know whether lost profits will be included in the damages to be awarded by the jury. What will be known is whether the plaintiff is seeking lost profits. We believe that the bracketed language should be given whenever the plaintiff seeks lost profits and that the reason is to avoid duplicative damages. Accordingly, we suggest modifying the last sentence of the second paragraph of the Directions for Use as follows: "Give the bracketed phrase in the paragraph introducing the	The committee agreed in substance with the comment, but did not adopt the commentator's proposed revision. The fact that the plaintiff is seeking lost profits doesn't resolve the issue as to how to compute them if they are the same as the defendant's wrongful profits. The committee did, however, revise this paragraph to hopefully clarify the issue.

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	Commentator	Summary of Comment	Advisory Committee Response
		second part of the instruction only if the plaintiff is seeking lost profits under the first part of the instruction, to avoid duplicative damages."	
		We believe that VF-1804 should be used whenever this instruction is given, particularly if there is a potential for a $750 minimum damages award. We suggest so stating in the Directions for Use.	The committee believes that a cross reference is sufficient to alert users to the parallel verdict form.
VF-1804. *Privacy—Use of Name or Likeness*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that the new question 5 is unnecessary and should be deleted. Question 4 asks if the defendant's conduct was a substantial factor in causing the plaintiff harm and therefore encompasses the fact of harm. If the jury finds that no compensation is due for that harm, it will answer "0" in question 6 as to each item of damages.	The committee believes that question 5 makes the form clearer. The purpose of question 5 is to allow the jury to skip question 6 if the only claim is for disgorged profits plus $750.
		The term "actual damages" is not used in the instruction (CACI No. 1821), which repeatedly refers to "damages." We believe that the language in the verdict form should correspond closely with that in the instruction to avoid confusion and therefore would delete the modifier "actual" in both question 5 (if question 5 is not deleted) and question 6. Also, the verb tense used in question 5 does not seem to encompass future damages, but it should because future damages may be included under question 6. Accordingly, we suggest modifying question 5 (if it is not deleted) and question 6 as follows and deleting the word "ACTUAL" from the total line at the end of question 6: "5. ~~Did~~ Has [*name of plaintiff*] suffered any damages or is [he/she/it] reasonably certain to suffer any ~~actual~~ future damages? "6. What are [*name of plaintiff*]'s ~~actual~~ damages?"	The committee believes that the use of *actual* damages distinguishes the disgorging of the defendant's wrongful profits under question 7from the standard damages that can be recovered under question 6, including the plaintiff's lost profits.
		We suggest modifying question 7 for greater clarity and to avoid use of the term "actual damages":	The committee believes that the use of actual damages and the reference to

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	Commentator	Summary of Comment	Advisory Committee Response
		"7. Did [*name of defendant*] receive any profits from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] that you did not include ~~under~~ in ~~[*name of plaintiff*]'s actual damages~~ any award of lost profits to plaintiff ~~in Question 6~~ above?"	Question 6 makes Question 7 clearer.
		The Directions for Use explain how to provide for an award of $750 if no actual damages are sought or if the jury awards less than that amount, but we believe that the jury should be informed in the verdict form itself that the plaintiff is entitled to at least $750 in damages if liability is established. That knowledge may save the jury time in its deliberation on damages and may help to avoid any artificial inflation of an award of the defendant's profits. We suggest revising the verdict form to provide for the jury, rather than the court, to award the greater of actual damages or $750.	The committee sees the point, but does not think it warrants making the verdict form even more complex. It doubts that $750 is enough to deter artificial inflation. However, the Directions for Use have been expanded to suggest that the jury be told to enter $750 for Total Actual Damages in question 6.
		We suggest that the Advisory Committee consider modifying this and other verdict forms to state the "stop here" option before the "answer question __" option. We believe that this would be more easily comprehendible to the jurors. We also suggest referring to "this question" rather than referring to the present question by number so as to reduce the clutter of numbers. For example: "If your answer to this question is no, then stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered yes to this question, then answer question 2."	This would require modifying every question in every verdict form in CACI. This "stop here/answer" order was established as the format of the publication and cannot now be changed.
2334. *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy*	California Judges Association, by Jordan Posamentier, Legislative Counsel	CJA supports these revisions. The change "he/she/it" language in the first element where it was superfluous in the existing instruction. It reads more clearly now.	No response is necessary.

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Limits— Essential Factual Elements	Orange County Bar Association, by Dimetria A. Jackson, President	Text is fine as written. Sources and Authority section may consider adding reference to a Recent Ninth Circuit decision applying California law (*Yan Fang Du vs. Allstate Ins. Co.* (2012) 681 F.3d 1118) that held that the insurer has duty to attempt settlement even in the absence of a settlement demand.	The committee considered including an excerpt from *Du*, but rejected it; preferring to await California authority. Further, a subsequent opinion in *Du* supersedes the cited one.
2440. *False Claims Act: Whistleblower Protection— Essential Factual Elements*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The proposed instruction omits one of the types of protected activity that can support a false claims act retaliation case; disclosing information to a government or law enforcement agency. (See Gov. Code, §12653(b).)	The committee agreed with the comment and revised the instruction to address disclosure of information.
		The proposed instruction should incorporate "adverse action" short of discharge in the instruction itself to maintain consistency among CACI employment instructions. In the experience of CELA's members, it is much easier to persuade a trial court to modify the CACI instructions if the modification is called for by a bracket than if the modification is only called for by the Directions for Use.	The committee considered this idea at length, but decided that since the series is titled "Wrongful Termination," the instructions should only address termination, with expansion to adverse acts short of termination noted in the Directions for Use.
		The instruction requires modification to include the concept of a "reverse false claim," which is filing a knowingly false record to conceal an obligation to pay money to the government.	Government Code section 12651 includes 8 enumerated violations. The proposed instruction defines a false claim action only as the first one, submitting a false claim for payment. The comment requests adding one more. Including all 8 violations would make the instruction overly complex and wordy. However, the possibility of a different kind of false claims action is now noted in the Directions for Use.
		The term "person" in the second sentence of the opening paragraph may create juror confusion by not explaining that "person" includes entities. The False Claims Act, defines "person" broadly to include other legal entities. (Gov. Code, §12650(b)(8).) But the proposed instruction simply uses the term "person" without explanation. This could create juror	The committee agreed with the comment and made the change.

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		confusion because a jury may not realize that a false claim action brought against a corporation or other entity meets the statutory definition of a false claims action.	
	California Judges Association, by Jordan Posamentier, Legislative Counsel	This is a new instruction that fairly well sets out the essential factual elements of the burden of proof of the plaintiff in such a case. The definitions of phraseology "...in furtherance of...." are also well written and unambiguous. The "optional language" (bracketed paragraph) is also clear and unambiguous to, and the Use Notes and Sources and Authority are well written.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that the essential elements of this instruction could be fewer in number and should incorporate the alternative grounds for an act in furtherance so to avoid having to set out those alternatives separately after stating the essential elements.	The committee did not find the commentator's proposed revision of the instruction to be better. It leaves "in furtherance of" a false claims action undefined. The proposed instruction explains to the jury what that means.
		We also suggest revisions to the introductory paragraph to correspond more closely with Government Code section 12651(a)(1), which refers to presenting "a false or fraudulent claim for payment or approval," and section 12653(b), which refers to a "false claims action" (instead of "false claim" action).	The committee has added "or approval" to the introductory paragraph and has changed "false claim action" to "false claims action" throughout.
		The California False Claims Act not only prohibits false claims and conduct directly related to false claims, but also prohibits other conduct (Gov. Code, § 12651 (a)(4)-(8)) and prohibits retaliation for lawfully disclosing information to a government or law enforcement agency (Gov. Code, § 12653 (b)). Yet the proposed instruction and our suggested revision address only retaliation for whistle-blowing conduct in connection with an actual or potential false claims action. We suggest that the Directions for Use should state that the instruction should be modified if the basis for the alleged retaliation is some other conduct protected under the CFCA.	As noted above, the committee agreed with this comment and has noted the issue in the Directions for Use.
2441.	California	The proposed instruction should incorporate "adverse action"	The committee considered this idea at

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Discrimination Against Member of Military—Essential Factual Elements	Employment Lawyers Association, by David M. deRobertis and Ellen Lake	short of discharge in the instruction itself to maintain consistency among CACI employment instructions.	length, but decided that since the series is titled "Wrongful Termination," the instructions should only address termination, with expansion to adverse acts short of termination noted in the Directions for Use.
	California Judges Association, by Jordan Posamentier, Legislative Counsel	This new instruction accurately tracks the Military & Veterans Code Section 394, setting out the six elements. It is unambiguously written. The instruction seems to be needed as there will likely be enough cases of this kind that a "standard" instruction on the elements would be helpful to the court, counsel, and jury. As with 2440, the Use Notes seem helpful and the Sources and Authority are well written.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee suggests deleting "[current/past]" in the introductory paragraph of the instruction and element 4, and deleting ["was serving/had served"] in element 2. We believe that these temporal references are unnecessary and of no benefit.	As explained in the Directions for Use, the statute covers status discrimination, which is based on the person having been in the armed forces, and participation discrimination, which involves military requirements on a current member. The temporal references are needed depending on which is alleged.
		Military and Veterans Code section 394 prohibits discrimination against "any officer, warrant officer or enlisted member of the military or naval forces . . . ." We believe that this instruction should track this language rather than state more broadly that the plaintiff "was serving" or "had served" served in the armed services.	The committee considers "service in the armed forces" to be a preferable plain-language alternative to the long statutory list.
		We note that the Directions for Use do not state why the fourth element should be optional, and we believe that it should be mandatory.	The committee agreed and has removed the brackets.
2505. *Retaliation—Essential Factual Elements*	California Employment Lawyers Association, by	CELA commends the advisory committee for not modifying the intent element of this instruction despite the dictum contained in *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, which erroneously suggested that the	No response is necessary.

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	David M. deRobertis and Ellen Lake	standard CACI employment instructions do not adequately address the intent element. CELA strongly believes that the *Joaquin* court's dictum was simply wrong; the current CACI correctly state the intent element by using the "motivating reason" causal nexus or intent standard. Thus, CELA fully supports the first four sentences of the proposed "Directions for Use" addressing *Joaquin*.	
		The last sentence of the proposed addition to the "Directions for Use" should be stricken because by focusing on the employer's alleged "good faith belief," it perpetuates part of the analytic error committed by the *Joaquin* court that led it to erroneously criticize the intent element. The statement that a "good faith belief that the report was falsified" is a "permitted motivating reason" is incorrect, and thus perpetuates the analytic flaw of the *Joaquin* court. If an employee engages in true protected activity by making a report of harassment, an employer's alleged good faith belief that the activity was not protected cannot justify termination. Instead, a termination expressly based on the fact that an employee reported harassment is only lawful if, in fact, the harassment complaint did not qualify as "protected activity."	The committee believes that the comment misstates the issue decided in *Joaquin*. It is not a good-faith belief that "the activity was not protected," but a good-faith belief that the report was falsified. The last sentence is supported by the holding of the case.
	California Judges Association, by Jordan Posamentier, Legislative Counsel	There is a paragraph added in the Directions for Use that references an appellate case in which this jury instruction was criticized in dictum because the appellate court alleged that instruction contained no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2010) 202 Cal.App.4th 1207, 1229–1231.) The CACI Committee concluded that the instruction as given is correct for the intent element in a retaliation case. But the Committee notes that in cases such as *Joaquin* in which the distinction between a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified) is a subtle one, the instruction may need to be modified to clarify this	The committee understands the comment as approving of the revisions to the instruction. As such, no further response is necessary.

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		distinction, and to make it clear that plaintiff must prove that defendant acted based on the prohibited motivating reason and not the permitted motivating reason. The Use Notes make clear that both reasons (the prohibited motivating reason and the permitted motivating reason) should be added to element 3 in order to allow the jury to decide which one is supported by the evidence in a *Joaquin*-type case, and to clearly demonstrate that retaliatory intent is an essential element of retaliation under the Fair Employment and Housing Act (FEHA). Element 3 should be modified to make clear that plaintiff must prove that the defendant acted based on the prohibited motivating reason and not the permitted motivating reason.	
		The added excerpt to the Sources and Authority from *Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 is a very good addition.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the rejection of the criticism in *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207 and the statement that the instruction may need to be modified in some cases.	No response is necessary.
		We believe that a modification could focus more on whether the plaintiff's complaint of discrimination was protected activity, rather than whether the defendant's motives were proper. An employee's complaint of discrimination is protected activity under FEHA if the employee reasonably believes the conduct complained of to be discriminatory. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043.) Focusing on this issue may help to avoid the question of the impact of a defendant's mixed motives, which is an issue currently pending before the California Supreme Court in *Harris v. City of Santa Monica*, No. S181004. We suggest the following revisions to the last sentence of proposed new	The committee found the proposed rewrite is too complex and not really responsive to the decision in *Joaquin*. Proposed modification (a) is correct on the law, but was not the problem in *Joaquin*. Proposed modification (b) is responsive, but very hard to follow. The committee has, however, made a minor revision to the wording of the sentence.

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		paragraph in the Directions for Use: However, in cases such as *Joaquin* in which the ~~distinction between a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified) is a subtle one, the instruction may need to be modified to clarify this distinction, and to make it clear that plaintiff must prove that defendant acted based on the prohibited motivating reason and not the permitted motivating reason~~ employer's proffered legitimate reason involves the employee's alleged fabrication of a protected activity, the court may modify the instruction to emphasize that (a) plaintiff's activity is not protected unless he/she reasonably believed that the conduct complained of constituted sexual harassment or discrimination, or (b) plaintiff must prove that his/her report of sexual harassment or discrimination, rather than his/her having fabricated a report of sexual harassment or discrimination, motivated the adverse action."	
2511. *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The second element improperly imposes a "but for" causal nexus standard in "Cat's Paw" cases, thereby conflicting with the established "motivating reason" FEHA causal nexus standard. There is language in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 that may appear to support the "but for" causation requirement contained in the proposed element two. But that language cannot be reconciled with the FEHA's long-standing use of the "motivating reason" causal nexus standard, nor with the authority on which *Reeves* is based. *Reeves* largely relies on *Clark v. Claremont Univ. Ctr.* (1992) 6 Cal.App.4th 639,665-666. But *Clark* simply required that the discriminatory animus of one part of the decision-making process must have "influenced the decision-making process and thus allowed discrimination to infect the ultimate decision." It did not impose a heightened "but for"	The committee agreed with the comment and has changed the second element from a "but for" to a "motivating reason" standard of causation. This response is developed further in the committee's report to the Judicial Council.

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		causation standard on these multi-actor decision-making fact patterns.	
		The requirement of specifying the acts upon which the decision-maker relied is impractical or impossible in some cases. There could be a large number of underlying retaliatory or discriminatory acts of the supervisor spread over a long time period so that it is impractical to list each act in the instructions without the instructions becoming too complicated, cumbersome, and confusing. Or, there may be a core factual dispute as to which acts the decision-maker relied on. The decision-maker may deny having relied on certain acts, but the plaintiff may argue to the jury that the decision maker did rely on these acts (denial notwithstanding). In this circumstance, the acts that should be listed are those that the plaintiff alleges were relied on as part of the discriminatory or retaliatory decision, not simply those that the decision-maker actually admitted to relying on. For these reasons, CELA submits that the "Directions for Use" should make clear that there is no requirement in all cases that the specific acts be listed and also that the acts that should be listed when they are specifically listed are those that the plaintiff properly alleges were relied on- not just those admitted to have been relied on by the decision maker(s).	The committee believes that the court and attorneys can figure out how to adjust the instruction if necessary without any guidance in the Directions for Use.
	California Judges Association, by Jordan Posamentier, Legislative Counsel	This new jury instruction appears to set forth properly the elements for an adverse action made by the decision-maker-without-animus but where the decision-maker acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision-maker is referred to as the “cat’s paw” of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121	No response is necessary.

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		Cal.App.4th 95, 100.) The jury instruction looks unproblematic.	
	David B. Monks, Fisher & Phillips, San Diego	CACI 2511 (cat's paw) is well written. The only revision I recommend is to ensure that "decision-maker" is shown consistently throughout the instruction and commentary. Presently, it is sometimes hyphenated and sometimes not. I believe the more acceptable version is to use the hyphen.	The committee has decided to use "decision maker" (no hyphen).
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would delete the words "In this case," at the beginning of this instruction as superfluous and unnecessary.	The committee believes that "in this case" makes the opening paragraph clearer.
		We suggest an excerpt from *Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186 in the Sources and Authority for its discussion of the "cat's paw" doctrine under federal law.	Under CACI standards for the Sources and Authority, federal cases are not included unless they are directly on point for the instruction. *Staub* is decided under the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. § 4301 et seq.) Were it decided under California law via diversity jurisdiction, it would be a candidate for inclusion if it added something not addressed in any California case.
2560. *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Federal courts have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (*EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614 fn.5.) The Directions for Use now properly set forth how to modify element 7 if the court agrees that this rule and wants to apply it in the particular case before the court.	No response is necessary.
	Church State Council, by Alan J. Reinach, Executive Director	I want to thank the Advisory Committee for considering my initial submission, which is reflected in a change to CACI 2560, with advice on addressing the situation in which an employee is forced to violate his or her religious beliefs in order to avoid discipline.	No response is necessary.

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	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that the cited discussion in *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 614 fn. 5, was not part of the holding in that case. We suggest revising the first sentence of the third paragraph of the Directions for Use by substituting the words "have suggested" for "have held."	While it may not have been an express holding of *EEOC v. Townley*, the point for which it is cited is clearly the law in the 9th Circuit. Because it is a "see, e.g.," cite, the committee believes that "have held" is appropriate.
VF-2500. *Disparate Treatment*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The proposed "Direction for Use" requiring the jury to separately consider each protected status would misstate the law in some cases. Sometimes, multiple protected traits merge together to collectively constitute the protected trait on which the discrimination claim is based. (See *Lam v. University of Hawaii* (9th Cir. 1994) 40 F.3d 1551.) "Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor white women. In consequence, they may be targeted for discrimination "even in the absence of discrimination against [Asian] men or white women."	For reasons unrelated to the comment, the committee has decided not to proceed with the proposal to explain in the Directions for Use when certain verdict form questions may need to be repeated based on separate allegations that rely on different facts. It proved to be far more complex that originally believed to identify all the verdict forms that might be affected. Further, different language would be required for different situations. The Directions for Use currently advise that the verdict forms are presented as models and will need to be modified depending on the case.
	California Judges Association, by Jordan Posamentier, Legislative Counsel	VF-2500 properly explains in the Use Notes that "if the plaintiff alleges discrimination on the basis of more than one protected status, question 4 will need to be modified so that the jury considers each status separately."	No response is necessary.
2620. *CFRA Rights Retaliation—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	CJA supports revisions to 2620, which add to the Use Notes explaining that one of the elements can be modified to allege constructive discharge or adverse acts other than actual discharge.	No response is necessary.

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2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption* and 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The instruction fails to state the presumption that an employee is not exempt and fails to state the proper burden of proof and the heightened standard of proof. The instruction should begin with a statement that an employee is presumed to be non-exempt and that, to overcome the presumption, the employer must prove "plainly and unmistakably" that the employee meets all of the requirements of the exemption.	The committee considered these points and decided that any presumption is for the court, not the jury. It did not think that "plainly and unmistakably" is really a burden of proof.
		The instruction states the requirements of the exemption in the legalistic language of the Wage Order. It uses terms that are vague or specialized and may be difficult for a juror to understand. For example, paragraph 1 states that the plaintiffs "duties and responsibilities involve management of' the defendant's business/enterprise." The term "management" is unclear and should be defined or paraphrased.	The committee sympathized with the comment, but does not believe it has a remedy. There is no definition of "management" in the wage orders; yet the term must be in the instruction. It may be subsumed in the "duties that meet the test of the exemption," which in turn may require additional instructions per the last paragraph in the Directions for Use.
		Element 5 states that, to be exempt, the plaintiff must perform executive duties more than half of the time. However, it does not define executive duties to make clear that "executive duties" include the duties set forth in elementss 1-4. This could be clarified by stating, for example, in element 5 that the plaintiff "performs executive duties, *such as those set forth in paragraphs 1-4 above,* more than half of the time."	The requirement of the wage orders is that the employee be "primarily engaged in duties which meet the test of the exemption." This language will be meaningless to a jury. The committee has elected to use the term "executive duties" and then note in the Directions for Use that it might be necessary to give additional instructions from the federal regulations. The committee does not believe that the commentator's proposed revision is correct. This element is actually about the "more than half" requirement. So it involves how the employee spends his or

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			her time. Of elements 1-4, only element 1 is arguably relevant to spending time.
		The Sources and Authority properly states, "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee" "together with the employer's realistic expectations and the realistic requirements of the job." The commentary also states that "the regulations identify job duties, not job titles." (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014–1015.) This is a correct statement of the law that should be incorporated into the instruction itself. Too often employers assign job titles or write job descriptions that use fancy-sounding "duties" which do not reflect the actual tasks performed by the employees.	The committee agreed with the comment and added a sentence to the instruction directing the jury to consider work actually performed, not the job title.
	Matthew A. Kaufman, Attorney at Law, Westlake Village	Element 5 of proposed CACI 2720 (and element 4 of proposed 2721) is confusing and could be considered contrary to Supreme Court precedent. It wrongly suggests that a jury use the "qualitative test" rejected by *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785. Under that test, the fact finder looks to the employee's "primary function" (*id.* at 797); if the employee's "chief or primary function" is exempt, then the employee is exempt as well. But California law uses a "quantitative test," under which an employee is exempt if he or she "spent" more than half their work time on an exempt "activity." \ (*Id.* at 801.) To make this determination, the jury must itemize the employee's exempt and nonexempt activities, and the approximate average times spent on each of those activities. Element 5 wrongly imposes the rejected qualitative test where it states, "[*Name of plaintiff*] performs executive duties more than half of the time[.]" If an employee has one ongoing exempt duty, such as supervision, then under proposed CACI 2720, a juror could conclude that the	The committee believes that the addition of language directing the jury to consider actual work performed rather than the job title is partially responsive to the commentator's concerns and to his first proposed revision to element 5. With regard to the other two proposed changes to element 5, the committee does not believe that the jury needs to go through the employee's calendar and itemize how all time was spent. With regard to apportionment of time between exempt and nonexempt activities, *Ramirez* involved apportionment of travel time. Other cases could present different apportionment issues. There is no simple way to word the instruction that would

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		employee is exempt because he or she had this duty over half the time. This instruction permits this conclusion to stand notwithstanding the amount of nonexempt work performed by the employee. This occurs because the instruction directs jurors to look at the employee's duties. To comply with *Ramirez*, this instruction needs three things: First, Element 5 should mirror the Wage Order. I suggest replacing the language with "who is engaged in executive duties for more than half of the total time worked per week." Second, the jury should be instructed to itemize the exempt and nonexempt activities, and approximate average times spent on those activities. See footnote 5 of *Ramirez*. This itemization is completely missing from the proposed instructions. Third, the jury should receive instructions based on *Ramirez's* discussion of apportionment of time if an employee is performing work in aid of both exempt and nonexempt duties.	account for all situations involving apportionment of time.
		The Comments ignores much of the Wage Orders. Some of the text should be included. For example, the Wage Order 9 states regarding the Executive Exemption, "The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215." Without such a comment, a trial court may fail to instruct a jury on what is proper exempt and nonexempt work. The similar language for the Administrative Exemption should be included as well. This appears advisable after *Harris v.*	The last paragraph in the Directions for Use directs the user to C.F.R. The committee believes that this is sufficient guidance to the court and counsel. The wage orders are complex, and while they are substantially similar, there are different ones (with different citations) applicable to different job sectors. Another problem is that the C.F.R. sections cited in the wage orders are no

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		Superior Court (2011) 53 Cal.4th 170 which emphasized the C.F.R. definitions of administrative work.	longer correct.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would avoid use of the undefined terms "executive duties" in element 5 of 2720 and of "administrative duties" in element 4 of 2721. We suggest revising these elements as follows for greater clarity: "5. [*Name of plaintiff*] spends more than one-half of [his/her] work time performing the duties described in items 1 through 4;	See response to same concern from commentator CELA above.
		Sentences in the second paragraph of the Directions for Use of both instructions state that the requirements of the exemptions under the various wage orders are essentially the same. We believe that this is true with respect to the executive exemption under the various wage orders and the administrative exemption under the various wage orders, but the executive exemption differs somewhat from the administrative and professional exemptions. We suggest modifying this sentence as follows: "The requirements of the executive exemptions under the various wage orders are essentially the same."	The committee agreed with the comment and has made the change.
2720. *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Element 3 fails to accurately express the requirement that the employee either "[1] has the authority to hire or fire other employees or [2] whose suggestions and recommendations [a] as to the hiring or firing *and* [b] as to the advancement and promotion or any other change of status of other employees will be given particular weight." (Wage Order No. 9, Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(1)(c), italics added.) We suggest modifying element 3 to state: "3. [*Name of plaintiff*] has the authority to hire or terminate employees,	The committee agreed with the comment and has revised element 3 to address it.

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		or [His/Her] suggestions as to hiring, or firing, and promotion or other changes in status are given particular weight;"	
		The Sources and Authority refer to the applicable wage orders, but do not cite or quote any wage order. We believe that Wage Order No. 9, on which the instruction is based, should be quoted in pertinent part in the Sources and Authority.	See response to same concern from commentator Matthew A. Kaufman above.
2721. *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*	Matthew A. Kaufman, Attorney at Law, Westlake Village	The last excerpt in the Sources and Authority to *Harris, supra,* 53 Cal.4th at p. 190 could be wrongly construed. The reference to "other sources" is undefined and unclear. To make it complete, I suggest adding the following to the beginning of the excerpt: "We do not hold that the administrative/production worker dichotomy … can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. [¶] "	The committee made the suggested addition to the excerpt.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Element 1 departs somewhat from the language of the wage orders. Wage Order No. 9 refers to "[t]he performance of office or non-manual work directly related to management policies or general business operations of his employer or his/her employer's customers." (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(2)(a)(1); see also *United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1028, quoted in the Sources and Authority, which also refers to "management policies or general business operations.") We suggest modifying element 1 of the instruction to follow this language more closely: "1. [*Name of plaintiff*]'s duties and responsibilities	The committee agreed with the comment and made the proposed change.

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		involve the performance of office or nonmanual work directly related to management policies or ~~administrative~~ general business operations of [*name of defendant*] or [*name of defendant*]'s customers;"	
		The wage order states that the employee "executes" special assignments and tasks under only general supervision. (Cal. Code Regs., tit. 8, § 11090, subd. 1(A)(2)(d).) The proposed instruction uses the term "completes." We suggest changing "completes" to "performs," to dispel any suggestion that the employee must complete those special assignments or tasks to be exempt.	The committee agreed with the comment and made the proposed change.
2730. *Whistleblower Protection—Essential Factual Elements*	California Employment Lawyers Association, by David M. deRobertis and Ellen Lake	The instruction should incorporate the burden of proof established by Labor Code section 1102.6. Under this statute: In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5.	Section 1102.6 is an affirmative defense and as such would have to be a separate instruction. But the committee decided that it should be noted in the Directions for Use and included in the Sources and Authority.
		CELA objects to the bracketed instruction that follow the elements of the claims- the statement that "[t]he disclosure of actions or policies believed to be merely unwise, wasteful, gross misconduct, or the like, is not protected," and (2) the statement that "[a] report of publicly known facts is not a protected disclosure." The proposed language is confusing, argumentative, redundant, and will lead to more juror confusion than clarity.	The committee disagreed with the majority of the comment. The language objected to is from *Mize-Kurzman.* The committee believes that it is important for the jury to distinguish between that which is unwise and that which is illegal. But, *Mize-Kurzman* does not include the word "merely." And it refers only to

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		There is very often substantial overlap between activities that are unlawful (or reasonably believed to be unlawful) and activities that are "unwise, wasteful" or constitute "gross misconduct." Particularly in the context of government employers, "waste" can constitute a legal violation. (See, e.g., Code Civ. Proc., § 526a (permitting actions to enjoin "waste" of public funds).) Likewise, "gross misconduct" involving misuse of public funds may also constitute a crime. (See, e.g., Pen, Code, §425 ("Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of a felony."). Indeed, even the court in *Mize-Kurzman* acknowledged that there is often overlap between "unwise" or "wasteful" acts or "gross misconduct" and a legal violation: "The confusion occurs because a policy may be challenged both as unwise, wasteful, gross misconduct, and the like *and* because the purported whistleblower reasonably believes the policy violates a statute or regulation." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 854 (original italics).	policies, not to actions. Therefore, the committee made these two minor revisions to the instruction.
		CELA objects to the bracketed instruction that follow the elements of the claims- the statement that "[a] report of publicly known facts is not a protected disclosure." This statement from *Mize-Kurzman* is an incorrect statement of law or, at the very least, one that is sufficiently debatable and unsettled that it should not make its way into the standard, Judicial Council-approved jury instructions.	This point is a holding of *Mize-Kurzman*. (202 Cal.App.4th at pp. 858–859.) The commentator's position is that the case is wrongly decided. It attacks the federal cases on which *Mize-Kurzman* relies and advances policy arguments for the opposite result. However, the commentator has no authority supporting its view. Even if *Mize-Kurzman* is the only California case on point, it is authority for the issue. The committee does not believe that it should

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			omit this holding just because there are arguments that support an opposite result.
		The word "was" should be added to element 3 after the word "disclosed."	The commentator has misread the element.
	Timothy P. O'Donnell, Patton Wolan Carlisle, Oakland	For disclosure of information cases, the first options of elements 2 and 3 and the first bracketed qualifier that follow the elements omit a necessary requirement regarding the nature of the plaintiff's disclosure to the government/law enforcement agency. Statutory law and cases from the California Supreme Court, California Court of Appeal, and Federal District Court for the Northern District of California make clear that the information disclosed to the government or law enforcement agency must be about the employer's violation of or noncompliance with a state or federal rule or regulation.	The committee agreed with the comment and has revised element 3 accordingly. It has not revised element 2 because "[*specify information disclosed*]" can be limited to information about the employer.
		The employer's failure to act should be included in the first qualifying sentence, that "disclosure of actions or policies believed to be merely unwise, wasteful, gross misconduct, or the like, is not protected."	*Mize-Kurzman*, from which this language was taken, mentions neither acts nor failures to act. It only mentions policies. The commentator does not cite any authority for this proposed addition.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Element 5 of the instruction states that the plaintiff's disclosure or refusal to participate was "a motivating reason" for the adverse employment action. Labor Code section 1102.5 does not use this language, but states that "[a]n employer may not retaliate against an employee for" specified behavior. Although the Sources and Authority cite no authority for expressing this as "a motivating reason," use of this language seems consistent with use of the same language (i.e., "a motivating reason") in other FEHA instructions where the statute prohibits any adverse employment action "because of" a particular characteristic (Gov. Code, § 12940, subd. (a)) or "because" of certain conduct (id., subd. (h)) (CACI No. 2500, Disparate	Causation under several California employment protection statutes including this one is unresolved. In the absence of authority to the contrary, the committee has elected to use the standard from the FEHA in instructions on these statutes.

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		Treatment—Esssential Factual Elements, CACI No. 2505—Retaliation—Essential Factual Elements, CACI No. 2540, Disability Discrimination—Essential Factual Elements). The committee suggests, however, that any supporting authority on this point should be cited in the Sources and Authority.	
		The Directions for Use refer to other instructions in the FEHA series that can be modified for use with this instruction, but do not refer to CACI No. 2507, *"Motivating Reason" Explained*, which we believe should be given with this instruction. We suggest adding a reference to CACI No. 2507 to the Directions for Use.	The committee has added a cross reference to CACI No. 2507.
		The Directions for Use for CACI No. 2507 list the instructions with which that instruction should be given. We suggesting adding CACI No. 2730 to that list of instructions, as well as CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*, which also uses the term "a motivating reason" in element 5.	No revisions to CACI No. 2507 are proposed for this release. The committee does not wish to include 2507 in the release just to add cross references.
		We believe that the four bracketed paragraphs at the end of this instruction do not belong in this instruction stating the essential elements of the cause of action. We suggest that it would be appropriate to include such information in the Directions for Use instead, citing authority on point and explaining when it may be appropriate to instruct the jury on point (particularly as to the third bracketed paragraph). We note that no authority is cited in the Sources and Authority for the first and fourth bracketed paragraphs, and we question whether the fourth bracketed paragraph accurately states the law.	These are all instructions approved in *Mize-Kurzman*. The committee believes that they are very helpful in guiding the jury as to what is and what is not a protected disclosure. The committee has added excerpts from *Mize-Kurzman* that support the first and fourth limitations. The question as to whether the fourth one accurately states the law is addressed above in response to the argument made by commentator CELA that it does not.
		The last case excerpt in the Sources and Authority is a quotation from *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822, stating that certain "personnel matters" such as "transferring employees, writing up employees, and counseling employees" do not "rise to the	Whether something is an adverse employment action under CACI No. 2509 and whether something is a protected disclosure under this instruction are two wholly separate

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		level of whistleblower retaliation." We believe that CACI No. 2509, *"Adverse Employment Action" Explained,* rather than this instruction, is the appropriate place to cite authorities on what conduct may constitute an adverse employment action. We also believe that the "personnel matters" listed in *Mueller* may constitute an adverse employment action depending on the circumstances, and that the Directions for Use for CACI No. 2509 support this view. We therefore suggest deleting this case excerpt.	questions. *Mueller* is a Labor Code section 1102.5 case; the language is relevant.
3000 et seq. Civil Rights series	Erin K. Baldwin, Beaumont	The proposed revisions pertaining to [42 U.S.C.] section 1983 litigation currently pending public comment must not be approved until the majority population affected by the revisions, i.e., unrepresented litigants, is made aware of same. This majority population is substantially ignorant to the existence of this committee much less its power to limit remedies available to them for civil rights violations. As far as I know, the Advisory Committee on Civil Jury Instructions is not a legislative committee. However, it presumes to propose revisions to civil jury instructions that will significantly diminish California Section 1983 litigants' redress against officials acting under color of state law and those acting in joint participation with same. As it is, the U.S. Supreme Court decision in *Pearson v. Callahan* (555 U.S. 223 (2009)), has jeopardized legitimate claims by allowing the courts to dismiss Section 1983 complaints based solely on immunity without first looking at whether the plaintiff's constitutional rights have been violated. Prior to *Pearson*, pro se litigants depended on the required constitutional inquiry previously mandated in *Saucier v. Katz* (533 U.S. 194, 205 (2001)), as it was, in essence, the "pro se immunity" against state official abuse. And now this committee proposes further limitations that	In this release, the committee is making only two proposals for 1983 cases. A proposed change to CACI No. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements* (to be renumbered as CACI No. 3001) would actually make it easier for plaintiffs to obtain 1983 relief. The other proposal is to revoke CACI No. 3015, *Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest*, removing probable cause to arrest as a jury issue. The commentator doesn't say just how anything that is proposed will diminish 1983 litigants' rights. Nor does she say just what "further limitations" we are proposing that will increase the chance of arbitrary judicial decisions biased against pro per litigants. The proposed revocation of 3015 does involve the interaction between the qualified immunity analysis and the

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		increase the chance of arbitrary judicial decisions biased against pro se litigants.	constitutional violation analysis, which is the issue in *Pearson*. But the commentator says nothing specific about what might be wrong with revoking 3015 other than perhaps her disagreement with *Pearson*. Without any specific analysis of the issue of probable cause to arrest, the committee cannot really treat this comment as a criticism of revoking 3015.
3007, *Local Government Liability—Policy or Custom—Essential Factual Elements* (to be renumbered as CACI No. 3001)	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The question is whether the local governmental entity's deliberate indifference is always an essential element of a cause of action against the entity for a civil rights violation under 42 United States Code section 1983 based on its policy or custom. We believe that the answer is "no," but that deliberate indifference is an essential element in some cases. We therefore would bracket current element 2 to make it optional, rather than delete it. *Canton v. Harris* ((1989) 489 U.S. 378, 388) held that deliberate indifference is an essential element of a section 1983 cause of action against a local governmental entity for a civil rights violation resulting from the inadequate training of its employees, or "failure to train." The Ninth Circuit has extended the rule from *Canton* to other section 1983 actions involving an omission or failure to act to preserve constitutional rights. (*Van Ort v. Estate of Stanewich* (9th Cir. 1996) 92 F.3d 831, 835 [negligent training, supervision, and monitoring]; see *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.) *Burke v. County of Alameda* ((9th Cir. 2009) 586 F.3d 725, 734) involved failure to train, but the court stated more generally that a plaintiff seeking to establish municipal liability under section 1983 must show that " 'the policy	The committee agreed for the most part with the commentator's analysis of this issue. But CACI No. 3009 is a separate instruction on failure to train. The Directions for Use discuss deliberate indifference and cite *Clouthier*. By restoring element 2 to 3007, the instruction would suggest that the element might be appropriate in a *Monnell* claim not involving failure to train.

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		amounted to a deliberate indifference to her constitutional right.' " (*Id.* at p. 735.) In our view, the Ninth Circuit opinions are not reliable authority for extending the deliberate indifference requirement to all section 1983 municipal liability cases based on policy or custom. Accordingly, we would approve the proposal to the extent that it eliminates deliberate indifference as a necessary essential element. We believe, however, that current element 2 should be bracketed for optional use as an essential element and that the Directions for Use should state that deliberate indifference is required in failure to train cases, citing *Canton v. Harris, supra,* 489 U.S. 378, and may be required in other section 1983 cases involving a local governmental entity's omission or failure to protect against a constitutional violation, citing the Ninth Circuit authorities most on point.	
3015, *Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest,*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that the authorities closest on point do not justify the elimination of this instruction. Absence of probable cause is an essential element of the cause of action (see CACI No. 3014) and is necessary to establish a Fourth Amendment violation. Qualified immunity, in contrast, is an affirmative defense. We believe that the probable cause inquiry differs from the qualified immunity inquiry. *Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126 and *Hunter v. Bryant* (1991) 502 U.S. 224 do not implicitly overrule *McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1008, on which this instruction is predicated because of the difference between probable cause as an element and qualified immunity as a defense.	The committee disagreed with the comment and continues to recommend that the instruction be revoked. This response is developed further in the committee's report to the Judicial Council.

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		The Ninth Circuit authorities involving the existence of qualified immunity are distinguishable from the prior Ninth Circuit cases involving the existence of probable cause where qualified immunity is not at issue. Absent some authority that the prior Ninth Circuit opinions have been overruled, we believe that probable cause is an issue of fact for the jury to decide if the court has not decided as a matter of law that qualified immunity applies. We therefore would retain this instruction.	
3205. *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements*	Martin W. Anderson, Attorney at Law, Santa Ana (and others; see Appendix)	The sentence in the Directions for Use that "A violation of Civil Code § 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a new motor vehicle as provided in section 1793.2(d)(2)" should not be included because it is irrelevant and potentially misleading. It is true that the restitution or replacement remedy contained in Civil Code § 1793.2(d)(2) is not available when a consumer files a lawsuit for breach of the provisions of § 1793.2(b). However, there is no need to include that information in the Directions for Use of this instruction, because nothing in this instruction suggests that the restitution or replacement remedy contained in Civil Code § 1793.2(d)(2) is available.	The committee proposed this change in response to a report that courts have entertained claims to give (d)(2) remedies for (b) violations. As the sentence is an accurate statement of law, the committee believes that it should be included.
		The reference to Civil Code § 1793.2(d)(2) should be changed to § 1793.2(d) and the reference to "new motor vehicle" should be changed to "consumer good." Subdivision (d)(2) applies only to new motor vehicles. Subdivision (d)(1) applies to other consumer goods. Because CACI 3205 applies to both motor vehicles and general consumer goods, a reference to the more general § 1793.2(d) is proper.	The committee agreed with the comment and has made this change.
		The sentence in the Directions for Use that:" Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities as described in section 1793.22." Inclusion of this language is inappropriate	The committee proposed this change in response to a report that courts have entertained claims to give (d)(2) remedies for (b) violations. As this

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		for the reasons discussed above, with respect to sentence number 1. The remedies available under Civil Code § 1793.2(d) are completely irrelevant to a claim for violation of Civil Code § 1792.3(b).	sentence is also an accurate statement of law, the committee believes that it should be included.
		The sentence that:" Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities as described in section 1793.22." is inappropriate because the reference to section "1793.22" is wrong. The referenced statute should be section 1793.2(d), and not 1793.22. It is section 1793.2(d) of the Civil Code that creates a claim when a reasonable number of repair attempts fail. Section 1793.22 creates a rebuttable presumption concerning what constitutes a reasonable number of repair attempts. A consumer is not required to use the presumption, and it is reversible error to instruct on the presumption in cases where the consumer elects not to rely upon it. (*Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal. App. 4th 1235, 1245.)	The committee has made a slight revision to the sentence to address this comment.
		The statement that section 1793.2(b) "presumes" that the repairs in question were ultimately successful is rebutted by the text of the statute. Nothing in § 1793.2(b) requires or presumes that the repairs were "ultimately successful." To the contrary, § 1793.2(b) applies in a number of common situations in which the repairs sought are unsuccessful.	The committee has removed this sentence, but does believe that whether repairs were or were not successful is relevant to remedies under 1793.2(b).
		The statement that damages are those caused by the delay is wrong. There is no statutory support for this proposition. In fact, the consumer is entitled to Commercial Code remedies through Civil Code section 1794(b). 1794(b)(1) permits a buyer to recover restitution of the purchase price of the product if he revokes acceptance, while subdivision (b)(2) permits the buyer to recover diminution in value if he has not.	The committee has also removed this sentence as it agreed with the commentator that there is no authority for it. But the committee is not convinced that the commentator is correct in his view that Commercial Code remedies are available under section 1793.2(b). See the committee's report to the Judicial

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			Council for further development of this response.
		The addition of the text of Civil Code section 1793.22(b). is inappropriate because this statute is totally irrelevant to claims brought under Civil Code § 1793.2(b).	The committee agreed and removed this statute from the Sources and Authority
		The excerpt from the *Oregel* case should not be deleted from the Sources and Authority. This excerpt correctly states that a consumer who seeks to prove a violation of the Song-Beverly Act need not submit expert testimony to prove the existence of a defect, and need not prove the cause of the defect. Element Number 3 of CACI 3205 continues to require the consumer to prove that the product at issue "had [a] defect[s] that [was/were] covered by the warranty." Although the language quoted from *Oregel* concerned proving a defect in the case of a violation of Civil Code § 1793.2(d), there is no reason to believe that the standard for proving a defect under § 1793.2(b) would be any different.	The committee deleted this excerpt because it was tangential to the subject of the instruction. It is about the burden to prove the cause of the defect, not about delay.
	Michael E. Lindsey, Attorney at Law, an Diego	II have read the objections filed by Attorney Martin Anderson, and I agree. As counsel for Mr. Oregel, the deletion of the language from *Oregel v.American Isuzu Motors, Inc*. (2001) 90 Cal.App.4th 1094 from the Sources and Authority has the effect of imposing the burden on consumers to prove the cause of the mechanical defect, when clearly that burden is on the manufacturer who promised to repair it. That language should be retained.	Including or excluding something from the Sources and Authority has no legal effect.
	Michael R. Quirk, Attorney at Law, Walnut Creek	I have reviewed the objection submitted by attorney Martin Anderson, and I agree with it entirely. There is nothing in section 1793.2(b), or any legislative history that I am aware of, that contemplates that the legislature assumed that repairs not commenced or completed within 30 days would always be successfully	If repairs are unsuccessful after a reasonable number of repair opportunities, then the consumer can proceed for remedies under section 1793.2(d). The consumer would not need to rely on subsection (b). The committee continues to believe that the

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		repaired such that the legislative remedies clearly set forth in 1794 should be butchered to only include damages for "delay." Although I am sure such a scenario happens, I have never been contacted by a consumer merely seeking "delay" damages for a consumer good successfully repaired, albeit late. Rather, my experience is that the cases involve repairs that are never "commenced" at all, or perhaps "commenced" once, but never completed, let alone repaired to conform to the express warranties, leaving the consumer with a consumer good in or out of their possession that's useless. Providing directions to the trial judge to interpret the section as proposed would fly in the face of the mandate that "The Song-Beverly Consumer Warranty Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 990.) There is no case law that I am aware of that indicates that 1793.2(b) presumes that repairs not commenced or completed within 30 days would always be successfully repaired, and until there is, trial judges should not be so instructed.	(b) cause of action would be construed as limited to remedies for delay after successful repairs. But since no court or statute has expressly said so, the committee has revised the Directions for Use as noted above in response to commentator Martin W. Anderson.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The new paragraph in the Directions for Use includes the statement, "Section 1793.2(b) presumes repairs that are unreasonably delayed but ultimately successful." No authority is cited for this proposition in the Sources and Authority, and we believe that it may be inaccurate. Reading section 1793.2(b) together with section 1794(a) suggests that (1) damages can be awarded if no repairs are attempted within 30 days or if repairs are attempted but not completed within 30 days, even if repairs were not successfully completed later; and (2) the equitable remedy of an injunction requiring the defendant to complete repairs may	The committee agreed. See response to commentator Martin W. Anderson, above.

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		be available in those same circumstances. In other words, section 1793.2(b) arguably does not presume that repairs were unreasonably delayed but ultimately successful, but instead provides a basis for relief in other circumstances as well. If there is any doubt about the circumstances where relief is available under this provision, and no authority to support the quoted sentence, we suggest deleting the quoted sentence and the sentence that follows it.	
		Other instructions cover the remedies of restitution or replacement of a new motor vehicle and define a reasonable number of repair opportunities under section 1793.22. We suggest including cross-references to those instructions in the new paragraph of the Directions for Use. "A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a new motor vehicle as provided in section 1793.2(d)(2). (See CACI Nos. 3201, 3241.) Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities as described in section 1793.22 (See CACI Nos. 3202, 3203).	Because our format requires that the title of the instruction be included with any cross reference, a cross reference can sometimes break up a paragraph with lots of words in parentheses. So the value of a cross reference has to be balanced against what it does to the readability of a paragraph. Here, the committee does not see that the value of the cross references is that great. Also, the proposed cross references are to the motor vehicle instructions, but this instruction applies to other consumer goods also.
		A new entry is added to the Sources and Authority for Civil Code section 1793.22(b), which establishes a presumption that a reasonable number of repair attempts have been made if certain facts are true. We believe that this new entry does not belong here because relief under section 1793.2 (b) does not require a reasonable number of repair attempts. Section 1793.22 is quoted in the Sources and Authorities for CACI No. 3203, Reasonable Number of Repair Opportunities—Rebuttable Presumption, where seems more appropriate. We suggest deleting this new entry.	As noted above, the committee agreed and has deleted this statute.
	Jon D. Univeral, Universal,	Civil Code section 1793.2(b) also provides a defense by way of the following language: "delay caused by conditions	The commentator is correct that the statute contains this limitation on

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	Shannon & Wheeler, Roseville	beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay." Thus, without adding in this further qualification and/limitation to the statute, as presently written suggests there would be no defense if repairs were simply not completed within 30 days. That is not the law. Accordingly, it is further proposed that a new 5th essential factual element be added as follows: 5. That any delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement."	liability. The committee agreed with him that it is a defense, but as such, it cannot be included in this instruction. The committee has, however, mentioned it in the Directions for Use.
		I endorse the proposed addition to the Directions for Use regarding what damages are recoverable. The insertion of this language is entirely appropriate since the only statutory basis for a plaintiff/buyer to obtain remedies of restitution or replacement is found only at §1793.2(d)(2) by way of establishing that the vehicle had substantial nonconformities/defects which were covered by the warranty which were not repaired after a reasonable number of repair attempts. As initially written, CACI 3205 left open the possibility that restitution or replacement remedies were indeed available if the plaintiff/buyer established a simple violation of §1793.2(b). Accordingly, this new draft language is welcomed.	No response is necessary.
		Additionally, I welcome the addition of Civil Code section 1793.22(b) To the Sources in Authority. The §1793.22(b) presumptive elements also not only outline the "reasonable number of repair opportunities" benchmarks, but also require the "substantial impairment" requirement with respect to the nonconformity or defect. On the other hand, §1793.2(b) does	The committee agreed with the comments pointing out the lack of relevance of this statute to the instruction and has removed it from the Sources and Authority.

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		not have a "substantial impairment" requirement. As such, this further establishes that a §1793.2(b) statutory violation does not provide for the remedies of restitution or replacement.	
		Finally, I question the proposed removal of the excerpt from the *Oregel* case from the Sources in Authority. One of the more common reasons for delays in repairs is the servicing dealer's inability to verify the reported problem. However, the *Oregel* decision nonetheless holds that even in such a circumstance where the servicing dealer does not verify the problem (and performs no repairs) it still counts as a "repair attempt." As discussed above, the defendant has a possible defense to the 30-day limitation if such delay was caused by conditions beyond its control, and one of those conditions is simply being unable to verify the problem (but needs extra time to try to). *Oregel* recognizes that these circumstances sometimes occur. Accordingly, I believe that this excerpt should be left in the instruction as originally drafted.	Nothing in the excerpt supports the commentator's argument for including it, and the committee has declined to delete it.
4107. *Duty of Disclosure by Real Estate Broker to Client*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Revisions appear to be well drafted modifications regarding fiduciary duty to appear. CJA supports the revisions.	No response is necessary.
	Albert E. Cordova, Attorney at Law, San Rafael	The current instruction requires a broker to disclose to his client "all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction." The broker must "place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision." What kind of information is the broker required to obtain and advise the client about? Does this include tax advice? Legal advice? Advice about construction, soils and drainage? Although any rational interpretation of a real estate broker's	This comment addresses matters not considered by the committee and outside of the revisions posted for comment. It will be considered in the next release cycle.

CACI 12-02
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Advisory Committee Response
		duty to advise would limit that duty to the "subject matter about which the broker is trained," there is no such limitation in CACI 4107.	
		Object to the inclusion of the following case excerpt in the Sources and Authority: "[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this *fiduciary duty is not a creature of contract* and, therefore, did not arise under the buyer-broker agreement. Thus, the contractual limitations period in the buyer-broker agreement did not apply to the breach of the common law fiduciary duty owed by [broker] to [client buyer]." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at p. 1312, internal citations omitted, emphasis added by commentator.) It is well settled that the scope of an agency may be limited by contract. *Carleton v.Tortosa* (1993) 14 Cal.App.4th 745, 755-756. This is true for any fiduciary, not only a real estate broker. An instruction that imposes a duty to " investigate and advise" as to " all material information" "relating to the transaction" and then cites to language that "fiduciary duty is not a creature of contract" and a " contractual limitations period [does] not apply to the breach of a common law fiduciary duty owed by [broker] to [client]" supports virtually unlimited liability on the part of a real estate broker.	The committee agreed that the second sentence on the contract limitations period is beyond the scope of the instruction, and has removed it from the excerpt. But the first two sentences on the fiduciary relationship between a broker and buyer existing separately from any contractual terms is not only helpful, but also a correct statement of the law. The excerpt does not say or suggest that duty cannot be limited by contract. It says that the duty is not a creation of contract; it rises from the relationship. As noted elsewhere above, the decision about what to include in the Sources and Authority does not depend on whether the content can stand scrutiny on all points and all facts, but on whether a user of the instruction would want to know of the existence of the case and the language.
	Manning & Kass Ellrod, Ramirez, Trester	Object to the same case excerpt set forth above for three reasons: First: it is not relevant to CACI No. 4107. The elements of a duty, fiduciary or otherwise, are conceptually distinct from when an action for breach of that	See response above.

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New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Advisory Committee Response
		duty must be filed. Conflating these two concepts causes "confusion worse confounded." John Milton, PARADISE LOST II, 996-997. They should be uncoupled as pertinent authorities by deleting the quote from *William L. Lyon* about the different limitations periods applicable to broker-agent breaches of fiduciary duty to seller-clients versus buyer-clients.	
		In addition, the quotation about the limitations period is itself internally confusing. Under the facts of *William L. Lyon,* the appellate court simply found the specific language in that particular buyer-broker agreement, which echoed the language in Civil Code § 2079.4 that the opinion characterized as governing duties a broker owes the seller-client, did not apply to the breach of the common law fiduciary duty owed by the broker to his buyer -client. It did not say that any or no language agreed to by the parties – broker and buyer-client and/or broker and seller-client – about the limitations period could alter a statutorily prescribed period for breach of fiduciary duty or a common law duty. The meaning or significance of this quotation is further confused by the opinion's acknowledgment that "the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way." William L. Lyon, supra, 204 Cal.App.3d at 1307-1308, citing and quoting from Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, 1430.	See response above.
		Finally, the quotation is, at most, dicta or obiter dicta, because it is unnecessary to the reasoning and conclusion of the opinion.	The question is not whether the language of the excerpt is controlling law, but whether a user would be interested in the language.
	State Bar	We believe that the new paragraph in the instruction, stating	The committee agreed with the comment

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	Commentator	Summary of Comment	Advisory Committee Response
	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	that a broker cannot accept as true and pass on to the client information provided by third parties without verifying that information or informing the client that the information has not been verified, will not be relevant in many cases involving breach of the duty of disclosure and therefore should be optional and bracketed, with a statement added to the Directions for Use as to when to use the bracketed language.	and has bracketed the paragraph to make it optional.
		The final bullet point in the Sources and Authorities states that a broker's duty to his or her client does not arise from contract, so the contractual limitations period is inapplicable. But this instruction says nothing about the statute of limitations. This new bullet point does not support the instruction or anything stated in the Directions for Use. We believe that this bullet point does not belong here, but that it would be appropriate to include in the Sources and Authority for CACI No. 4120.	The first two sentences of the excerpt are relevant; the third one has been deleted as noted above.
4120. *Affirmative Defense—Statute of Limitations*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Revisions appear to be well drafted modifications regarding fiduciary duty to appear. CJA supports the revisions.	No response is necessary.
	Manning & Kass Ellrod, Ramirez, Trester	Both the "Directions for Use" and quotations from opinions in the "Sources and Authority" sections for this revision strongly suggest the need for further clarification from the Judicial Council or future guidance from the Legislature. Counsel, courts and litigants will find it difficult to navigate the current conflicting shoals of authority listed by the Advisory Committee in this proposed revision. For instance, the quotation from *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 imposes on courts a duty to pierce the labeling of a claim as one for "breach of fiduciary duty"	The committee agrees that further clarification is most definitely needed, and that the cases are not harmonious. But that clarification can only come for the courts or the legislature. The Judicial Council and the committee cannot clarify that which is not clear. Nor is it within the charge of the committee to seek guidance from the Legislature.

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	Commentator	Summary of Comment	Advisory Committee Response
		governed by a four-year statute of limitations (Code of Civ. Proc. § 343) by determining if its "gravamen" is that the "defendant's acts [really] constitute actual or constructive fraud" and are thus governed by the three-year limitations period (Code of Civil Procedure § 338). *William L. Lyon* further confuses the matter by stating that, while "[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of . . . section 343, . . . a breach of a fiduciary duty usually constitutes constructive fraud" governed by the three-year limitations period. William L. Lyons, supra, 204 Cal.App.4th at 1312, 1313. The Advisory Committee expressly acknowledges that *Thomson, supra,* 198 Cal.App.4th at 607 conflicts with *Stalberg v. Western Title Ins.* Co. (1991) 250 Cal.App.3d 1223, 1230 over whether the four-year or three-year statute of limitations applies to a breach of fiduciary duty "based on concealment of facts." See "Directions for Use." When, then, and under what circumstances is a breach of fiduciary duty not constructive fraud? How do the two causes of action differ? What limitations period applies to fiduciary breaches "based on concealment of facts"? There is a significant difference between four and three years when it comes to the applicable limitations period, even whether the "discovery rule" applies. Can the parties contractually agree to a three or two-year limitations period? These are illustrative, not exhaustive, of the questions courts and counsel seek guidance on when they turn to approved-form jury instructions, but they are not addressed by CACI 4120. The Advisory Committee is not, of course, responsible for this befuddled state of the law, but it should either try to	

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	Commentator	Summary of Comment	Advisory Committee Response
		provide clarification or seek legislative guidance on the matter. Just providing conflicting case authorities and leaving it to courts and counsel to plug into the proposed instruction various lengths of limitation periods (take your pick from conflicting case authorities) falls far short of the purpose of jury instructions – "to inform jurors of the law." Misinformation, or conflicting information, provided by jury instructions increases the likelihood of appeals, reversals and retrials – costly mistakes the judiciary cannot afford. This committee should do all it can to prevent these avoidable mistakes. An excellent starting point would be to take a thorough look at the muddled state of the law and its current instructions on fiduciary duty, and to provide clarity and understanding so that justice can be furthered rather than smothered.	
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions and would move the final bullet point in the Sources and Authority for CACI No. 4107 (from *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312) to the Sources and Authority for this instruction, as stated above.	There are already two citations to *William L. Lyon* in this instruction.
5004. *Service Provider for Juror With Disability*	California Judges Association, by Jordan Posamentier, Legislative Counsel	CJA supports the proposed revisions. The instruction has been substantially reworded to clarify the role of the service provided in assisting the juror with a disability, and to clarify the need to speak directly to the juror with the disability and to avoid side conversations. This guidance is probably useful.	No response is necessary.
5014. *Substitution of Alternate Juror*	California Judges Association, by Jordan Posamentier, Legislative Counsel	CJA supports the proposed revisions. This instruction has been substantially reworded. It advises the jurors not to consider the substitution for any purpose. It also contains a greater and more forceful explanation of the need to begin the deliberations over again.	No response is necessary.

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All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Advisory Committee Response
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal except that we believe that the admonition in the first paragraph would be better understood if some explanation were provided. We suggest revising he first paragraph as follows: "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. Do not consider this substitution ~~for any purpose~~ because the reasons for this substitution do not relate to any matter that you should consider."	The committee sees no need to make this change.
User Guide	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with revising the paragraph on uncontested elements to state that uncontested elements should not be omitted, but suggests the following revisions for greater clarity: "~~Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties.~~ All of the elements set forth in the instruction should be read to the jury, even if the parties have stipulated that some elements are satisfied. If the parties have so stipulated, the instruction should be modified to indicate which elements are deemed satisfied. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof. It is better to include all the elements and then indicate that one or more of them have been agreed to by the parties as ~~not at issue~~ satisfied."	The committee has made some minor adjustments to this section of the User Guide in response to this comment.
		The example that follows does not conform to the convention of referring to the parties as [name of plaintiff] and [name of defendant]. We suggest revising the example accordingly.	The User Guide does not need to conform to the convention.
		There appears to be a typographical error in the paragraph on multiple parties; "cross-complaints" should be "cross-complainants."	"Cross-complaints" is what is intended.

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	Commentator	Summary of Comment	Advisory Committee Response
		The committee believes that the User Guide is helpful, but feels that it is hard to find in the CACI official softcover publication by LexisNexis. In the first volume of the LexisNexis publication, the User Guide begins on page xxvii after other front matter. The table of contents appears immediately after the User Guide and does not list the User Guide or any of the preceding pages. We suggest that the Advisory Committee consider moving the User Guide to the beginning of the volume and listing it in the table of contents, or some other measure to make it more prominent and easy to locate.	The committee agreed with the comment. The User Guide will be moved to the end of the front matter, right before instruction 100, either as the last Roman numeral pages (front matter) or starting as page 1.
Multiple	Orange County Bar Association, by Dimetria A. Jackson, President	Agree with all new and revised instructions except as indicated above	No response is required.
Multiple	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree with all new and revised instructions except as indicated above	No response is required.
General	William B. Smith, Abramson Smith Waldsmith, San Francisco	I have reviewed your email and the proposed CACI changes. Good work.	No response is required.

APPENDIX

CACI 12-02
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

In addition to the commentators noted above, the following, without further comment, have endorsed the views of commentator Martin Anderson with regard to the proposed changes to CACI No. 3205, *Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements:*

1. Gregory T. Babbitt, Attorney at Law, San Diego
2. Linda Deos, Attorney at Law, Sacramento
3. Denise V. Foley, Lamonica & Foley, Los Angeles
4. John W. Hanson, Attorney at Law, San Diego
5. Larry R. Hoddick, Attorney at Law, Palm Desert
6. Kalman Hutchens, Hutchens & Hutchens, Bellflower
7. Lucy Kasparian, California Lemon Law Center, Glendale
8. William M. Krieg, Kemnitzer, Barron & Krieg, Fresno
9. Douglas D. Law, Law & Kolakowski, San Diego
10. Russel David Myrick, Law & Kolakowski, San Diego
11. Donald F. Seth, Attorney at Law, Santa Rosa
12. Steven A. Simons, Attorney at Law, Granada Hills
13. Stephanie Tatar, Attorney at Law, Burbank
14. Norman F. Taylor, Attorney at Law, Glendale
15. Quyen Tu, Attorney at Law, Fullerton

CIVIL RIGHTS SERIES

OLD AND NEW NUMBERS

Title	Old #	New #
Violation of Federal Civil Rights--In General--Essential Factual Elements (42 U.S.C. § 1983)	3000	3000
Excessive Use of Force--Unreasonable Arrest or Other Seizure--Essential Factual Elements (42 U.S.C. § 1983)	3001	3020
Unreasonable Search--Search With a Warrant--Essential Factual Elements (42 U.S.C. § 1983)	3002	3022
Unreasonable Search--Search Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)	3003	3023
Affirmative Defense--Search Incident to Lawful Arrest	3004	3024
Affirmative Defense--Consent to Search	3005	3025
Affirmative Defense--Exigent Circumstances	3006	3026
Local Government Liability--Policy or Custom--Essential Factual Elements (42 U.S.C. § 1983)	3007	3001
"Official Policy or Custom" Explained (42 U.S.C. § 1983)	3008	3002
Local Government Liability--Failure to Train--Essential Factual Elements (42 U.S.C. § 1983)	3009	3003
Local Government Liability--Act or Ratification by Official With Final Policymaking Authority--Essential Factual Elements (42 U.S.C. § 1983)	3010	3004
Violation of Prisoner's Federal Civil Rights--Eighth Amendment--General Conditions of Confinement Claim (42 U.S.C. § 1983)	3011	3040
Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Medical Care (42 U.S.C. § 1983	3012	3041
Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force (42 U.S.C. § 1983)	3013	3042
Unlawful Arrest by Peace Officer Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)	3014	3021

Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest (42 U.S.C. § 1983)	3015	Revoked
Retaliation--Essential Factual Elements (42 U.S.C. § 1983)	3016	3050
Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)	3017	3005
Unruh Civil Rights Act--Essential Factual Elements (Civ. Code, §§ 51, 52)	3020	3060
Discrimination in Business Dealings --Essential Factual Elements (Civ. Code, § 51.5)	3021	3061
Gender Price Discrimination--Essential Factual Elements (Civ. Code, § 51.6)	3022	3062
Acts of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)	3023A	3063
Threats of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)	3023B	3064
Sexual Harassment in Defined Relationship--Essential Factual Elements (Civ. Code, § 51.9)	3024	3065
Bane Act--Essential Factual Elements (Civ. Code, § 52.1)	3025	3066
Unruh Civil Rights Act--Damages (Civ. Code, §§ 51, 52(a))	3026	3067
Ralph Act—Damages and Penalty (Civ. Code, §§ 51.7, 52(b))	3027	3068
Harassment in Educational Institution (Ed. Code, § 220)	3028	3069
Violation of Federal Civil Rights—In General (42 U.S.C. § 1983)	VF-3000	VF-3000
Excessive Use of Force—Unreasonable Arrest or Other Seizure (42 U.S.C. § 1983)	VF-3001	VF-3010
Unreasonable Search—Search With a Warrant (42 U.S.C. § 1983)	VF-3002	VF-3011
Unreasonable Search—Search Without a Warrant (42 U.S.C. § 1983)	VF-3003	VF-3012
Unreasonable Search—Search Without a Warrant—Affirmative Defense—Search Incident to Lawful Arrest (42 U.S.C. § 1983)	VF-3004	VF-3013
Public Entity Liability (42 U.S.C. § 1983)	VF-3005	VF-3001
Public Entity Liability—Failure to Train (42 U.S.C. § 1983)	VF-3006	VF-3002
Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)	VF-3007	VF-3020

Violation of Prisoner's Federal Civil Rights—Eighth Amendment—General Conditions of Confinement Claim (42U.S.C. § 1983)	VF-3008	VF-3021
Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)	VF-3009	VF-3022
Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))	VF-3010	VF-3030
Discrimination in Business Dealings (Civ. Code, § 51.5, 52(a))	VF-3011	VF-3031
Gender Price Discrimination (Civ. Code, § 51.6)	VF-3012	VF-3032
Ralph Act (Civ. Code, § 51.7)	VF-3013	VF-3033
Sexual Harassment in Defined Relationship (Civ. Code, § 51.9)	VF-3014	VF-3034
Bane Act (Civ. Code, § 52.1)	VF-3015	VF-3035

CIVIL JURY INSTRUCTIONS (CACI 12–02)
WINTER 2012 REVISIONS—TABLE OF CONTENTS

100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or ~~Web site~~website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

~~**You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.**~~

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it ~~or using Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony~~. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any

event involved in this case or use any Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

~~**You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.**~~

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. ~~And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom.~~ Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009, December 2011; December 2012

Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that "it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case

is finally submitted to them."

Sources and Authority

- Article I, section 16 of the California Constitution provides that "trial by jury is an inviolate right and shall be secured to all."

- Code of Civil Procedure section 608 provides in part: "In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact." (See also Evid. Code, § 312; Code Civ. Proc., § 592.)

- Code of Civil Procedure section 611 provides: "If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to conduct research, disseminate information, or converse with, or permit themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them. The court shall clearly explain, as part of the admonishment, that the prohibition on research, dissemination of information, and conversation applies to all forms of electronic and wireless communication."

- Code of Civil Procedure section 1209(a) provides in part:

  (a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

  (1)–(5) omitted

  (6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.

  (7)–(12) omitted

- Under Code of Civil Procedure section 611, jurors may not "form or express an opinion" prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443-444 [54 Cal.Rptr. 68].)

- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)

- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520-521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)

- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)

- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)

- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women's Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' " (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid*.)

- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge's comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) "It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge's opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury's determination." (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.05

106. Evidence

~~**Sworn testimony, documents, or anything else may be admitted into evidence.**~~ **You must decide what the facts are in this case only from the evidence you see or hear during the trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you see or hear when court is not in session, even something done or said by one of the parties, attorneys, or witnesses.**

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggests that it is true. However, the attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No other proof is needed and you must accept those facts as true in this trial.

Each side has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

New September 2003; Revised February 2005, December 2010, December 2012

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:
  Except as otherwise provided by law, where the trial is by jury:

  (a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:
  A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

  (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

  (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 281, 282

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.56-322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

107. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? For example, ~~Did~~ did the witness show any bias or prejudice~~? Did the witness~~ or have a personal relationship with any of the parties involved in the case~~? Does the witness~~ or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

~~**You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias*]].**~~

New September 2003; Revised April 2004, June 2005, April 2007, December 2012

Directions for Use

This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses.*)

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:
  Except as otherwise provided by law, where the trial is by jury:

  (a) All questions of fact are to be decided by the jury.

  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:
  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.

  (b) The character of his testimony.

  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

  (d) The extent of his opportunity to perceive any matter about which he testifies.

  (e) His character for honesty or veracity or their opposites.

  (f) The existence or nonexistence of a bias, interest, or other motive.

  (g) A statement previously made by him that is consistent with his testimony at the hearing.

  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

  (i) The existence or nonexistence of any fact testified to by him.

  (j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

- ~~Standard 10.20(a)(2) of the California Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."~~

- ~~Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.~~

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 281

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010; Revised December 2012

Sources and Authority

- Standard 10.20(a)(2) of the California Standards of Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

202. Direct and Indirect Evidence

Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

Direct evidence can prove a fact by itself. For example, if a witness testifies she saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. ~~Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky.~~ Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave~~, such as testimony of a witness who saw only the white trail that jet planes often leave~~. This indirect evidence is sometimes referred to as "circumstantial evidence." In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

New September 2003; Revised December 2012

Directions for Use

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084 [105 Cal.Rptr. 387]; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551 [33 Cal.Rptr. 333]; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6 [321 P.2d 803].)

Sources and Authority

- Evidence Code section 410 provides: "As used in this chapter, 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact."
- Evidence Code section 600(b) provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."
- The Assembly Committee on Judiciary Comment to section 600 observes: "Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."
- "[T]he fact that evidence is 'circumstantial' does not mean that it cannot be 'substantial.' Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The terms 'indirect evidence' and 'circumstantial evidence' are interchangeable and synonymous." (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250 [302 P.2d 406], *disapproved on other grounds, People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [293 P.2d 495].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 1, 2

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 138–141

7 Witkin, California Procedure (5th ed. 2008) Trial, § 291

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 19.12–19.18

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.62 (Matthew Bender)

205. Failure to Explain or Deny Evidence

If a party failed to explain or deny evidence against [him/her/it] when [he/she/it] could reasonably be expected to have done so based on what [he/she/it] knew, you may consider [his/her/its] failure to explain or deny in evaluating that evidence.

It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party.~~You may consider whether a party failed to explain or deny some unfavorable evidence. Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.~~

New September 2003; Revised December 2012

Directions for Use

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

Sources and Authority

- Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § ~~116~~115

7 Witkin, California Procedure (5th ed. 2008) Trial, § 302

Cotchett, California Courtroom Evidence, § 11.04 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.93[3] (Matthew Bender)

4 Johnson, California Trial Guide, Ch. 90, *Closing Argument*, § 90.30[2] (Matthew Bender)

208. Deposition as Substantive Evidence

During the trial, you received deposition~~heard~~ testimony that was [read from ~~a~~ the deposition transcript/[*describe other manner presented, e.g., shown by video*]]. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was ~~read~~presented to you in the same way as you consider testimony given in court.

New September 2003; Revised December 2012

Sources and Authority

- Code of Civil Procedure section 2002 provides:
  The testimony of witnesses is taken in three modes:

  1. By affidavit;

  2. By deposition;

  3. By oral examination.

- Code of Civil Procedure section 2025.620 provides, in part: "At the trial ... any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition ... so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision]."

- "Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact." (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)

- Evidence Code section 1291(a) provides:
  Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

  (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

  (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

- Evidence Code section 1292(a) provides:

  Evidence of former testimony is not made inadmissible by the hearsay rule if:

  (1) The declarant is unavailable as a witness;

  (2) The former testimony is offered in a civil action; and

  (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

- Evidence Code section 1290(c) defines "former testimony" as "[a] deposition taken in compliance with law in another action."

- "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code." (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 [201 Cal.Rptr. 887], citation omitted.)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 153–~~163~~162

7 Witkin, California Procedure (5th ed. 2008) Trial, § 293
~~7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351~~

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, §§ 20.30–20.38, Unit 40, *Hearsay*, §§ 40.60-40.61 (Matthew Bender)

5 Levy et al., California Torts, Ch. 72, *Discovery*, § 72.41 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.90–193.96 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 6, *Oral Depositions in California*

211. Prior Conviction of a Felony

You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction [only] to help you decide whether you should believe the witness. [You also may consider the evidence for the purpose of [*specify*].] You must not consider it for any other purpose.

New September 2003; Revised December 2012

Directions for Use

Include the word "only" unless the court has admitted the evidence for some other purpose, in which case, include the next-to-last sentence. For example, a prior alcohol-related conviction might be relevant to show conscious disregard if the claim involves conduct while under the influence.

Sources and Authority

- Evidence Code section 788 provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness's credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.

- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273 [32 Cal.Rptr.2d 337], the court observed: "Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases." (*Id.* at p. 273.)

  In *Robbins*, the court concluded that article I, section 28(f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra*, 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court "may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352." (*Ibid.*)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 292, 294, 295, 308

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.123 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.64

213. Adoptive Admissions

You have heard evidence that [~~*insert* name of declarant~~] made the following statement: [~~*insert description of*~~*describe* statement]. You may consider that statement as evidence against [~~*insert* name of party against whom statement was offered~~] only if you find that ~~both~~ all of the following conditions are true:

1. **The statement was made to [*name of party against whom statement was offered*] or made in [his/her] presence;**

2. **[*Name of party against whom statement was offered*] heard and understood the statement;**

3. **[*Name of party against whom statement was offered*] would, under all the circumstances, naturally have denied the statement if [he/she] thought it was not true;**

   AND

4. **[*Name of party against whom statement was offered*] could have denied it but did not.**

~~1. That [*name of party against whom statement was offered*] was aware of and understood the statement; and~~

~~2. That [*name of party against whom statement was offered*], by words or conduct, either~~

~~(a) expressed [his/her] belief that the statement was true; or~~

~~(b) implied that the statement was true.~~

If you decide that any of these conditions are not true, you must not consider for any purpose either the statement or [*name of party against whom statement was offered*]'s response.

[You must not consider this evidence against any other party.]~~If you do not decide that these conditions are true, you must not consider the statement at all.~~

New September 2003; Revised December 2012

Directions for Use

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admission if it finds that the preliminary facts do not exist.

For statements of a party opponent, see CACI No. 212, *Statements of a Party Opponent*. ~~For admissions by silence, see CACI No. 214, *Admissions by Silence*.~~ Evasive conduct falls under this instruction rather than under CACI No. 212~~ or 214~~.

Sources and Authority

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- ~~The basis for the doctrine of adoptive admissions has been stated as follows:~~ "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104 [12 Cal.Rptr. 470].)

- "[T]here may be admissions other than statements made by the party himself; that is, statements of another may in some circumstances be treated as admissions of the party. The situations are (1) where the person who makes the statement is in privity with the party against whom it is offered, as in the case of agency, partnership, etc.; and (2) where the statement of the other is adopted by the party as his own, either expressly or by conduct. Familiar examples of this second situation are the admissions by silence, where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)

- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].)

- If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson*, *supra*, 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be

inferred from his conduct that he adopted the statement as an admission. (*Gilbert*, *supra*, 249 Cal.App.2d at p. 1009.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102–105

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

Cotchett, California Courtroom Evidence, § 21.09 (Matthew Bender)

2 California Trial Guide, Unit 40, *Hearsay*, § 40.31 (Matthew Bender)

214. Admissions by Silence

Revoked December 2012

You have heard evidence that [*insert name of declarant*] made a statement in the presence of [*insert name of party who remained silent*] that [*insert description of statement*]. You have also heard that [*insert name of party who remained silent*] did not deny the statement.

You may treat the silence of [*insert name of party who remained silent*] as an admission that the statement was true only if you believe all of the following conditions are true:

1. **That [*insert name of party who remained silent*] was aware of and understood the statement;**

2. **That [he/she], by either words or actions, could have denied the statement but [he/she] did not; and**

3. **That [he/she] would have denied the statement if [he/she] thought it was false. In determining this, you may consider whether, under the circumstances, a reasonable person would have denied the statement if he or she thought it was false.**

If you do not decide that all three of these conditions are true, you must not consider [*insert name of party who remained silent*]'s silence as an admission.

New September 2003

Directions for Use

The jury should be instructed on the doctrine of adoptive admission by silence if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104-105 [12 Cal.Rptr. 470].)

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence if it finds that the preliminary facts do not exist.

For statements of a party opponent, see CACI No. 212, *Statements of a Party Opponent*. For admissions by words or evasive conduct, see CACI No. 213, *Adoptive Admissions*.

Sources and Authority

- Evidence Code section 1221 provides: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

- Evidence Code section 403(a)(4) provides: "The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

- The basis for the doctrine of adoptive admissions has been stated as follows: "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)

- This instruction addresses adoption of an admission by silence. Adoption occurs "where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission." (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)

- "The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].) If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson*, *supra*, 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)

- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert*, *supra*, 249 Cal.App.2d at p. 1009.)

- In order for the hearsay evidence to be admissible, "it must have been shown clearly that [the party] heard and understood the statement." (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." (*Southers*, *supra*, 191 Cal.App.2d at p. 104.)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 102–105

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

2 California Trial Guide, Unit 40, *Hearsay*, § 40.31 (Matthew Bender)

215. Exercise of a Communication Privilege

[*Name of party/witness*] has an absolute~~People have a legal~~ right not to disclose what [he/she]~~they~~ told [his/her]~~their~~ [doctor/attorney/[*other*]]~~, etc.~~] in confidence because the law considers this information privileged. Do not consider, for any reason at all, the fact that [*name of party/witness*] did not disclose what [he/she] told [his/her] [doctor/attorney/[*other*]]. Do not discuss that fact during your deliberations or let it influence your decision in any way.~~People may exercise this privilege freely and without fear of penalty.~~

~~**You must not use the fact that a witness exercised this privilege to decide whether he or she should be believed. Indeed, you must not let it affect any of your decisions in this case.**~~

New September 2003; Revised December 2012

Directions for Use

This instruction must be given upon request, ~~where~~ if appropriate and the court has determined that the privilege has not been waived. (Evid. Code, § 913(b).)

Sources and Authority

- Evidence Code section 913(b), provides: "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

- The comment to Evidence Code section 913 notes that this statute "may modify existing California law as it applies in civil cases." Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co.* (1937) 8 Cal.2d 648 [67 P.2d 682] and *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350]. The *Nelson* court had held that evidence of a person's exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself.

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 95–97

7 Witkin, California Procedure (5th ed. 2008) Trial, § 299

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 35.26–35.27

Cotchett, California Courtroom Evidence, § 18.09 (Matthew Bender)

3 California Trial Guide, Unit 51, *Privileges*, §§ 51.01–51.32 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 2, *Scope of Discovery*, 2.09–2.24

216. Exercise of ~~Witness'~~ Right Not to Incriminate Oneself (Evid. Code, § 913)~~Testify~~

[*Name of party/witness***] has an absolute constitutional ~~exercised [his/her] legal~~ right not to give testimony that might tend to incriminate [himself/herself]~~testify concerning certain matters~~. Do not consider, for any reason at all, the fact that [***name of party/witness***] invoked the right not to testify. Do not discuss that fact during your deliberations or let it influence your decision in any way. ~~draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A [party/witness] may exercise this right freely and without fear of penalty.~~**

New September 2003; Revised December 2012

Directions for Use

The privilege against self-incrimination may be asserted in a civil proceeding. (*Kastigar v. United States* (1972) 406 U.S. 441, 444 [92 S.Ct. 1653; 32 L.Ed.2d 212]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759],) Under California law, neither the court nor counsel may comment on the fact that a witness has claimed a privilege, and the trier of fact may not draw any inference from the refusal to testify as to the credibility of the witness or as to any matter at issue in the proceeding. (Evid. Code, § 913(a); see *People v. Doolin* (2009) 45 Cal.4th 390, 441–442 [87 Cal.Rptr.3d 209, 198 P.3d 11].)

Therefore, the issue of a witness's invocation of the Fifth Amendment right not to self-incriminate is raised outside the presence of the jury, and the jury is not informed of the matter. This instruction is intended for use if the circumstances presented in a case result in the issue being raised in the presence of the jury and a party adversely affected requests a jury instruction. (See Evid. Code, § 913(b).)~~Citing *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350], courts have stated the following: "When a claim of privilege made on this ground in a civil proceeding logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 117 [130 Cal.Rptr. 257, 550 P.2d 161], internal citation omitted.) However, Assembly Committee on the Judiciary's comment to Evidence Code section 913 states: "There is some language in *Fross v. Wotton* ... that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."~~

Sources and Authority

- Evidence Code section 913 provides:

  (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any

matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

- Evidence Code section 940 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him."

- ~~Evidence Code section 930 provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."~~

- ~~Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."~~

- "[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity." (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793], internal citation omitted.)

- "[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.' " (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)

- "The Fifth Amendment of the United States Constitution includes a provision that '[no] person ... shall be compelled in any criminal case to be a witness against himself, ...' Although the specific reference is to criminal cases, the Fifth Amendment protection 'has been broadly extended to a point where now it is available even to a person appearing only as a *witness* in *any* kind of proceeding where testimony can be compelled.' " (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], citation and footnote omitted.)

- "There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. 'All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.' " (*Brown, supra*, 180 Cal.App.3d at p. 708, internal citations omitted.)

- "It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action. However, while the privilege of a criminal

defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 [204 Cal.Rptr. 864], internal citations omitted.)

- "The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, 'two separate and distinct testimonial privileges' exist under this guarantee. First, a defendant in a criminal case 'has an absolute right not to be called as a witness and not to testify.' Second, 'in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.' " (*People v. Merfeld*, *supra*, ~~(1997)~~ 57 Cal.App.4th at p.~~1440,~~ 1443 ~~[67 Cal.Rptr.2d 759]~~, internal citations omitted.)

- "The jury may not draw any inference from a witness's invocation of a privilege. Upon request, the trial court must so instruct jurors. 'To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the *propriety* of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence.' Such a procedure makes sense under the appropriate circumstances. If there is a dispute about whether a witness may legitimately rely on the Fifth Amendment privilege against self-incrimination to avoid testifying, that legal question should be resolved by the court. Given the court's ruling and the nature of the potential testimony, the witness may not be privileged to testify at all, or counsel may elect not to call the witness as a matter of tactics." (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 441-442, original italics, internal citations omitted.)

Secondary Sources

2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 96, p. 347

5 Levy et al., California Torts, Ch. 72, *Discovery*, §§ 72.20, 72.30 (Matthew Bender)

Cotchett, California Courtroom Evidence, § 18.09 (Matthew Bender)

3 California Trial Guide, Unit 51, *Privileges*, § 51.32 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.30 et seq. (Matthew Bender)

1 California Deposition and Discovery Practice, Ch. 21, *Privileged Matters in General*, § 21.20, Ch. 22, *Privilege Against Self-Incrimination* (Matthew Bender)

306. Unformalized Agreement

[*Name of defendant***] contends that the parties did not enter into a contract because they had not signed a final written agreement ~~was never written and signed~~. To prove that a contract was created~~overcome this contention~~, [***name of plaintiff***] must prove both of the following:**

1. **That the parties understood and agreed to the terms of the agreement; and**

2. **That the parties agreed to be bound ~~without a written agreement [or~~ before a written agreement was completed and signed~~prepared]~~.**

New September 2003; Revised December 2012

Directions for Use

Give this instruction if the parties agreed to contract terms with the intention of reducing their agreement to a written and signed contract, but an alleged breach occurred before the written contract was completed and signed. For other situations involving the lack of a final written contract, see CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

Sources and Authority

- "Where the writing at issue shows 'no more than an intent to further reduce the informal writing to a more formal one' the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract." (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822], internal citations omitted.)

- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: "[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)

- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237].)

- "Whether it was the parties' mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding

facts and circumstances of a particular case and is a question of fact for the trial court." (*Banner Entertainment, Inc., supra,* 62 Cal.App.4th at p. 358.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 133, 134

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07[3]

325. Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract. [*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] entered into a contract;**

2. **That [***name of plaintiff***] did all, or substantially all of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from having to do those things];**

[3. **That all conditions required for [***name of defendant***]'s performance [had occurred/ [or] were excused];]**

4. **That [***name of defendant***] unfairly interfered with [***name of plaintiff***]'s right to receive the benefits of the contract; and**

5. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New April 2004; Revised June 2011, December 2012

Directions for Use

This instruction should be given ~~only when~~if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be given in addition to CACI No. 303, *Breach of Contract—Essential Factual Elements*, if breach of contract on other grounds is also alleged. For discussion of element 3, see the Directions for Use to CACI No. 303.

Sources and Authority

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)

- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted, original italics.)

- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' ... 'In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.' " (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 [14 Cal.Rptr.2d 335], internal citations omitted.)

- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)

- "Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736].)

- "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 798, 800–802

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)

[*Name of plaintiff***] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [***specify electronic means, e.g., e-mail messages***]. If the parties agree, they may form a binding contract using an electronic record. An "electronic record" is one created, generated, sent, communicated, received, or stored by electronic means. [***E.g., E-Mail***] is an electronic record.**

[*Name of plaintiff***] must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [***e.g., e-mail***] to formalize their agreement.**

[[*Name of plaintiff***] must have sent the contract documents to [***name of defendant***] in an electronic record capable of retention by [***name of defendant***] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

New December 2012

Directions for Use

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply some or all of the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of "electronic record," such as e-mail or fax. (See Civ. Code, § 1633.2(g).) Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

If a law requires a signature, an electronic signature satisfies the law. (Civ. Code, § 1633.7(d).) The UETA defines an electronic signature as an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. (Civ, Code, § 1633.2(h).) The validity of an electronic signature under this definition would most likely be a question of law for the court. If there is an issue of fact with regard to the parties' intent to use electronic signatures, this instruction will need to be modified accordingly.

Sources and Authority

- Civil Code section 1633.2(g) provides: " 'Electronic record' means a record created, generated, sent, communicated, received, or stored by electronic means."

- Civil Code section 1633.2(h) provides: " 'Electronic signature' means an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

- Civil Code section 1633.3(b) provides:

  (b) This title does not apply to transactions subject to the following laws:

  (1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

  (2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.

  (3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

  (4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

- Civil Code section 1633.5(b) provides: "This title [UETA] applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement."

- Civil Code section 1633.7 provides:

  (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

  (b) A contract may not be denied legal effect or enforceability solely because an electronic

record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

- Civil Code section 1633.8(a) provides: "If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record."

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Contracts § 11

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 15, *Attacking or Defending Existence of Contract—Failure to Comply With Applicable Formalities*, 15.32

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.26 (Matthew Bender)

27 California Legal Forms: Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.17 (Matthew Bender)

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**

2. **That the [statement was made to a person other than [***name of plaintiff***]/***specify other publication, e.g., deed became a public record***];**

3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**

4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/***e.g., deed***];**

7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2012

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege.

The privilege of Civil Code section 47(c), applicable to communications between "interested" persons

(see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(c) at issue.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson, supra,* 46 Cal.2d at p. 381.) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683].) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "The elements of a cause of action for slander of title are '(1) a publication, (2) which is *without privilege* or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.'(*Alpha & Omega Development, LP, supra,* 200 Cal.App.4th at p. 664, original italics, internal citations omitted.)

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259],

quoting Rest. 2d Torts § 623A.)

- "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- "Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss." (*Howard v. Schaniel* 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- "Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code." (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405], internal citations omitted.)

- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall

explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- " 'The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.' 'Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].' Finally, 'Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication s one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.'" (*Smith, supra,* 177 Cal.App.3d at pp. 630–631, internal citations omitted.)

- "[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the lis pendens, in addition to being subject to expungement, is not privileged. It follows the lis pendens in that situation may be the basis for an action for slander of title." (*Palmer, supra,* 109 Cal.App.4th at p. 1380.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts § 642

6 Witkin, Summary of California Law (10th ed. 2005) Torts § 1703

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.80 et seq. (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.90 (Matthew Bender)

1821. Damages for Use of Name or Likeness (~~Under Civil~~ Civ. Code ~~Section~~ § 3344(a))

If you decide that [*name of plaintiff*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money will reasonably compensate [*name of plaintiff*] for the harm. This compensation is called "damages."

[*Name of plaintiff*] must prove the amount of [his/her] damages. ~~However,~~ [~~*name*~~ *Name of plaintiff*] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. However, y~~Y~~ou must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [*name of plaintiff*]:

1. **[Humiliation, embarrassment, and mental distress, including any physical symptons;]**

2. **[Harm to [*name of plaintiff*]'s reputation;] [and]**

3. **[*Insert other item(s) of claimed harm*].**

~~**If [*name of plaintiff*] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750.**~~

In addition, [*name of plaintiff*] may recover any profits that [*name of defendant*] received from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] [that have not already been taken into account with regard to~~in computing~~ the above damages]. To establish the amount of ~~such~~ these profits you must:

1. **Determine the gross, or total, revenue that [*name of defendant*] received from ~~such~~ the use;**

2. **Determine the expenses that [*name of defendant*] had in obtaining the gross revenue; and**

3. **Deduct [*name of defendant*]'s expenses from the gross revenue.**

[*Name of plaintiff*] must prove the amount of gross revenue, and [*name of defendant*] must prove the amount of expenses.

New September 2003; Revised June 2012, December 2012

Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or $750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135

Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or modified to simply instruct the jury to award $750 if it finds liability.

The plaintiff might claim that he or she would have earned the same profits that the defendant wrongfully earned. In such a case, to avoid a double recovery, the advisory committee recommends computing damages to recover the defendant's wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 ("other item(s) of claimed harm"). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness.* Give the bracketed phrase in the ~~last full~~ paragraph that introduces the second part of the instruction~~only~~ if the plaintiff's alleges lost profits ~~have been~~ that are different from the defendant's wrongful profits and that are claimed under actual damages item 3.

Sources and Authority

- Civil Code section 3344(a) provides: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs."

- "[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff's right of publicity is not limited to present or future economic loss, but 'may induce humiliation, embarrassment, and mental distress.' " (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)

- "We can conceive no rational basis for the Legislature to limit the $750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: 'If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name …] [that have not already been taken into account in computing the above damages].' (CACI No. 1821, italics omitted.)." (*Orthopedic Systems Inc., supra,* 202 Cal.App.4th at p. 546.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1556

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters West)

VF-1804. Privacy—Use of Name or Likeness (Civ. Code, § 3344)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] knowingly use [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?**
   ____ 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 defendant***] have [***name of plaintiff***]'s consent?**
   ____ Yes ____ No

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

3. **Was [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] directly connected to [***name of defendant***]'s commercial purpose?**
   ____ 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 [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ 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. Did [*name of plaintiff***] suffer any actual damages or is [***name of plaintiff***] reasonably likely to suffer any actual damages in the future?**
Yes No

If your answer to question 5 is yes, then answer questions 6 and 7. If you answered no, answer question 7.]

~~5~~6. What are [*name of plaintiff***]'s actual 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 [humiliation/embarrassment/mental distress including any physical symptoms~~physical pain/mental suffering~~:]

$ _____]

[d. Future noneconomic loss, including [humiliation/embarrassment/mental distress including any physical symptoms ~~physical pain/mental suffering~~:]

$ _____]

TOTAL ACTUAL DAMAGES $ _____

[7. Did [*name of defendant*] receive any profits from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness] that you did not include under [*name of plaintiff*]'s actual damages for lost profits in Question 6 above?
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. What amount of those profits did [*name of defendant*] receive from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness]?

TOTAL PROFITS RECEIVED BY DEFENDANT $ _____]

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.

New September 2003; Revised April 2007, April 2008, December 2010~~;~~, June 2012, December 2012

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. 1804A, *Use of Name or Likeness*, and CACI No. 1821, *Damages for Use of Name or Likeness~~Under Civil Code Section 3344~~*.

Under Civil Code section 3344(a), the plaintiff may recover actual damages or $750, whichever is greater. The plaintiff may also recover any profits that the defendant received from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) The advisory committee recommends calculating the defendant's profits to be disgorged separately from actual damages. Questions 5 through 8 take the jury through the recommended course. If no actual damages are sought, question 5 may be omitted and the jury instructed to enter $750 as the total actual damages in question 6. If the jury awards actual damages of less than $750, the court should raise the amount to $750. If there is no claim to disgorge the defendant's wrongful profits, questions 7 and 8 may be omitted.

Additional questions may be necessary if the facts implicate Civil Code section 3344(d) (see Directions for Use under CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*).

If specificity is not required, users do not have to itemize all the actual damages listed in question ~~5~~ 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*.

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

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[*Name of plaintiff*] claims that [he/she/it] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand in a lawsuit against [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff in underlying case*] brought a lawsuit against [*name of plaintiff*] for a claim that ~~[[he/she/it] alleged]~~ was covered by [*name of defendant*]'s insurance policy;**

2. **That [*name of defendant*] failed to accept a reasonable settlement demand for an amount within policy limits; and**

3. **That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits.**

"Policy limits" means the highest amount available under the policy for the claim against [*name of plaintiff*].

A settlement demand is reasonable if [*name of defendant*] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probable liability.

New September 2003; Revised December 2007, June 2012, December 2012

Directions for Use

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.

This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].) 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 limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified.

This instruction should 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. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)

- "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.)

- "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].)

- "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 v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- "[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, where 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, supra,* 204 Cal.App.4th at p. 244, 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 v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

~~Croskey et al., California Practice Guide: Insurance Litigation, ¶¶ 12:201–12:686 (The Rutter Group)~~

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)

2440. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] discharged [him/her] because [he/she] [acted in furtherance of/ a false claims action/ disclosed information to a [government/law enforcement] agency concerning a false claim]. A false claims action is a lawsuit against a person or entity who is alleged to have submitted a false claim to a government agency for payment or approval. In order to establish [his/her] unlawful discharge claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**
2. **That [***name of false claimant***] was [under investigation for/charged with/[***other***]] defrauding the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**
3. **That [***name of plaintiff***] [***specify disclosures or acts done in furthering the false claims action***];**
4. **That [***name of plaintiff***]'s acts were [a disclosure to a [government/law enforcement] agency/in furtherance of a false claims action];**
5. **That [***name of defendant***] discharged [***name of plaintiff***];**
6. **That [***name of plaintiff***]'s acts [of disclosure/in furtherance of a false claims action] were a motivating reason for [***name of defendant***]'s decision to discharge [him/her];**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

[An act is "in furtherance of" a false claims action if:

[[*Name of plaintiff***] actually filed a false claims action [himself/herself].]**

[*or***]**

[Someone else filed a false claims action but [*name of plaintiff***] [***specify acts in support of action, e.g., gave a deposition in the action***], which resulted in the retaliatory acts.]**

[*or***]**

[No false claims action was ever actually filed, but [*name of plaintiff***] had reasonable suspicions of a false claim, and it was reasonably possible for [***name of plaintiff***]'s conduct to lead to a false claims action.]]**

New December 2012

Directions for Use

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) discloses information to a government or law enforcement agency or (2) takes steps in furtherance of a false claims action. (See Gov. Code, § 12653(b).)

The second sentence of the opening paragraph defines a false claims action in its most common form; submitting a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the disclosures that the plaintiff made or the steps that the plaintiff did that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(b).) Elements 5 and 6 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses "motivating reason" to express both intent and causation. See CACI No. 2507, *"Motivating Reason" Explained*.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

If the defendant alleges that the plaintiff participated in conduct that directly or indirectly resulted in a false claim being submitted, an additional instruction will be required. In such a case, the plaintiff is entitled to relief only if he or she (1) voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed; and (2) had been harassed, threatened with termination or demotion, or otherwise coerced by the defendant into engaging in the fraudulent activity in the first place. (Gov. Code, § 12653(d).)

Sources and Authority

- Government Code section 12653 provides:

  (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.

  (b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any

other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.

(c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

- "The False Claims Act prohibits a "person" from defrauding the government of money, property, or services by submitting to the government a 'false or fraudulent claim' for payment." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)

- "The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a 'person' being liable for defrauding the government, but of an 'employer' who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been 'characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1274.)

- "[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged 'in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1276.)

- "Generally, to constitute protected activity under the CFCA, the employee's conduct must be in

furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action." (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)

- "There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra,* 179 Cal.App.4th at pp. 59–60.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288

5 Witkin, Summary of California Law (10th ed. 2005) Torts § 767

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

2441. Discrimination Against Member of Military—Essential Factual Elements (Mil. & Vet. Code, § 394)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] because of [his/her] [current/past] service in the [United States/California] military. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **That [***name of plaintiff***] [was serving/had served] in the [***specify military branch, e.g., California National Guard***];**

3. **That [***name of defendant***] discharged [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [[past/current] service in the armed forces/need to report for required military [duty/training]] was a motivating reason for [***name of defendant***]'s decision to discharge [***name of plaintiff***];**

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.**

New December 2012

Directions for Use

Military and Veterans Code section 394 prohibits employment discrimination against members of the military on two grounds. First, discrimination is prohibited based simply on the plaintiff's military membership or service. In other words, an employer, public or private, may not refuse to hire or discharge someone based on the fact that the person serves or has served in the armed forces. (Mil. & Vet. Code, § 394(a), (b).) Second, a military-member employee is protected from discharge or other adverse actions because of a requirement to participate in military duty or training. (Mil. & Vet. Code, § 394(d).) For element 4, choose the appropriate option.

The statute prohibits a refusal to hire based on military status, and also reaches a broad range of adverse employment actions short of actual discharge. (See Mil. & Vet. Code, § 394(a), (b), (d) [prohibiting prejudice, injury, harm].) Elements 1, 3, 4, and 6 may be modified to refer to seeking employment and refusal to hire. Elements 3, 4, and 6 may be modified to allege constructive discharge or adverse acts other than discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses "motivating reason" to express both intent and causation. See CACI No. 2507,

"Motivating Reason" Explained.

Sources and Authority

- Military and Veterans Code section 394 provides in part:

  (a) No person shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any person, employer, or officer or agent of any corporation, company, or firm with respect to that member's employment, position or status or be denied or disqualified for employment by virtue of membership or service in the military forces of this state or of the United States.

  (b) No officer or employee of the state, or of any county, city and county, municipal corporation, or district shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any officer or employee of the state, or of any county, city and county, municipal corporation, or district with respect to that member's employment, appointment, position or status or be denied or disqualified for or discharged from that employment or position by virtue of membership or service in the military forces of this state or of the United States.

  (c) [omitted]

  (d) No employer or officer or agent of any corporation, company, or firm, or other person, shall discharge any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer, or enlisted member of the military or naval forces of this state, or hinder or prevent that person from performing any military service or from attending any military encampment or place of drill or instruction he or she may be called upon to perform or attend by proper authority; prejudice or harm him or her in any manner in his or her employment, position, or status by reason of performance of military service or duty or attendance at military encampments or places of drill or instruction; or dissuade, prevent, or stop any person from enlistment or accepting a warrant or commission in the California National Guard or Naval Militia by threat or injury to him or her in respect to his or her employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission.

  (e)–(h) [omitted]

- [I]ndividual employees may not be held personally liable under section 394 for alleged discriminatory acts that arise out of the performance of regular and necessary personnel management duties." (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 998 [134 Cal. Rptr. 3d 214].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 355, 426

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [***describe activity protected by the FEHA***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***describe protected activity***];**

2. **[That [***name of defendant***] [discharged/demoted/[***specify 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;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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.**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 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. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting

liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Also select "conduct" in element 3 if the third option is included for element 2.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of

any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs., tit. 2, § 7287.8(a).)

- "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042, internal citations omitted.)

- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision." (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra,* 36 Cal.4th at p. 1052.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra,* 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

- "Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.' Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers." (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer's harassment against those employees." (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)

- "[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), 'by permitting … fellow employees to punish [him] for invoking [his] rights.' We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446,. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for

complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:680–7:841 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters West)

2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

In this case, the decision to [discharge/[*other adverse employment action***]] [***name of plaintiff***] was made by [***name of decision maker***]. Even if [***name of decision maker***] did not hold any [discriminatory/retaliatory] intent [or was unaware of [***name of plaintiff***]'s conduct on which the claim of retaliation is based], [***name of defendant***] may still be liable for [discrimination/retaliation] if [***name of plaintiff***] proves both of the following:**

1. **That [***name of plaintiff***]'s [***specify protected activity or attribute***] was a motivating reason for [***name of supervisor***]'s [***specify acts of supervisor on which decision maker relied***]; and**

2. **That [***name of supervisor***]'s [***specify acts on which decision maker relied***] was a motivating reason for [***name of decision maker***]'s decision to [discharge/***other adverse employment action***] [***name of plaintiff***].**

New December 2012

Directions for Use

Give this instruction if the "cat's paw" rule is a factor in the case. Under the cat's paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the "cat's paw" of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

The purpose of this instruction is to make it clear to the jury that they are not to evaluate the motives or knowledge of the decision maker, but rather to decide whether the acts of the supervisor with animus actually caused the adverse action. Give the optional language in the second sentence of the first paragraph in a retaliation case in which the decision maker was not aware of the plaintiff's conduct that allegedly led to the retaliation (defense of ignorance). (See *Reeves, supra,* 121 Cal.App.4th at pp. 106–108.)

Sources and Authority

- "This case presents the question whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities. We hold that so long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or 'cat's paws' for the supervisor, that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury." (*Reeves, supra,* 121 Cal.App.4th at p. 100.)

- "This concept—which for convenience we will call the 'defense of ignorance'—poses few analytical challenges so long as the 'employer' is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of 'the employer' may be fraught with ambiguities, untested assumptions, and begged questions." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "[P]laintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a 'but-for' cause, i.e., a force without which the adverse action would not have happened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation." (*Reeves, supra,* 121 Cal.App.4th at p. 108.)

- "Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a 'solid case' of 'workplace violence,' and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn." (*Reeves, supra,* 121 Cal.App.4th at p. 121.)

- "Our emphasis on the conduct of *supervisors* is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker." (*Reeves, supra,* 121 Cal.App.4th at p. 109 fn. 9, original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 921, 940

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶ 7:806.5 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][a] (Matthew Bender)

2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12940(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] by failing to reasonably accommodate [his/her] religious [belief/observance]. 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/[***other covered relationship to defendant***]];**

3. **That [***name of plaintiff***] has a sincerely held religious belief that [***describe religious belief, observance, or practice***];**

4. **That [***name of plaintiff***]'s religious [belief/observance] conflicted with a job requirement;**

5. **That [***name of defendant***] knew of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement;**

6. **That [***name of defendant***] did not reasonably accommodate [***name of plaintiff***]'s religious [belief/observance];**

7. [**That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***] for failing to comply with the conflicting job requirement;]**

   [**or**]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action for failing to comply with the conflicting job requirement;]**

   [**or**]

   [That [*name of plaintiff***] was constructively discharged for failing to comply with the conflicting job requirement;]**

8. **That [***name of plaintiff***] was harmed; and**

9. **That [***name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] was a substantial factor in causing [his/her] harm.**

If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.

New September 2003; Revised June 2012, December 2012

Directions for Use

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 7 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 7 and also give CACI No. 2510, *"Constructive Discharge" Explained*.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir.1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, a threat of discharge or discipline may be inserted as an "other adverse employment action." Or in the second option, "subjected [*name of plaintiff*] to" may be replaced with "threatened [*name of plaintiff*] with."

Sources and Authority

- Government Code section 12940(*l*)(1) provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship, as defined in subdivision (t) of Section 12926, on the conduct of the business of the employer ... . Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance, and religious dress practice and religious grooming practice as described in subdivision (p) of Section 12926."

- Government Code section 12926(p) provides: "'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice, including religious dress and grooming practices. 'Religious dress practice' shall be construed broadly to include the wearing or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed. 'Religious grooming practice' shall be construed broadly to include all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed."

- The Fair Employment and Housing Commission's regulations provide: "'Religious creed' includes

any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant's or employee's religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation." (Cal. Code Regs., tit. 2, § 7293.1(b).)

- The Fair Employment and Housing Commission's regulations provide: "An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.3.)

- "In evaluating an argument the employer failed to accommodate an employee's religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)

- "Any reasonable accommodation is sufficient to meet an employer's obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer's efforts to accommodate is determined on a case by case basis ... . '[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee's proposed accommodations would result in undue hardship.' '[W]here the employer has already reasonably accommodated the employee's religious needs, the ... inquiry [ends].' " (*Soldinger, supra,* 51 Cal.App.4th at p. 370, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters West)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224,

226–227; *id.* (2000 supp.) at pp. 100–101

2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship

Revoked December 2012

See Gov. Code, § 12940(*l*) as amended by Stats 2012, Ch. 287 (A.B. 1964); see also Gov. Code, § 12926(t), CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*.

[*Name of defendant*] claims that its failure, if any, to accommodate [*name of plaintiff*]'s religious [belief/observance] was justified because any accommodation would have caused undue hardship. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] explored available ways to accommodate [*name of plaintiff*]'s religious [belief/observance], including excusing [him/her] from duties that conflict with [his/her] religious [belief/observance] or permitting those duties to be performed at another time or by another person; and**

2. **That [*name of defendant*] was unable to accommodate [*name of plaintiff*]'s religious [belief/observance] without causing undue hardship on the conduct of [*name of defendant*]'s business.**

An accommodation causes an "undue hardship" when it would have more than an insignificant effect on the business.

New September 2003

Directions for Use

Note that the terms "reasonable accommodation" and "undue hardship" do not have the same meanings under religious discrimination and disability discrimination laws as interpreted by California and federal courts. Because an employer has a competing duty to avoid religious preferences, the duty to accommodate an employee's religious beliefs presents a lesser burden than the duty to accommodate an employee's disability.

Sources and Authority

- Government Code section 12940(*l*) provides that it is an unlawful employment practice "[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer. Religious belief or observance ... includes, but is not limited to, observance

of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance."

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ... '[A]n accommodation causes "undue hardship" whenever that accommodation results in "more than a de minimis cost" to the employer.' " (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far ... . Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages ... . To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:215, 7:305, 7:610, 7:631, 7:640–7:641

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35[2][a]–[c], 115.54, 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) §§ 2:71–2:73

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234; *id.* (2000 supp.) at pp. 100–105

VF-2512. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(l))—Affirmative Defense—Undue Hardship

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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. **Does [***name of plaintiff***] have a sincerely held religious belief that [***describe religious belief, observance, or practice***]?**
   ____ 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***]'s religious [belief/observance] conflict with a job requirement?**
   ____ 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. **Did [***name of defendant***] know of the conflict between [***name of plaintiff***]'s religious [belief/observance] and the job requirement?**
   ____ 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***] reasonably accommodate [***name of plaintiff***]'s religious [belief/observance]?**

____ Yes ____ No

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

7. Did [*name of defendant***] explore available ways to accommodate [***name of plaintiff***]'s religious [belief/observance]?**
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, skip question 8 and answer question 9.

8. Could [*name of defendant***] have accommodated [***name of plaintiff***]'s religious [belief/observance] without causing undue hardship to [***name of defendant***]'s business?**
____ 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. Did [*name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***] because [***name of plaintiff***] failed to comply with the conflicting job requirement?**
____ Yes ____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Was [*name of defendant***]'s failure to reasonably accommodate [***name of plaintiff***]'s religious [belief/observance] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. 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.

New September 2003; Revised April 2007, December 2010, December 2012

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. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements*, and See also Gov. Code, §§ 12926(t), 12940(*l*); CACI No. 25612545, *Religious CreedDisability Discrimination—Reasonable Accommodation —Affirmative Defense—Undue Hardship*.

If specificity is not required, users do not have to itemize all the damages listed in question 11 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*.

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

2620. CFRA Rights Retaliation—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. 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] [family care/medical] leave/[***other protected activity***]];**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a motivating reason for [discharging/[***other adverse employment action***]] [him/her];**

5. **That [***name of plaintiff***] was harmed; and**

6. **That [***name of defendant***]'s retaliatory conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2012

Directions for Use

The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12945.2(*l*).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Sources and Authority

- Government Code section 12945.2(*l*) provides:

  > It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:
  >
  > (1) An individual's exercise of the right to family care and medical leave ...

(2) An individual's giving information or testimony as to his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.

- Government Code section 12945.2(t) provides: "It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section."

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- "A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave*." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491 [130 Cal.Rptr.3d 350], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 943, 944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (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*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

[*Name of defendant***] claims that [he/she/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an executive employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an executive if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve management of [***name of defendant***]'s [business/enterprise] or of a customarily recognized department or subdivision of the [business/enterprise];**

2. **[***Name of plaintiff***] customarily and regularly directs the work of two or more employees;**

3. **[***Name of plaintiff***] has the authority to hire or fire employees, or [his/her] suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight;**

4. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

5. **[***Name of plaintiff***] performs executive duties more than half of the time; and**

6. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs executive duties more than half of the time, consider the work that [he/she] actually performs during the course of a workweek, not [his/her] job title.**

New December 2012

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt executive. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].) For an instruction for the affirmative defense of administrative exemption, see CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the executive exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal.Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be primarily engaged in duties that "meet the test of the

exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(1)(e) , sec. 2 (J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 5. However, the contours of executive duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "executive duties" in element 5.

Sources and Authority

- Labor Code section 515(a) provides in part: "The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a 'customarily recognized department or subdivision thereof'; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given 'particular weight'; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., § 11090, subd. 1(A)(1)].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014.)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is

insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 361

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

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

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

[*Name of defendant***] claims that [he/she/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an administrative employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an administrator if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [***name of defendant***] or [***name of defendant***]'s customers;**

2. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

3. **[[***Name of plaintiff***] performs, under general supervision only, specialized or technical work that requires special training, experience, or knowledge;]**

   [*or***]**

   [[*Name of plaintiff***] regularly and directly assists a proprietor or bona fide executive or administrator;]**

   [*or***]**

   [[*Name of plaintiff***] performs special assignments and tasks under general supervision only;]**

4. **[***Name of plaintiff***] performs administrative duties more than half of the time; and**

5. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs administrative duties more than half of the time, consider the work that [he/she] actually performs during the course of a workweek, not [his/her] job title.**

New December 2012

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the

transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the administrative exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be "primarily engaged in duties that meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(2)(f), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 4. However, the contours of administrative duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "administrative duties" (element 4) and the meaning of "directly related" (element 1).

Sources and Authority

- Labor Code section 515(a) provides in part: "The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment."

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "In order to establish that [plaintiff] was exempt as an administrative employee, [defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [defendant]; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1(A)(2)].)

- "Read together, the applicable Labor Code statutes, wage orders, and incorporated federal regulations now provide an explicit and extensive framework for analyzing the administrative exemption." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-

intensive inquiry." (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work*, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

- "In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ' "administering the business affairs of the enterprise" ' and production-level employees whose ' "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." [Citation.]' ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments." (*Harris, supra,* 53 Cal.4th at pp. 183, 188.)

- "We do not hold that the administrative/production worker dichotomy … can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. [¶] … [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance … is it appropriate to reach out to other sources." (*Harris, supra,* 53 Cal.4th at p. 190.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 361

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

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

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2730. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **[That [***name of plaintiff***] disclosed to a [government/law enforcement] agency that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [***name of defendant***]'s [violation of/noncompliance with] a [state/federal] rule or regulation;]**

   [*or***]**

   [That [*specify activity***] would result in [a violation of/noncompliance with] a [state/federal] rule or regulation;]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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.**

[The disclosure of policies that an employee believes to be unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff***] must have reasonably believed that [***name of defendant***]'s policies violated federal or state statutes, rules or regulations.]**

[It is not [*name of plaintiff***]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]**

[A report made by an employee of a government agency to his or her employer may be a protected disclosure.]

[A report of publicly known facts is not a protected disclosure.]

New December 2012

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses or refuses to participate in illegal activity. (Lab. Code, § 1102.5(b), (c).) Select the first option for elements 2 and 3 for disclosure of information; select the second options for refusal to participate. Also select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case.

Retaliation is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation.*) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction. CACI No. 2507, *"Motivating Reason" Explained,* may be given in support of element 5.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6.)

Sources and Authority

- Labor Code section 1102.5 provides:

  (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information

- Labor Code section 1102.6 provides: "In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5."

- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)

- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 1060 P.2. 1046].)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court

acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 844 [136 Cal.Rptr.3d 259].)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853)

- "[I]t is not the motive of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852.)

- "[I] f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

~~3007~~3001. Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of an official [policy/custom] of the [***name of local governmental entity***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That the [***name of local governmental entity***] had an official [policy/custom] [***specify policy or custom***];**

~~2. That [*name of local governmental entity*] knew, or it should have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [*specify right violated*];~~

~~3~~2. **That [***name of officer or employee***] was an [officer/employee/[***other***]] of [***name of local governmental entity***];**

~~4~~3. **That [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***];**

~~5~~4. **That [***name of officer or employee***]'s conduct violated [***name of plaintiff***]'s right [***specify right***];**

~~6~~5. **That [***name of officer or employee***] acted because of this official [policy/custom].**

New September 2003; Revised December 2010, Renumbered from CACI No. 3007 and Revised December 2012

Directions for Use

Give this instruction and CACI No. ~~3008~~3002, *"Official Policy or Custom" Explained*, if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's official policy or custom. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

~~The policy must amount to a deliberate indifference to constitutional rights. (*Burke v. County of Alameda* (9th Cir. 2009) 586 F.3d 725, 734.) Element 2 expresses this deliberate indifference standard. (See *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.)~~

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require "deliberate indifference." (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th

1468, 1477 [59 Cal.Rptr.2d 834.)

For other theories of liability against a local governmental entity, see CACI No. ~~3009~~3003, *Local Government Liability—Failure to Train—Essential Factual Elements,* and CACI No. ~~3010~~3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)

- ~~"To establish municipal liability under § 1983, a plaintiff 'must show that (1) she was deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation.' " (*Burke, supra*, 586 F.3d at p. 734.)~~

- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom." ' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)

- "Normally, the question of whether a policy or custom exists would be a jury question. However,

when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

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

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

3015. Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest (42 U.S.C. § 1983)

Revoked December 2012

~~**[*Name of plaintiff*]'s arrest was not wrongful if [*name of defendant*] had probable cause to arrest [*him/her*] without a warrant.**~~

~~**[*Name of defendant*] had probable cause to arrest [*name of plaintiff*] without a warrant if at the time of the arrest [he/she] knew or had reasonably trustworthy information sufficient to lead a law enforcement officer of reasonable caution to believe that [*name of plaintiff*] had committed or was in the process of committing a crime.**~~

~~**Whether [*name of defendant*] had probable cause for the arrest must be determined by looking at all of the circumstances. Conclusive evidence of guilt is not necessary to establish probable cause. However, mere suspicion or common rumor is not enough. Whether the officer acted in good faith or bad faith is not relevant. There must be some evidence that would allow a reasonable officer to conclude that a particular individual has committed or is in the process of committing a criminal offense.**~~

~~*New April 2009; Revised June 2012*~~

~~Directions for Use~~

~~Give this instruction in a false arrest case brought under Title 42 United States Code section 1983 in which the defendant asserts that there was probable cause to support the warrantless arrest. For an instruction for probable cause under California law, see CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest.*~~

~~There is perhaps some difference between the federal standard and the California standard with regard to the respective roles of judge and jury in determining probable cause to arrest. Under federal law construing section 1983, probable cause is usually a question for the jury. Summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest. (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1007–1008.) Under California law, the court makes the final determination on probable cause as a matter of law. However, the jury may be called on to resolve any disputed facts before the court makes its determination. (See *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535].)~~

~~There appears to be little or no actual difference in the two standards; both call for the jury to resolve disputed facts and for the court to decide the issue if there are none. Presumably, the case would not have made it to trial under either standard if there were no disputed facts and probable cause could be found as a matter of law. (See *Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126, ––– [probable cause found as a matter of law; summary judgment should have been entered].) The distinction is that under the federal standard, once the case makes it to trial, the jury is told to make the final determination on probable cause. Under the California standard, the jury is told only to find specified particular facts and must~~

leave the conclusion to be drawn from those facts to the court. This is perhaps a distinction without a difference. If the plaintiff alleges counts under both section 1983 and California law, consider combining this instruction with CACI No. 1402.

Sources and Authority

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- "Our task in determining whether probable cause to arrest existed as a matter of law in this § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. … By contrast, in a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, …; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest." (*McKenzie*, *supra*, 738 F.2d at pp. 1007–1008, internal citations omitted.)

- "In reviewing the grant of a motion for judgment as a matter of law, we must determine whether a reasonable jury could have concluded that the detectives lacked probable cause to arrest [plaintiff]." (*Torres v. City of L.A.* (9th Cir. 2008) 548 F.3d 1197, 1208.)

- "Here, the district court found that a 'reasonable jury could find a lack of probable cause at this stage,' not because the parties disputed what [defendants] knew about [plaintiff]'s actions, but instead because, in the court's view, those actions were 'consistent' with the inference that [plaintiff] had committed no crime. In doing so, the Court implicitly acknowledged that no material dispute existed concerning what facts [defendants] knew. Instead, the only material disputes concerned 'what inferences properly may [have] be[en] drawn from those historical facts.' Accordingly, … the district court should have decided 'whether probable cause existed' when [defendants] arrested [plaintiff], and reserving this question for the jury was error." (*Conner*, *supra*, -- F.3d --, --, internal citation omitted.)

- "The fact that reasonable people could draw different conclusions based on [plaintiff]'s behavior, however, is irrelevant to the probable cause analysis.. The only question is whether [defendants] could have reasonably concluded, under the totality of the circumstances, that a 'fair probability' existed that [plaintiff] knew that he controlled Harrah's property and intended to deprive Harrah's of that property. Whether the opposite conclusion was also reasonable, or even more reasonable, does not matter so long as the [defendant]'s conclusion was itself reasonable." (*Conner*, *supra*, -- F.3d --, --, internal citation omitted.)

- "Probable cause existed if 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had

committed a crime.' " (*United States v. Carranza* (9th Cir. 2002) 289 F.3d 634, 640.)

- " 'Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.' 'While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, "[m]ere suspicion, common rumor, or even strong reason to suspect are not enough." ' Under the collective knowledge doctrine, in determining whether probable cause exists for arrest, we look to 'the collective knowledge of all the officers involved in the criminal investigation[.]' " (*Torres*, *supra*, 548 F.3d at pp. 1206–1207, internal citations omitted.)

- "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause … ." (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769], internal citation omitted.)

- "There must be some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense." (*McKenzie*, *supra*, 738 F.2d at p. 1008.)

- "The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152 [125 S.Ct. 588, 160 L.Ed.2d 537], internal citations omitted.)

- "[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, ' "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." ' '[T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, whatever the subjective intent.' '[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.' " (*Devenpeck*, *supra*, 543 U.S. at p. 153, internal citations omitted.)

- "We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith on the part of the arresting officers is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." (*Beck v. Ohio* (1964) 379 U.S. 89, 97 [85 S.Ct. 223, 13 L.Ed.2d 142], internal citation omitted.)

- "Generally, officers need not have probable cause for every element of the offense, but they must have probable cause for specific intent when it is a required element. [¶] Because the probable cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest. Probable cause, however, must still exist under some specific criminal statute. It is therefore not enough that probable cause existed to arrest [plaintiff] for some metaphysical criminal offense; the Officers must ultimately point to a particular statutory offense." (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 953–954, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

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

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

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

~~3025~~3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threat~~en~~s, intimidation, or coercion~~ing or committing violent acts~~. To establish this claim, [*name of plaintiff*] must prove all of the following:

~~1. That [*name of defendant*] interfered with [or attempted to interfere with] [*name of plaintiff*]'s right [*insert alleged constitutional or statutory right*] by threatening or committing violent acts;~~

~~2~~1. **[That [*name of defendant*] made threats of violence against [*name of plaintiff*] causing [*name of plaintiff*] to reasonably believe~~d~~ that if [he/she] exercised [his/her] right [*insert right, e.g., "to vote"*], [*name of defendant*] would commit violence against [[him/her] [or] [his/her] property] and that [*name of defendant*] had the apparent ability to carry out the threats;]**

[*or*]

[That [*name of defendant*] ~~injured~~ acted violently against [[*name of plaintiff*]/ [and]~~or~~ [~~his/her~~*name of plaintiff*]'s property] [to prevent [him/her] from exercising [his/her] right [*insert right*]/to ~~or~~ retaliate~~d~~ against [*name of plaintiff*] for having exercised [his/her] right [*insert right*]];]

~~3~~2. **That [*name of plaintiff*] was harmed; and**

~~4~~3. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"];

City and County of San Francisco v. Ballard (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 2 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, ~~Unless plaintiff is claiming actual damages,~~ omit elements ~~3~~ 2 and ~~4~~3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages* and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

Sources and Authority

- Civil Code section 52.1 provides~~,~~ in part:

> (a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.
>
> (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.
>
> [(c)-(i) omitted]
>
> (j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a

specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

- Civil Code section 52~~(b)~~ provides:

  (a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

  (b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

  (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.

  (2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.

  (3) Attorney's fees as may be determined by the court.

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)

- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye*, *supra*, 203 Cal.App.4th at p. 956.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.*

(1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones*, *supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye*, *supra*, 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones*, *supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

- "[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela*, *supra*, ~~*v. Browning-Ferris Industries* (1998)~~ 68 Cal.App.4th ~~101,~~at p. 111 ~~[80 Cal.Rptr.2d 60]~~.)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S.*, *supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.27 (Matthew Bender)

VF-~~3015~~3035. Bane Act (Civ. Code, § 52.1)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make threats of violence against~~interfere with [or attempt to interfere with]~~ [[***name of plaintiff***]/ [or] [***name of plaintiff***]'s property]~~'s right [*insert alleged constitutional or statutory right*] by threatening or committing violent acts~~?**
   ____ **Yes** ____ **No**

   [*or*]

1. **Did [***name of defendant***] act violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property]?**
2. ____ **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 defendant***]'s threats cause [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***] [***name of defendant***] would commit violence against [him/her] or [his/her] property and that [***name of defendant***] had the apparent ability to carry out the threat?**
   ____ **Yes** ____ **No**

   [*or*]

2. **Did [***name of defendant***] commit these acts of violence to [prevent [***name of plaintiff***] from exercising [his/her] right [***insert right, e.g., "to vote"***]/retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]]?**
   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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ **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. **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 $ _____

[Answer question 5.

~~**5. What amount, if any, do you award as a penalty against [*name of defendant*]?**~~
~~**$ _____]**~~

~~**[Answer question 6.**~~

~~6~~5. What amount do you award as punitive damages?

$ _____]

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.

New September 2003; Revised April 2007, December 2010, Renumbered from CACI No. VF-3015 and Revised December 2012

Directions for Use

~~Civil Code section 52.1 references all damages under section 52, but does not specify whether subdivision 52(a) or 52(b), or both, is/are intended. Depending on how this point is decided, select question 5 and/or 6 as appropriate.~~

~~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. ~~3025~~3066, *Bane Act—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.

Give the first option for elements 1 and 2 if the defendant has threatened violence. Give the second option if the defendant actually committed violence.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the Bane Act refers to section 52. (See Civ. Code, § 52.1(b).) This reference would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52. The court should compute the damages under section 52(a) by multiplying actual damages by three, and awarding $4,000 if the amount is less. Questions 5 addresses punitive damages under section 52(b).~~If the plaintiff alleges an alternative ground of liability, modify question 2 as in element 2 of CACI No. 3025.~~

If no actual damages are sought, the $4000 statutory minimum damages may be awarded without proof of harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) In this case, only questions 1 and 2 need be answered.

If specificity is not required, users do not have to itemize all the damages listed in question 4 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*.

3205. Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—Essential Factual Elements (Civ. Code, § 1793.2(b))

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] failed to [begin repairs on the [***consumer good/new motor vehicle***] in a reasonable time/ [or] repair the [***consumer good/new motor vehicle***] within 30 days]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***consumer good/new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**

3. **That the [***consumer good/new motor vehicle***] had [a] defect[s] that [was/were] covered by the warranty;**

4. **That [***name of defendant***] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] complete repairs within 30 days so as to conform to the applicable warranties].**

New December 2011; Revised December 2012

Directions for Use

Give this instruction for the defendant's alleged breach of Civil Code section 1793.2(b), which requires that repairs be commenced within a reasonable time and finished within 30 days unless the buyer otherwise agrees in writing. This instruction assumes that the statute contains two separate requirements, one for starting repairs and one for finishing them, either of which would be a violation.

The damages recoverable for unreasonable delay in repairs are uncertain. A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a consumer good or new motor vehicle as provided in section 1793.2(d). Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities. (*Gavaldon v.DaimlerChrysler Corp.* (2004) 32 Cal.4th 1246, 1262 [13 Cal.Rptr.3d 793, 90 P.3d 752]; see Civ. Code, §§ 1793.2(d), 1793.22.) Commercial Code remedies that are generally available under Song-Beverly permit the buyer to cancel the sale and recover the price paid, or to accept the goods and recover diminution in value. (See Civ. Code, § 1794(b); Cal. U. Comm. Code, §§ 2711–2715.) It seems questionable, however, that a buyer could cancel the sale and get the purchase price back solely for delay in completing repairs, particularly if the repairs were ultimately successful.

Delay caused by conditions beyond the control of the defendant extends the 30-day requirement. (Civ. Code, § 1793.2(b).) It would most likely be the defendant's burden to prove that conditions beyond its control caused the delay.

Sources and Authority

- Civil Code section 1793.2(b) provides as follows: "Where those service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods shall be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming goods shall be tendered as soon as possible following termination of the condition giving rise to the delay."
- Civil Code section 1794(a) provides as follows: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief."

- "[T]he fifth cause of action in each complaint clearly stated a cause of action under Civil Code section 1794 … . Plaintiff had pleaded that he was such a buyer who was injured by a 'willful' violation of Civil Code section 1793.2, subdivision (b) which in pertinent part requires that with respect to consumer goods sold in this state for which the manufacturer has made an express warranty and service and repair facilities are maintained in this state (undisputed herein) and 'repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative.' " (*Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [215 Cal.Rptr. 507], footnote omitted.)

- ~~"[Defendant] also argues it was incumbent on [plaintiff] to prove not only that the car leaked oil but also to show the cause of the leak, and that he failed to meet this burden because he produced no expert testimony proving the cause of the leak. However, the statute requires only that [plaintiff] prove the car did not conform to the express warranty, and proof that there was a persistent leak that [dealer] could not locate or repair suffices. We do not interpret the statute as depriving a consumer of a remedy if he cannot do what the manufacturer, with its presumably greater expertise, was incapable of doing, i.e. identify the source of the leak." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)~~

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 317 et seq.

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.43, 502.161 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

30 California Legal Forms, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

4107. Duty of Disclosure by Real Estate Broker to Client

As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.

The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.

[A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.]

New April 2008; Revised December 2012

Directions for Use

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements,* if a real estate broker's duty of disclosure to the broker's own client is at issue. Give the second paragraph if relevant to the facts of the case.

Sources and Authority

- "Under the common law, … a broker's fiduciary duty to his client requires the highest good faith and undivided service and loyalty. 'The broker as a fiduciary has a duty to learn the material facts that may affect the principal's decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal's decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent's duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.' " (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784, internal citations omitted.)

- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)

- " 'W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. …' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' " (*Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1518–1519 [116 Cal.Rptr.3d 419], internal citations omitted.)

- " 'A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.' " (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)

- "[T]he broker has a fiduciary duty to investigate the material facts of the transaction, and he cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified. Because of the fiduciary obligations of the broker, the principal has a right to rely on the statements of the broker, and if the information is transmitted by the broker without verification and without qualification, the broker is liable to the principal for negligent misrepresentation." (*Salahutdin*, *supra*, 24 Cal.App.4th at pp. 562–563.)

- "[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts]." (*Michel, supra,* 156 Cal.App.4th at p. 763, original italics.)

- "The statutory duties owed by sellers' brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)

- "[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question." (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

- "[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this fiduciary duty is not a creature of contract and, therefore, did not arise under the buyer-broker agreement.." (*William L. Lyon & Associates, Inc.*, *supra*, 204 Cal.App.4th at p. 1312, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:164 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

4120. Affirmative Defense—Statute of Limitations

[*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 four years before complaint was filed***] unless [***name of plaintiff***] proves that before [***insert date four years before complaint was filed***], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [***name of defendant***]'s wrongful act or omission.**

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra*, 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, 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*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

Sources and Authority

- Code of Civil Procedure section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg*, *supra*, ~~*v. Western Title Ins. Co.* (1991)~~ 230 Cal.App.3d at p.~~1223,~~ 1230 ~~[282 Cal.Rptr. 43]~~, internal citation omitted.)

- " '[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,' governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty." (*Thomson*, *supra*, 198 Cal.App.4th at p. 607.)

- "Defendants argue on appeal that the gravamen of plaintiff's complaint is that defendants' acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff's claim is not founded upon the concealment of facts but upon defendants' alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud." (*Thomson*, *supra*, ~~*v. Canyon* (2011)~~ 198 Cal.App.4th at p.~~594,~~ 607 ~~[129 Cal.Rptr.3d 525]~~.)

- "Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343 … . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. … .[¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud." (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312, 1313 [139 Cal.Rptr.3d 670].)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg*, *supra*, 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "We also are not persuaded by [defendant]'s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: 'A misrepresentation that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.' " (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)

- "[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs*, *supra*, 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)

- " '[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].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 677–679

~~3 Witkin, California Procedure (4th ed. 1996) Actions, §§ 617–619~~

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

5002. Evidence

~~Sworn testimony, documents, or anything else may be admitted into evidence.~~ You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, you must ignore the question. If the witness did not answer, you must not guess what he or she might have said or why I sustained the objection. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

New September 2003; Revised April 2004, February 2007, December 2012

Directions for Use

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law. For a similar instruction to be given before trial, see CACI No. 106, *Evidence*.

Include the bracketed language in the third paragraph if the parties have entered into any stipulations of fact.

Read the last bracketed paragraph if a motion to strike testimony was granted during the trial.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of

a fact."

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:
  (a) All questions of fact are to be decided by the jury.

  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

  A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:
  (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
  (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 22 et seq.

7 Witkin, California Procedure (5th ed. 2008) Trial, § 272

Cotchett, California Courtroom Evidence, § 2.09 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.61 (Matthew Bender)

5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

(a) How well did the witness see, hear, or otherwise sense what he or she described in court?

(b) How well did the witness remember and describe what happened?

(c) How did the witness look, act, and speak while testifying?

(d) Did the witness have any reason to say something that was not true? ~~Did~~ For example, did the witness show any bias or prejudice~~? Did the witness~~ or have a personal relationship with any of the parties involved in the case~~? Does the witness~~ or have a personal stake in how this case is decided?

(e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

You must not be biased against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [*insert any other impermissible form of bias***]].**

New September 2003; Revised April 2004, April 2007, December 2012

Directions for Use

This instruction may be given as either an introductory instruction before trial (see CACI No. 107) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

Sources and Authority

- Evidence Code section 312 provides:

  Except as otherwise provided by law, where the trial is by jury:

  (a) All questions of fact are to be decided by the jury.

  (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

  Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

  (a) His demeanor while testifying and the manner in which he testifies.

  (b) The character of his testimony.

  (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.

  (d) The extent of his opportunity to perceive any matter about which he testifies.

  (e) His character for honesty or veracity or their opposites.

  (f) The existence or nonexistence of a bias, interest, or other motive.

  (g) A statement previously made by him that is consistent with his testimony at the hearing.

  (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

- Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact." According to former Code of Civil Procedure section 2061, the jury should be instructed that "they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: "It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar." (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)

- Standard 10.20(a)(2) of the Standards for Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- Canon 3(b)(5) of the Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys also.

Secondary Sources

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence* (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 551, *Trial,* § 551.110 et seq. (Matthew Bender)

Cotchett, California Courtroom Evidence, § 16.45 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.03 et seq.

5004. Service Provider for Juror With Disability

[*Name or number of juror***] has been assisted by [a/an] [***insert type of service provider***] to communicate and receive information. The [***service provider***] will be with you during your deliberations. You may not discuss the case with the [***service provider***] ~~or in any way involve the [***service provider***] in your deliberations~~. The [***service provider***] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [***name or number of juror***].**

All jurors must be able to fully participate in deliberations. In order to allow the [*service provider***] to properly assist [***name or number of juror***], jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to [***name or number of juror***], not to the [***service provider***].**

[Two [*service providers***] will be present during deliberations and will take turns in assisting [***name or number of juror***].]**

New September 2003; Revised April 2004, December 2012

Directions for Use

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 203(a)(6) provides: "All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person's ability to communicate or which impairs or interferes with the person's mobility."

- Code of Civil Procedure section 224 provides:

  (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.

  (b) As used in this section, "service provider" includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the

service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

(c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 320, 330

~~7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340~~

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 8 *Interpreters*, 8.31

5014. Substitution of Alternate Juror

One of your fellow jurors has been excused and an alternate juror has been selected to ~~take [his/her] place~~join the jury. Do not consider this substitution for any purpose.

The alternate juror must participate fully in the deliberations that lead to any verdict. The parties have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place.

Now, please return to the jury room and start your deliberations from the beginning.~~The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.~~

New September 2003; Revised April 2004, December 2012

Sources and Authority

- "Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations." (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782, 552 P.2d 742].)

- "We agree with plaintiff that the principles set forth in *Collins* apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by article I, section 16 of the California Constitution, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury's deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun." (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584–585 [153 Cal.Rptr. 213, 591 P.2d 503], overruled on other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 146

~~7 Witkin, California Procedure (4th ed. 1997) Trial, § 160~~

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 17 *Dealing With the Jury*, 17.38

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.52 (Matthew Bender)

1 California Trial Guide, Unit 10, Voir Dire Examination (Matthew Bender)

5015. Instruction to Alternate Jurors on Submission of Case to Jury

The jury [will soon begin/is now] deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.

Until the jury is discharged, do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors~~As alternate jurors, you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You should not form or express any opinion about this case until after you have been substituted in for one of the deliberating jurors on the panel or until the jury has been discharged~~.

New February 2005; Revised December 2012

Directions for Use

If an alternate juror is substituted, see CACI No. 5014, *Substitution of Alternate Juror*.

Sources and Authority

- "Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- Code of Civil Procedure section 234 provides:

  > Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as "alternate jurors."
  >
  > These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.
  >
  > The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the

other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

Secondary Sources

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examinations* (Matthew Bender)

1 Matthew Bender Practice Guide: Trial and Post-Trial Civil Procedure, Ch. 17 *Dealing With the Jury*, 17.38