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REPORT TO THE JUDICIAL COUNCIL

For business meeting on June 28, 2013

Title
Civil Jury Instructions (CACI): Additions, Revisions, and Revocations

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

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

Agenda Item Type
Action Required

Effective Date
June 28, 2013

Date of Report
April 23, 2013

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 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 June 28, 2013, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new, revised, and revoked instructions will be published in the June 2013 supplement to the official 2013 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached at pages 60–319.

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 22nd release of *CACI*. The council approved *CACI* release 21 at its December 2012 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 76 instructions and verdict forms: 303, 359, 361, VF-300, 462, 503A, 503B, 1511, 1530, 1707, 2000, 2002, 2004, VF-2000, VF-2001, VF-2003, VF-2004, 2202, 2205, VF-2202, 2430, 2440, 2441, VF-2406, 2500, 2505, 2507, 2511, 2521A, 2521B, 2522A, 2522B, 2527, 2540, 2543, 2560, 2561, 2570, VF-2500, VF-2501, VF-2504, VF-2506A, VF-2506B, VF-2507A, VF-2507B, VF-2508, VF-2511, VF-2512, VF-2514, 2620, VF-2602, 2730, 2923, 3005, 3060, 3061, 3062, 3063, 3064, 3067, VF-3030, VF-3031, VF-3032, VF-3033, 3706, 3903O, 3904A, 4108, 4200, 4320, 4328, VF-4300, VF-4301, VF-4302, 5009, and 5090. Of these, 66 are revised, 6 are newly drafted, 3 are proposed to be revoked, and 1 (CACI No. 2561) is proposed to be restored and revised after having been temporarily revoked in the last release.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 56 additional instructions under a delegation of authority from the council to RUPRO.[2]

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 jury instructions advisory committees 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 six new instructions. A trial judge requested several new instructions in the Malicious Prosecution series. In response, the committee proposes new CACI No. 1511, *Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client,* and CACI No. 1530, *Apportionment of Attorney Fees and Costs Between Proper and Improper Claims*.

In *Dahl v. Beckwith,*[3] the court created a new tort cause of action for intentional interference with expected inheritance. In response, the committee proposes new CACI No. 2205, *Intentional Interference With Expected Inheritance—Essential Factual Elements*.

Several recent cases involved the issue of damages for injury to a pet. In *Kimes v. Grosser,*[4] the court held that a pet owner is not limited to loss of market value for an injury to a pet but may recover the cost of veterinary care.[5] And in *Plotnik v. Meihaus,*[6] the court allowed emotional distress damages for an intentional injury to a pet. The committee proposes new instruction CACI No. 3903O, *Injury to Pet—Costs of Treatment (Economic Damage),* in response to *Kimes*. *Plotnik* has been added to the Sources and Authority for CACI Nos. 1301, *Assault—Essential Factual Elements,* 1600, *Intentional Infliction of Emotional Distress—Essential Factual Elements,* 2101, *Trespass to Chattels—Essential Factual Elements,* and 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*. These instructions are among those previously approved by RUPRO.

Another recent case, *William L. Lyon & Associates, Inc. v. Superior Court*,[7] suggested a new instruction concerning the statutory duty of a seller's real estate broker to inspect the property and disclose what the inspection disclosed or would have disclosed had it been made.[8] In response, the committee proposes new instruction 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements.*

Finally, several users and members of the committee requested a CACI instruction similar to CALCRIM No. 3590 to thank the jurors at the end of the trial and advise them about post-verdict contact with the parties and their counsel. In response, the committee proposes new instruction CACI No. 5090, *Final Instruction on Discharge of Jury*.

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[3] *Dahl v. Beckwith* (2012) 205 Cal.App.4th 1039.

[4] *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556.

[5] See also *Martinez v. Robledo* (2012) 210 Cal.App.4th 384 (recovery for veterinary malpractice not limited to lost market value).

[6] *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1607.

[7] *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294.

[8] See Civ. Code, § 2079.

Revoked instructions

The committee proposes revoking CACI No. 361, *Plaintiff May Not Recover Duplicate Contract and Tort Damages*. In December 2010, the council approved new CACI Nos. 3934 and VF-3920, *Damages on Multiple Legal Theories*. The purpose of both CACI No. 361 and the 2010 new instruction and related verdict form is to avoid the plaintiff's recovery of duplicate damages for a single harm. But the approach of the 2010 additions is to shift the focus away from determining all of the damages recoverable on each cause of action or claim. First, all nonduplicative recoverable items of damages are identified; then each separate recoverable item is tied to the different claims on which it is recoverable. This approach encompasses CACI No. 361; duplicate tort and contract damages are just one example of a situation to which CACI Nos. 3934 and VF-3920 apply. Therefore, the committee believes that CACI No. 361 is no longer needed.

Further, it has been held that CACI No. 361 should not be given with a special verdict form.[9] The committee believes that the court's reasoning for this conclusion would not be applicable under the approach of CACI Nos. 3934 and VF-3920. Continuing to present CACI No. 361 but limiting it to use with a general verdict presents a confusing situation for courts and counsel.

The committee also proposes temporarily revoking CACI No. 2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements*. This instruction is based on Government Code section 12653, the anti-retaliation provision of the False Claims Act. This statute was amended by 2012 legislation,[10] and CACI No. 2440 no longer accurately reflects the revised statute. The committee will consider revising and restoring this instruction in the next release cycle.

Finally, the committee proposes temporarily revoking CACI No. 2543, *Disability Discrimination—Affirmative Defense—Inability to Perform Essential Job Duties*. This instruction is no longer accurate in giving the defense the burden of proving that the plaintiff could not perform essential job duties, even with reasonable accommodation.[11] The committee will also consider revising and restoring this instruction in the next release cycle.

Restored and revised instruction

In the previous release, CACI No. 2561, *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship,* was temporarily revoked because it was no longer a correct statement of law. Under a 2012 statutory change amending Government Code section 12940(*l*)(1),[12] undue hardship for purposes of religious accommodation is now to be determined under the same statutory standard as undue hardship for purposes of disability

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[9] *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360–361.

[10] See Assem. Bill 2492 (Stats. 2012, ch. 647), § 5.

[11] See *Green v. State of California* (2007) 42 Cal.4th 254, 260.

[12] Assem. Bill 1964 (Stats. 2012, ch. 287).

discrimination. See CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship*. The committee proposes restoring CACI No. 2561, but simply cross-referring the user to CACI No. 2545 for the instruction text. The committee believes that a separate instruction number for religious creed hardship is preferable because of the authorities specific to this subject. Attempting to make CACI No. 2545 a dual-purpose instruction for both religious creed and disability hardship would place the authorities under the same instruction in a range of instructions otherwise limited to disability discrimination.

Trespass: Intentional, reckless, or negligent entry (CACI Nos. 2000, 2002, 2004, and related verdict forms)

The advisory committee proposes revisions to several instructions and verdict forms in the Trespass series to present the *intent* element in a way that is more understandable to jurors. Courts have often said that liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extrahazardous activity.[13] Currently, CACI Trespass instructions include an element that the defendant "intentionally, recklessly, or negligently" entered the plaintiff's property.[14] While this language is technically accurate, it suggests a standard that the average juror would very likely misconstrue.

The committee believes that most jurors would assume that an intentional trespass requires an intent to knowingly invade the property interest of another person. But this interpretation is incorrect. All that is required is that the person have intended to be in the particular location where the trespass occurred. It is not necessary to know that the property belongs to another person.[15] This intent standard is currently included in the third optional paragraph in CACI No. 2004, *"Intentional Entry" Explained*, but the other instructions do not cross-refer to CACI No. 2004. By including all three adverbs, "intentionally, recklessly, or negligently" in the intent element, the committee fears that the jury will not grasp the limited meaning of intent and will apply an improperly rigorous standard to the element.

To address this concern, the committee proposes that only one adverb be included in the instruction as read to the jury. Options are now provided to select the single applicable adverb from among "intentionally," "recklessly," and "negligently."[16] If "intentionally" is selected, the user is directed to also give CACI No. 2004 to present the correct definition of intent,. This definition has been expanded for greater clarity in CACI No. 2004.

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[13] See, e.g., *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406.

[14] See CACI Nos. 2000, *Trespass,* and 2002, *Trespass to Timber*. The same language appears in questions in verdict forms CACI Nos. VF-2000, *Trespass,* VF-2001, *Trespass—Affirmative Defense—Necessity,* VF-2003, *Trespass to Timber,* and VF-2004, *Trespass to Timber—Willful and Malicious Conduct*. Extrahazardous activities are presented separately in CACI Nos. 2001 and VF-2002.

[15] *Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481.

[16] A trespass can be unintentional but negligent, for example if a traffic accident causes entry onto the property of another. It can arguably be reckless if the accident is caused by a drunk driver.

The committee does not believe that the defense of necessity (CACI Nos. 2005, VF-2001) can apply to a reckless or negligent entry. Therefore, this instruction and related verdict form provide for only intentional entry. Further, the committee does not believe that willful and malicious damage to timber (CACI Nos. 2003, VF-2004)[17] can result from a negligent entry.

Harris v. City of Santa Monica: Causation and mixed motive under the Fair Employment and Housing Act

On February 7, 2013, the California Supreme Court handed down its long-awaited opinion in *Harris v. City of Santa Monica*.[18] The court in *Harris* addressed the causation standard under the Fair Employment and Housing Act (FEHA) in so-called mixed-motive cases—that is, when there is evidence that both a discriminatory and a legitimate reason led an employer to take an adverse employment action against an employee.

The date of the *Harris* decision left the committee in a bit of a quandary. The January full committee meeting had passed, and the proposed instructions approved at that meeting had been posted for the public comment period. The committee still had time to address the *Harris* decision before the June Judicial Council meeting, however, if it used a somewhat expedited process.

Harris presented two holdings relevant to jury instructions. First, the court held that there is an affirmative defense of "same decision" by which the employer can attempt to prove that it would have taken the adverse action anyway for the legitimate reason even if it may have also acted for a discriminatory reason. But the affirmative defense is only partial; it denies recovery for damages but not for injunctive relief and attorney fees.[19] Second, the court held that CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, was insufficient in stating the causation standard as "a motivating reason." Instead, the court held that the standard had to be a *substantial* motivating reason.[20]

The committee decided that the holding on the "same decision" affirmative defense did not require expedited consideration. It would involve the possible addition of a new instruction and related verdict form, but did not render any current CACI instructions or verdict forms incorrect. The committee elected to defer consideration of this issue until the next regular release cycle, which will bring it up for consideration at the July 2013 full committee meeting.

But the committee decided that consideration of the issue on "substantial motivating reason" should be expedited. At a minimum, CACI No. 2500 was no longer a correct statement of the law. Further, the revision was clearly required and seemed to be relatively simple; the word

[17] See Civ. Code, § 3346; Code Civ. Proc., § 733.

[18] *Harris v. City of Santa Monica* (2013) 53 Cal.4th 203.

[19] *Id.* at p. 243.

[20] *Id.* at p. 232.

"substantial" had to be added to the causation element. And CACI No. 2507, *"Motivating Reason" Explained,* had to be revised to instead define *substantial* motivating reason.

With the committee's approval, the working group responsible for the FEHA series reviewed *Harris* and made recommendations to the full committee for immediate revisions to be included in this pending release. The full committee approved and adopted the numerous recommendations of the working group. The instructions approved for revision in light of *Harris* were then posted for a separate four-week public comment period.

In its *Harris* revisions, the committee took a very expansive view of the scope of the court's holding on "substantial motivating reason." The "motivating reason" standard of CACI No. 2507 has been the standard for the causation element in numerous CACI instructions for causes of action under the FEHA.[21] The committee believes that *Harris* applies to all FEHA causes of action that previously expressed causation as a "motivating reason," not just to disparate treatment discrimination under CACI No. 2500. The word "substantial" has been added to the causation element in all of these instructions.

The "motivating reason" standard has also been used in CACI's FEHA-related employment law instructions for wrongful termination[22] and under the California Family Rights Act.[23] Because these causes of action rest on similar employment-related public policy grounds as those of the FEHA, the committee believes that the holding of *Harris* on causation also applies to them. Therefore, "substantial" has been added to "motivating reason" in these instructions also.

Additionally, the committee has used the "motivating reason" causation standard in its instructions under the Unruh Act[24] and other related California civil rights statutes.[25] The committee has always recognized that there is no clear authority for this language under these statutes and in these instructions. But the dilemma that the committee has faced is that the instructions must have a causation element, and there is no authority for any other language either. Because the committee believes that the policy concerns with regard to discrimination in employment and discrimination in public accommodations and other civil rights are similar, it thinks it most likely that when confronted by the issue, courts will adopt the *Harris* "substantial

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[21] See CACI Nos. 2505, *Retaliation—Essential Factual Elements,* 2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*, 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* and related verdict forms.

[22] See CACI Nos. 2430, *Wrongful Discharge in Violation of Public Policy—Essential Factual Elements,* 2441, *Discrimination Against Member of Military—Essential Factual Elements,* and related verdict forms.

[23] See CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements,* and related verdict form.

[24] Civ. Code, § 51.

[25] See CACI Nos. 3060, *Unruh Civil Rights Act—Essential Factual Elements,* 3061, *Discrimination in Business Dealings—Essential Factual Elements,* 3063, *Acts of Violence—Ralph Act—Essential Factual Elements,* 3064, *Threats of Violence—Ralph Act—Essential Factual Elements,* and related verdict forms.

motivating reason" standard under these civil rights statutes. The committee has elected to change "motivating reason" to "substantial motivating reason" in these instructions, while making it clear in the Directions for Use that no court has addressed the applicability of *Harris* to these statutes and instructions.

Finally, the committee took a narrow view on how to define "*substantial* motivating reason" in CACI No. 2507. The court in *Harris* provided no specific language or guidance with regard to what makes a motivating reason "substantial."[26] The court's rejection of a complete defense based on a "but for" standard[27] means that the current sentence in CACI No. 2507, that a (substantial) motivating reason does not have to be the only reason motivating the adverse employment action, is still good law. The committee decided that further guidance should for the most part be left to future judicial interpretation. The committee did look to CACI No. 430, *Causation: Substantial Factor,* as the *Harris* opinion suggested similarities between "substantial motivating reason" for an adverse employment action and the general tort causation standard of "substantial factor."[28] The committee decided that it would be appropriate and helpful to a jury to instruct that a substantial motivating reason "must be more than a remote or trivial reason," borrowing this language from CACI No. 430. The committee also decided that a substantial motivating reason has to be one that *actually* contributed to the adverse employment action. Inherent in the word "motivating" is the idea that the employer must have actually acted with discrimination.

Juror reliance on common sense and experience (CACI No. 5009)

A trial judge proposed a change to CACI No. 5009, *Predeliberation Instructions*. The judge objected to the current language: "[y]ou should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case." The judge's comment was that "[j]urors cannot perform their function as fact-finders if they cannot rely on their training and experience in evaluating evidence. … As the expression goes, 'A juror should have an open mind, not an empty mind.' "

The committee was sympathetic to the views behind the proposal, but recognized that it is misconduct for a juror to bring nonevidentiary information into deliberations based on the juror's alleged personal experiences and training. The committee proposes some language designed to tread a middle path, recognizing that jurors need not entirely check their own common sense and experience at the door of the jury room, but cautioning them not to interject what they think they know or have learned into the deliberations if that information was otherwise not introduced into evidence. The committee borrowed some language from CALCRIM No. 105, *Witnesses,* encouraging jurors to use their common sense and experience "[i]n deciding whether testimony

[26] *Harris v. City of Santa Monica* (2013) 53 Cal.4th at p. 232: "Given the wide range of scenarios in which mixed-motive cases might arise, we refrain from opining in the abstract on what evidence might be sufficient to show that discrimination was a substantial factor motivating a particular employment decision."

[27] *Id.* at p. 229.

[28] *Id.* at p. 232.

is true and accurate," but then warning them not to make any statements or provide any information to other jurors based on any special training or unique personal experiences that they may have had related to matters involved in the case.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 21 to March 1, 2013. Comments were received from 15 different commentators. A second comment period limited to changes in response to *Harris v. City of Santa Monica* ran from March 11 to April 5, 2013. The committee received 8 additional comments for this posting, quite a few of which were unrelated to *Harris*. No instruction or issue generated a particularly large number of comments. Few comments indicated serious substantive opposition to any proposed change. The committee evaluated all comments and revised some of the instructions as a result. Two separate charts with summaries of all comments received from each of the two comment periods and the committee's responses are attached at pages 11–59.

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 submit its recommendations to the council for approval. The proposed new, revised, and revoked instructions are presented to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

The committee did consider deferring consideration of *Harris v. City of Santa Monica* to a special interim release between its regularly scheduled June and December releases, but rejected this idea because there was sufficient time to expedite required changes into this June release. An interim release would also have been a particular hardship on our official publisher because it allocates its resources to other publication projects when no regular *CACI* release is scheduled.

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 publish a new supplement to the 2013 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. Charts of comments, at pages 11–59
2. Full text of new and revised *CACI* instructions, at pages 60–319

CACI 13-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

	Commentator	Summary of Comment	Committee Response
303, *Breach of Contract—Essential Factual Elements* (and VF-300)	California Judges Association, by Jordan Posamentier, Legislative Counsel	This proposed revision adds an element 2 – that the plaintiff did all, or substantially all, of the significant things that the contract required plaintiff to do, or that plaintiff was excused from doing those things. The changes focus the inquiry on (1) the materiality of the things plaintiff was to do, and (2) whether the obligations of the parties are dependent or independent. They also note that if no extrinsic evidence is offered in aid of construction of the agreement, the issue is one of law for the court. These changes appear useful and unobjectionable. CJA approves these changes.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee agrees that element 2 of the instruction should be optional, but believes that the explanation added to the Directions for Use goes beyond what is needed for purposes of this instruction. We question whether such an explicit two-part requirement and explanation of the court's role in interpreting the contract belong in the Directions for Use for this instruction. We believe that the relationship between materiality and dependent obligations is beyond the scope of this instruction. We also believe that the discussion of the court's role in contract interpretation when extrinsic evidence is considered does not conform to more modern authorities stating that contract interpretation is solely a question of law for the court to decide unless the interpretation turns on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; see Sources and Authority for CACI No. 314, *Interpretation—Disputed Term*.) We suggest replacing the new second paragraph of the Directions for Use with the following: "Element 2 is needed if there is an issue of performance of	The committee agreed with some of the comment and has revised the proposed new first paragraph of the Directions for Use. The committee disagreed with other suggestions. It's clear that not every failure to perform excuses the other party's failure to perform. The two issues identified in the cases are materiality and dependent/independent covenants. These points should be explained.

CACI 13-01
New and Revised CACI Instructions
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	Commentator	Summary of Comment	Committee Response
		the plaintiff's obligations under the contract. The plaintiff's breach must be material to excuse the defendant's performance. Whether a breach is material is generally a question of fact. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277-278.) Element 2 addresses this requirement by instructing the jury that the plaintiff must have done the significant things required by the contract. A question may also arise as to whether the defendant's obligation is dependent on performance of the plaintiff's obligation. (See *Brown, supra,* at p. 279.)"	
359, *Present Cash Value of Future Damages*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The proposed revisions only add to the Directions for Use with respect to evidence from which a reduction to present value can be made. They clarify that the instruction is to be used if there are future damages and if there is evidence offered to permit a reduction to present cash value to be made, noting that expert testimony will usually be necessary. This is closely similar to CACI 3904A, which differentiates between economic and noneconomic damages. These changes appear useful and unobjectionable. CJA approves these changes.	No response is necessary.
361, *Plaintiff May Not Recover Duplicate Contract and Tort Damages*	California Judges Association, by Jordan Posamentier, Legislative Counsel	The proposed revisions would delete the entire instruction and cover its subject matter instead in more detail in CACI 3934, which specifies the legal theories and which items of damages are only recoverable once under the various theories. CACI 3934 requires more work to tailor but gives more precise guidance to the jury. These changes appear useful and unobjectionable. CJA approves these changes.	No response is necessary.
	Orange County Bar Association, by Wayne R. Gross, president	The comment form is marked "Disagree," but no reasons are given.	No response is possible.

CACI 13-01
New and Revised CACI Instructions
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	Commentator	Summary of Comment	Committee Response
462, *Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The proposed first paragraph of the Directions for Use should be modified to more clearly state that a separate instruction covers injuries caused by animals that are inherently dangerous. We would also delete the citation to *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, which is cited in the Sources and Authority for CACI No. 463, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements,* and need not be cited here. Accordingly, we would revise the first paragraph of the Directions for Use as follows: "Give this instruction to impose strict liability on an animal owner if the owner knew or should have known that the animal had a dangerous propensity. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) ~~There is also~~ For an instruction to be used to impose strict liability for injuries caused by animals of a type that are inherently dangerous without the need to show the owner's knowledge or constructive knowledge of dangerousness, . ~~(*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671~~]; see CACI No. 461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*.~~)~~"	The committee did not see the suggested language as an improvement.
		The quotation from *Mann v. Stanley* (1954) 141 Cal.App.2d 438, 441, added in the last bullet point in the Sources and Authority states that the owner must have actual knowledge of the animal's dangerousness. But this seems inconsistent with the rule stated in the instruction and in the cases cited in the first, second, and seventh bullet points that actual or constructive knowledge is needed. So we would delete the final bullet point.	The case is included primarily to alert that a bull is legally "not naturally vicious." Case excerpts in the Sources and Authority do not need to contain complete statements of the relevant legal principles in order to be of interest to users.
		The committee suggests that consideration be given to changing the term "wild" in CACI No. 461, and in the title to that instruction, to "inherently dangerous," consistent	CACI No. 461 is not currently under consideration for revisions. The committee will consider this change in

CACI 13-01
New and Revised CACI Instructions
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	Commentator	Summary of Comment	Committee Response
		with the language used in the reference to CACI No. 461 in the Directions for Use for this instruction. We believe that "inherently dangerous" more accurately describes the basis for liability.	the future if the instruction comes before the committee for other reasons.
503A, *Psychotherapist's Duty to Protect Intended Victim From Patient's Threat*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The language "reasonable efforts to protect the victim by communicating the threat to the victim and to a law enforcement agency" in the revised Directions for Use differs somewhat from the statutory language "reasonable efforts to communicate the treat" (Civ. Code, § 43.92, subdivision (b)) and may suggest a different meaning. The revised language may suggest a requirement that the therapist must have actually communicated the threat as distinguished from making reasonable efforts to do so. Also, we believe that "by having made reasonable efforts" could be stated more clearly and directly as "because the therapist made." Accordingly, we suggest the following modifications to the final sentence of the first paragraph of the Directions for Use: "First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) ~~by having~~ because the therapist made reasonable efforts to ~~protect the victim by~~ communicat~~ing~~e the threat to the victim and to a law enforcement agency."	The committee agreed with the comment and has made the proposed change.
		The first sentence of the Directions for Use states that the instruction should be used in an action against a psychotherapist for professional negligence "for failure to protect a victim from a patient's act of violence after the patient made a threat to the therapist against the victim." We believe that this could be more clearly stated ". . . after the patient communicated to the therapist a threat against the victim."	The committee agreed with the comment and has made the proposed change.

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1511, *Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The second sentence in the second paragraph of the instruction begins, "To establish this claim . . . ." The word "claim" in this context ordinarily is used in other instructions to refer to the plaintiff's claim. The affirmative defense instructions typically state, "To succeed . . . ." For consistency and to avoid any confusion between the plaintiff's claim and an affirmative defense, we would modify this sentence to state "To succeed . . . ." We also suggest that consideration be given to using more explicit language such as "To establish this defense . . ." here and in other affirmative defense instructions.	The committee agreed with the comment and has made the proposed change.
		Whether undisputed facts establish probable cause to sue is a question of law for the court to decide, as stated in the Directions for Use. We believe that this instruction should be given only if the court determines that the information that the attorney purportedly relied on would establish probable cause. The Directions for Use do not clearly articulate this point. The jury should decide only whether the client provided the information to the attorney (element 1) and whether the attorney actually relied on that information unaware of its inaccuracy (elements 2 &3). The Directions for Use state that the jury decides "what information was communicated to the attorney that established apparent probably cause," but should state that the jury decides whether the information was communicated to the attorney. We would modify paragraph 1 of the Directions for Use as follows: "Give this instruction if an attorney defendant alleges that he or she relied on information provided by the client to establish probable cause and the court determines that the attorney's reliance on the information, if proved, would establish probable cause. ~~The presence or absence of probable cause on undisputed facts is a question of law for~~	The committee did not agree with the proposed revision. It is incorrect in stating that "*the attorney's reliance* on the information, if proved, would establish probable cause." The reliance would not establish it, the information would.

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		~~the court. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P. 2d 498]; CACI No. 1501, *Wrongful Use of Civil Proceedings*.)~~ The questions here for the jury to resolve are ~~what~~ whether the specified information was communicated to the attorney ~~that established apparent probable cause~~, and whether the attorney knew that the information was inaccurate."	
		The sentence beginning, "The presence or absence of probable cause . . ." and the citation to *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881, that we propose deleting above should be moved to the Sources and Authority.	The committee, as noted above, did not agree with removing this sentence and citation from the Directions for Use.
1530, *Apportionment of Attorney Fees and Costs Between Proper and Improper Claims*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The hyphen in the title apparently does not belong.	The hyphen, which was a typographical error, has been removed.
1707, *Fact Versus Opinion*	California Judges Association, by Jordan Posamentier, Legislative Counsel	These revisions redefine an opinion as defamatory if the opinion implies that a false statement of fact is true. The revision correctly adds a quotation from a recent case, *Hawran v. Hixon* (2012) 209 Cal.App.4th 256, 289 to the Sources and Authority, and the Directions for Use correctly state that the court should give the instruction only if the court concludes, as a matter of law, that the defamatory statement could reasonably be construed as implying a false assertion of fact. The revision is a correct statement of the law, and CJA approves it.	No response is necessary.
	Orange County Bar Association, by Wayne R.	The proposed changes to the text and commentary for CACI 1707 are not substantive; they are just changes in wording, continuing the substance and important language of the	No response is necessary.

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	Gross, president	existing instruction, to the effect that for a statement of opinion (versus fact) to be actionable as defamation it must imply that a false statement of fact is true.	
	John Scheppach, Attorney at Law, Irvine	It seems the proposed revisions to CACI 1707 are aimed at providing further clarity on the distinction between statements of fact (which can form the basis of a defamation claim) and statements of opinion (which cannot). However, I don't believe the revisions accomplish the apparent goal, and, in fact, the revisions conflate the issue of whether a statement has a defamatory meaning (e.g., whether a statement tends to bring shame on the plaintiff) with the separate issue of whether a statement is one of fact or opinion. If a statement of opinion brings shame on a plaintiff, the opinion is "defamatory" under the common or general meaning of the term. But a statement of opinion is not actionable as defamation even if it is "defamatory," i.e., even if it brings shame on a plaintiff. An opinion – by its very nature – cannot be false. Statements of fact, however, can be false. And statements of fact can be defamatory. And only statements of fact can form the basis of a defamation claim. The beginning of CACI 1707 accurately states that, to recover for defamation, the alleged defamatory statement(s) "must have been [a] statement(s) of fact, not opinion." However, the proposed revisions to CACI 1707 also tells the jury that an "opinion may be defamatory if the opinion implies that a false statement of facts is true." This instruction is misleading and compound. It wraps three different and distinct concepts – opinions, statements of fact, and defamatory meaning – in a single sentence. The jury is	The committee did not agree with the comment becausethe target of the instruction is a statement that superficially looks like an opinion but is actually defamatory. The commentator's analysis and proposed revision do not address the purpose of the instruction.

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		not being asked, in this instruction, to determine whether a statement is "defamatory," the jury is being asked to determine if a statement is one of opinion or one of fact. If it is a statement of opinion, the defamation claim fails and there is no need to further consider whether the statement of opinion is also "defamatory." Other CACI instructions address whether a statement is "defamatory." I would recommend editing CACI 1707 to read along these lines: "For [*name of plaintiff*] to recover, [*name of defendant*]'s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is one that can be proved true or false. A statement of opinion is one that cannot be proved true or false. "In determining whether a statement is one of fact or opinion, you should consider the actual words [written/spoken] and the context in which they were [written/spoken]. For a statement to qualify as a statement of fact, it may but does not have to be expressly asserted or phrased as a statement of fact. A statement of fact can be implied from the words [written/spoken] and context in which they were [written/spoken].	
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	This instruction is for use if a statement of opinion may imply a false assertion of fact. The instruction should make it clear that such a finding supports liability for defamation. The committee does not believe that adequately comes through. After stating the rule that for the plaintiff "to recover" the defendant's statement must be a statement of fact, the instruction states that "an opinion may be defamatory." But	The committee agreed with the need to create consistency in the use or nonuse of the word "defamatory." But the original CACI task force made a conscious decision to avoid using "defamation" and its relatives because they are conclusory terms of art. The committee believes that this decision should not be revisited. The instruction

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		it may not be clear to the jury that a "defamatory" opinion is an exception to the rule that only a statement of fact supports liability. Other instructions stating the essential factual elements of defamation avoid using the term "defamation" or "defamatory." Jurors may hear the term "defamatory" for the first time in this instruction. For example, *CACI No. 1700, Defamation Per Se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*, states in relevant part: "[*Name of plaintiff*] claims that [*name of defendant*] harmed [him/her] by making [one or more of] the following statement(s): [*list all claimed per se defamatory statements*]. To establish this claim . . . ." We believe that use of the term "defamatory" for the first time in this instruction without previously being instructed on "defamation" could confuse the jury. This problem could be solved either by deleting the term "defamatory" here or by introducing the term "defamation" earlier in other instructions. We would prefer the latter and suggest substituting the words "committed a defamation" for "harmed [him/her]" in each of the instructions stating the essential factual elements of defamation (CACI Nos. 1700-1705). For example, in CACI No.1700: "[Name of plaintiff] claims that [name of defendant] ~~harmed [him/her]~~ committed a defamation by making [one or more of] the following statement(s): [list all claimed per se defamatory statements]. To establish this claim . . . ." We also suggest modifying the first paragraph of this	has been revised to remove the word "defamatory.

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		instruction (CACI No. 1707) and using the term "defamation" rather than "defamatory" for greater clarity, as shown below	
		We believe that rather than refer to "this issue" in the second paragraph of this instruction, the instruction should identify the issue. We also believe that "implying a false statement of fact" is clearer than "implying a false statement of facts is true." These proposed modifications, those discussed above, and other modifications for greater clarity are shown here: ""For [*name of plaintiff*] to recover damages for defamation, [*name of defendant*]'s statement(s) must have been [a] statement(s) of fact~~, not~~ rather than a statement of opinion. A statement of fact is one that can be proved to be true or false. ~~In some circumstances, an~~ A statement of opinion may be ~~defamatory~~ defamation, however, if ~~the opinion~~ it implies ~~that~~ a false statement of fact~~s is true~~. "In deciding ~~this issue~~ whether [*name of defendant*] made a statement of opinion that implied a false statement of fact, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [*name of defendant*] was implying ~~that~~ a false statement of fact~~s is true~~."	The committee did not agree with the comment and preferred the language without the proposed revision.
All instructions and verdict forms that were posted for comment in the Trespass series (2000, 2002, 2004, VF-2000, VF-2001, VF-2003, VF-2004)	California Judges Association, by Jordan Posamentier, Legislative Counsel	The revisions to this group of instructions and verdict more clearly define the element of "intent" in a trespass case. For trespass, the defendant need only act intentionally, and the current wording to include that the defendant acted "recklessly or negligently" is misleading. The correct definition of "intent" for trespass is set forth in CACI 2004. The revisions are helpful, and CJA approves them.	No response is necessary.
	Orange County	The change incorrectly implies that the trespass must occur	See response to the State Bar Litigation

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	Bar Association, by Wayne R. Gross, president	"intentionally." This is inaccurate. Instead, the entry need only be tortious, which obviously includes reckless or negligent conduct. (See e.g., *Newhall Land & Farming Co v. Superior Court* (1983) 19 Cal App. 4th 334, 347 ["thus, the contaminants which remain on the property were tortuously placed there…Newhall has stated a cause of action for a continuing trespass on this theory."]	Section Jury Instructions Committee, below.
2000, *Trespass—Essential Factual Elements* (and VF-2000)	State Bar Committee on Administration of Justice	The deletion of the words "recklessly, or negligently" from element two of CACI 2000 and question 2 of VF-2000 is confusing and requires further clarification. The case law cited under Directions for Use clearly states that trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406.) Further, the cite to *Miller v. National Broadcaster Corp.* (1986) 187 Cal.App.3d 1463, concerns "intent to trespass," which does not appear to be the same as element 2 of the instruction of question 2 of the verdict form. In *Miller,* a cause of action for trespass was found proper when a television camera crew entered a home, without the consent of the residents, in order to film the work of paramedics called to administer life-saving techniques to a man who had suffered a heart seizure. The court held that intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. As such, if a person intentionally enters the property of another, no negligence or recklessness need be shown to find trespass. (*Id.,* at pp. 1480-1481.) The revisions under Directions for Use of this instruction appear to indicate that what is being addressed by element 2 is the "intent to trespass," which is not a required element of the cause of action. Thus, the proposed revision to the	See response to the State Bar Litigation Section Jury Instructions Committee, below.

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		elements of a cause of action for trespass may cause confusion. CAJ's recommendation: Because the proposed revisions appear to be addressing the issue of what constitutes "intentional entry," the revisions to CACI 2004 ("*Intentional Entry" Explained*) appear more appropriate. No change to the elements stated in CACI 2000 or to the questions in VF 2000 should be made. Rather, the proposed additions to the Directions for Use for CACI 2000 should suffice.	
All instructions and verdict forms in the Trespass series that were posted for comment except CACI No. 2004, *"Intentional Entry" Explained* (2000, 2002, VF-2000, VF-2001, VF-2003, VF-2004)	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	This new language seems to state that since the only intent required is an intent to be present on (or enter) the property, the plaintiff need not prove that the defendant was reckless or negligent. We believe that the plaintiff need not prove an intentional entry because a reckless or negligent entry is sufficient. We believe that element 2 should state that the entry must be intentional, reckless, or negligent, not that the entry must be intentional. An example of reckless or negligent conduct that we believe would constitute a trespass without an intent to enter the property (as intent is defined in CACI No. 2004, "*Intentional Entry" Explained*) is if a drunk driver crashes into a house. The driver did not intend to enter the property and was not substantially certain to do so, but entered the property as a result of his or her reckless or negligent conduct. But under the proposed revision, this conduct would not constitute a trespass. We therefore would reject the proposed revisions to element 2 of the instruction, but would modify element 2 for greater clarity. The words "recklessly, or negligently" in the current	The committee agreed with the comment and the example of the drunk driver. It has revised CACI Nos. 2002, 2004, VF-2000, VF-2003, and VF-2004 to account for unintentional intrusions resulting from negligence or recklessness. The committee, however, did not adopt the revised language proposed by the commentator as it does not resolve the problem of potential juror confusion when the words "intentionally, reckless, or negligently" are all included. Intent to trespass is defined in a way that is counter to most peoples' expectations. No intent to invade the property interest of another person is required. All that is required is an intent to be in the particularly location, whether or not one is aware that he or she is trespassing. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-

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		instruction may suggest to some a mistaken belief in a right to enter. We would revise both options in element 2 to state more clearly what it means to recklessly or negligently enter the property. Also, in many cases the facts may not support a finding that the defendant entered the property recklessly or negligently (i.e., the defendant either entered the property intentionally or not at all), so recklessly or negligently could be made optional to simplify the instruction. We would modify element 2 as follows: 2. That [*name of defendant*] [intentionally, recklessly, or negligently entered [*name of plaintiff*]'s property [or, although not intending to enter the property, did so as a result of a reckless or negligent act];] [or] [intentionally, recklessly, or negligently caused [another person [*insert name of thing*] to enter [*name of plaintiff*]'s property [or, although not intending to cause [another person [*insert name of thing*]] to enter the property, did so as a result of a reckless or negligent act	1481.) The committee did not revise VF-2001, which involves the defense of necessity. This defense could not arise in the context of a negligent or reckless entry. With regard to trespass to timber (2002, VF-2003, VF-2004), the committee does not believe that it is possible that the defendant could "cut down trees or take timber" after a negligent or reckless entry; the only possible harm is damage to trees. It has not included these two acts in the option for negligent or reckless conduct. Further, the committee does not believe that wanton and malicious conduct (VF-2004) could apply to a negligent entry. Only reckless conduct is included as an option in this verdict form.
		We believe that the new first paragraph in the Directions for Use is confusing and inaccurate, as stated above. Consistent with our proposed modifications above, we suggest deleting it and replacing it with the following: "Read the bracketed language in the first optional paragraph in element 2 only if the evidence could support a finding that the defendant's entry on the property resulted from a reckless or negligent act."	The committee agreed that the paragraph must be revised, but did not agree with the commentator's proposed language.
		Consistent with the foregoing, we suggest deleting the word "Further" at the beginning of the new second paragraph in the Directions for Use.	The committee agreed and has removed the word "Further."

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		Other instructions listing the essential factual elements include "Essential Factual Elements" in the title. We believe that the titles to CACI Nos. 2002 and 2002 should be modified to include those same words.	The committee agreed and has made this change to the titles.
2002, *Trespass to Timber, Essential Factual Elements*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	This instruction states the essential factual elements of a cause of action for trespass to timber. Element 4 is that the plaintiff "was harmed." We believe that the significance of lost aesthetics and functionality for purposes of this instruction is that such a loss can satisfy the element of harm. So we believe that the new paragraph at the end of the instruction should refer to "harm" rather than "diminished value." The term "diminished value" seems to suggest the amount of damages (which is not otherwise discussed in this instruction) rather than the fact of harm. We would modify this paragraph as follows: "In considering ~~the diminished value of an injured tree~~ whether [*name of plaintiff*] was harmed, you may take into account the lost aesthetics and functionality of an injured tree."." We also believe that a corresponding change should be made in the last paragraph of the Directions for Use as follows: "Include the last paragraph if the plaintiff ~~alleges~~ claims harm based on lost aesthetics and functionality."	The committee agreed and has made this change.
2202, *Intentional Interference With Prospective Economic Relations—*	California Judges Association, by Jordan Posamentier, Legislative	This revision is relatively minor. It modifies identifying the defendant and the conduct with which the defendant intended to disrupt the relationship. The new language conforms to the Supreme Court opinion	No response is necessary.

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Essential Factual Elements (and VF-2202)	Counsel	in *Della Penna v. Toyota Motor Sales* (1995) 11 Cal.4th 376, which requires the court, rather than the jury, to find that the defendant engaged in "wrongful" conduct. The Court must, by this modification (and the proposed modification to VF 2202) decide what the evidence shows to be the asserted wrongful conduct. The jury must then decide if the specific wrongful conduct occurred. The revision reflects a correct statement of law, and CJA approved it.	
2202, *Intentional Interference With Prospective Economic Relations—Essential Factual Elements*, and 2205, *Intentional Interference With Expected Inheritance—Essential Factual Elements*	Orange County Bar Association, by Wayne R. Gross, president	It is important to cite legal authority directly after one or both of the following sentences appearing in the proposed Directions for Use "Whether the conduct alleged qualifies as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law." "If the court lets the case go to trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct."	The committee has been unable to find any supporting authority for this division of labor between court and jury. Nevertheless, the various roles seem to be universally followed.
2205, *Intentional Interference With Expected Inheritance—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	This is a new instruction that directly incorporates the elements expressly set out by the court in *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, which held, for the first time, that a party may pursue such a claim. This instruction is needed and useful. CJA approves.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by	*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, on which this new instruction is based, stated that this tort remedy is available only if there is no adequate remedy under probate law, as noted in the Sources and Authority. We believe that this important point should be stated in the Directions for	The committee does not think that this is necessary. This determination will have been made long before there's a jury to instruct.

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	Reuben A. Ginsburg, chair	Use as well. We would modify the Directions for Use by adding the following as a separate paragraph after the first paragraph: "This tort is available only if the court determines that the plaintiff has no adequate remedy under probate law. (*Beckwith, supra,* 205 Cal.App.4th at p. 1056.)"	
		The quotation from *Beckwith* in the third bullet point in the Sources and Authority appears on page 1056 of the opinion rather than page 1052.	This error has been corrected.
2500, *Disparate Treatment—Essential Factual Elements* (and VF-2500, VF-2501)	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee agrees with the proposal, but suggests that consideration be given to adding optional language to element 4 (and question 4 in the verdict forms) for use in circumstances in which the plaintiff was only perceived to be a member of the protected class or associated with such a member and modifying the new paragraph in the Directions for Use accordingly as set forth in our comments to CACI No. 2521A below.	There was inconsistency in the instructions in the FEHA series as to including the "perception/association" option. The committee has elected to resolve the inconsistency by removing it where it has been included, rather than adding it to where it has not been included (e.g., CACI No. 2500). The option for perception, association, or perception and association made for a complex presentation. Omitting the option results in simpler instructions with fewer brackets. The Directions for Use point out a possible modification of element 4 based on perception and association.
2521A and 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee believes that the optional language in element 2 (and question 2 in the verdict forms) may be useful and should not be deleted. Instead, we would modify the new second paragraph in the Directions for Use as follows: "~~Modify~~ Use the bracketed language in element 2 if the	See response above.

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Elements (and VF-2506A, VF-2507A)		plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)"	
2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee believes that when a jury is instructed on a claim for failure to prevent harassment, discrimination, or retaliation the jury ordinarily will also be instructed on the underlying claim for harassment, discrimination, or retaliation. The committee believes that this instruction is unnecessarily cumbersome in the way that it incorporates the requirements for the underlying harassment, discrimination, or retaliation. We believe that a better approach would be to expressly require a finding of harassment, discrimination, or retaliation pursuant to other instructions as an element of this instruction. We would delete element 3 (and question 3 in the verdict form) and modify element 2 as follows: "That [*name of plaintiff*] was subjected to [harassment/discrimination/retaliation] ~~in the workplace~~ pursuant to the instructions previously given;"	The committee agreed with this comment and has removed the element for the underlying discrimination, retaliation, or harassment claim from the instruction (and the corresponding question from VF-2514). The committee has also changed "in the workplace" to "in the course of employment" to account for the possibility that work-related harassment could occur other than at the employer's place of business. The Directions for Use now note that element 2 must be supported by the appropriate instructions on the wrong at issue.
		The committee agrees with the other proposed revisions to this instruction.	No response is necessary.
2561 *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee suggests that the Sources and Authority should cite California authority following the United States Supreme Court opinion quoted in the final bullet point (*Trans World Airlines v. Hardison* (1977) 432 U.S. 63) rather than only cite the federal case.	The committee does not believe that this is necessary[BG1].

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VF-2514, *Failure to Prevent Harassment, Discrimination, or Retaliation*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	Use of this verdict form together with a verdict form on the underlying harassment, discrimination, or retaliation results in many duplicative questions. We realize that the Directions for Use state that verdict forms for multiple causes of action can be combined into one form, which would avoid some duplication. But we believe that considerable duplication between this verdict form and the verdict form for the underlying conduct is almost certain to occur. We therefore would modify this verdict form by deleting questions 1 through 4 and adding directions at the beginning of this verdict form stating, for example: "If you found [*refer to required finding of harassment/discrimination/retaliation in other verdict form*], then answer question 1. If you did not find [*refer to required finding of harassment/discrimination/retaliation in other verdict form*], stop here, answer no further questions, and have the presiding juror sign and date this form."	The committee agreed with the comment and has removed the questions on the underlying claim (1-4) from the verdict form.
2923, *Borrowed Servant/Dual Employee* (the comment also applies to 3706, *Special Employment—General Employer and/or Special Employer Denies Responsibility*, also)	Hon. David W. Abbott, Judge of the Superior Court, Sacramento County	I question whether we should be telling the jury the right of control is the most important factor. I think it is more accurate and less misleading to simply say it is an important factor. This is actually borne out by the excerpt from *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286 in the Sources and Authority. I think by telling the jury the right of control is the most important factor, they may be inclined to place undue emphasis on it to the exclusion of other relevant factors. Telling them it is an important factor and instructing them to consider other factors in determining whether someone was an employee or independent contractor is a more accurate statement of the law and ensures all relevant factors will be considered and given appropriate weight.	*Bowman* says that control is the most important factor, citing numerous California Supreme Court cases. The committee has included a different excerpt from *Bowman* that makes the point clearly in the Sources and Authority.

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	Commentator	Summary of Comment	Committee Response
	California Judges Association, by Jordan Posamentier, Legislative Counsel	This revision modifies the instruction to make right of control not the first factor for the jury to determine but the most important factor. The current version of the instruction dates to 2003. The proposed new notes reference the fact that in 2006 the Restatement (Second) of Agency was superseded by the Restatement (Third) of Agency. In addition the changes are made based on a non-FELA case (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303.) As with changes to CACI 3706, the changes appear to be a correct update regarding the Restatement and make the instruction consistent with the *Bowman* case. The changes do not appear to extend trial length. CJA approves.	No response is necessary.
3005, *Supervisor Liability for Acts of Subordinates*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	Element 3 does not encompass discriminatory purpose and an optional new element 4 should be added to the instruction for use if discriminatory purpose is required. We would add language to the Directions for Use explaining when the new optional element 4 should be used and would delete the third sentence in the second paragraph of the Directions for Use, which seems inaccurate.	The committee does not believe that an intent element is possible. As stated in the Directions for Use, the supervisor must act with the purpose necessary to establish the underlying violation Thus, an intent element would have to vary depending on the underlying violation. The third sentence in the second paragraph says: "In such a case [one falling under *Ashcraft v. Iqbal*], element 3 requires not only express approval, but also discriminatory purpose." The commentator does not say why this sentence seems inaccurate. The purpose of revising the Directions for Use is to explain the possible limitations on the use of the instruction "in such a case."
3060, *Unruh Civil*	James S. Link,	I have previously sent letters to the CACI committee on	The committee has received and rejected

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Rights Act—Essential Factual Elements, and 3067, *Unruh Civil Rights Act—Damages* (and VF-3030)	attorney at law, Pasadena	these matters which I will send herewith as well. One key point the Committee still does not address is Civil Code § 55.56, which precludes the fundamental assertion that damage is "presumed". The Committee does not even cite section 55.56. Moreover, the Committee has not noted the changes brought about by the passage of SB 1608 that lower the statutory damages to $2000 (or $1000) under certain conditions. Section 55.56(f). Frankly, as I argue again here, Civil Code § 52 has required for a very long time proof of actual harm or damage. The law on which the Committee relies is out of date, dicta or not applicable.	this comment on multiple occasions. The commentator fails to recognize these instructions are not about Civil Code section 55.56 and construction-related accessibility cases; they are about the Unruh Act and the other California civil rights statutes for which remedies are provided in Civil Code section 52. Section 52 does not apply to section 55.56. But it does apply to the Unruh Act, and that is the subject of 3060 and 3067. Section 52 does not require proof of actual damages for Unruh Act claims; even though it might be required for section 55.56 claims.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee agrees with the revisions to the fourth paragraph of the Directions for Use, but suggests that the citation to Civil Code section 52 in line 6 should be to section 52(a), where the specific provision is found.	The committee has made this change.
		A stray period appears near the beginning of line 6.	The stray period has been found and deleted.
3060 *Unruh Civil Rights Act—Essential Factual Elements* 3061, *Discrimination in Business Dealings—Essential Factual Elements*	Alfred G. Rava, Attorney at Law, San Diego	I know of no legal authority requiring "a motivating reason" element for these three claims. "Motivating reason" may be a legally authorized requirement for an employment discrimination claim under the Fair Employment & Housing Act, which is not at all connected legislatively to the Unruh Civil Rights Act. In fact, I think a recent California Supreme Court case, *Harris v. City of Santa Monica,* addressed the mixed-motive defense in a FEHA employment law case, but neither *Harris* nor the mixed-motive defense have anything to do with discrimination claims brought by a business's patrons; FEHA and *Harris* concern discrimination by a business of its employees.	The committee recognizes that there is no authority for applying FEHA causation standards to California's civil rights statutes. But there must be a causation element, and there is no authority for any other standard either. Because of the underlying similarity of discrimination in employment and discrimination in public accommodations, the committee believes that the FEHA standards most

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3062, *Gender Price Discrimination—Essential Factual Elements*		Because there is no legal authority that I am aware of for this "motivating reason" term, this element should simply read: "A reason for defendant's conduct was its perception of plaintiff's sex, race, etc."	likely will be applied under the civil rights statutes when the case arises. The Directions for Use now incorporate the holding of *Harris*, while noting that *Harris* does not apply outside of the FEHA. The committee does not agree that the mixed motive defense could not be present in a case of discrimination against a business patron. A business might exclude a patron for both impermissible (e.g., race) and permissible (e.g., intoxication) reasons.
		The fourth element of CACI No. 3060 reads: "4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm. What is the authority for the "substantial factor" phrase in this Unruh Act instruction? I am not aware of the Unruh Act, codified as Civil Code section 51, or the case law related to the Unruh Act, requiring that a defendant's conduct be a substantial factor in causing plaintiff's harm. "Substantial conduct" is a higher standard of proof than "conduct," and this higher standard could make it more difficult for a plaintiff to prevail on his or her discrimination claim. Plus, adding this "substantial" requirement is contrary to Civil Code section 52, which imposes liability on not just "Whoever denies . . . or makes any discrimination or distinction contrary to section 51, 51.5, or 51.6," but also imposes liability on "Whoever . . . aides or incites" the	Like the FEHA, the Unruh Act has the double causation feature. First, the discrimination must have caused the denial of services; then the denial of services must have caused the plaintiff harm (unless only the $4K recovery for presumed harm is sought, in which case the substantial factor causation element need not be given). Consider this example: a gay man is having a business lunch at a restaurant. He is thrown out of the restaurant, cutting his meeting short, after which he loses a profitable contract with his lunch companions. First he must prove that he was thrown out because he was gay (motivating reason). Then he has to prove that

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		prohibited discrimination. By adding this "substantial" requirement to this instruction, a business that merely aided the major tortfeasor's "Caucasians' Night" or "Men's Night" promotion that discriminated against people of color or women, by perhaps helping with the sponsorship of such a promotion (e.g., "TGI Friday's Ladies Night, Sponsored By Bud Light"), could escape liability for at least aiding in the discrimination because a jury could find that its conduct, while a "factor" in causing a plaintiff's harm," was not a "substantial factor" in causing plaintiff's harm. Without any authority for the word "substantial" in this Unruh Act instruction, this instruction should instead read: "That defendant's conduct was a factor in causing plaintiff's harm." This word "substantial" may emanate from a jury instruction for an employment discrimination claim under FEHA, which is different than the Unruh Act, the latter being passed in 1959.	because he was thrown out, he lost the contract (substantial factor).
VF-3030, *Unruh Civil Rights Act,* VF-3031, *Discrimination in Business Dealings,* and VF-3032, *Gender Price Discrimination*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee finds the revised paragraph of the Directions for Use to be cumbersome and suggests replacing that paragraph with the following for greater clarity: "A successful plaintiff may recover a maximum of three times the amount of actual damages, but no less than $4,000. (Civ. Code, § 52(a).) The judge should increase or reduce the jury's award as necessary to stay within these limits."	The purpose of this paragraph is to explain how to approach question 5. The proposed revision clearly states the law, but doesn't tie it into the verdict form.
3706, *Special Employment—General Employer and/or Special Employer Denies Responsibility*	California Judges Association, by Jordan Posamentier, Legislative Counsel	Like the revision to CACI 2923, this revision modifies the instruction to make right of control not the first factor for the jury to determine but the most important factor. The change will allow the jury to deliberate on that "special employment" issue more effectively than in the current version where the language now requires deliberations on the issue in a specific order.	No response is necessary.

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		The change improves the instruction. It is reads much better and is more logical and consistent with appellate case law. It will be easier for the jury to use in making that determination. CJA approves.	
	Orange County Bar Association, by Wayne R. Gross, president	This instruction with its new edits provides greater clarification. Respectfully, however, the instruction is still laced with confusing and/or misleading verbiage and need further clarification and simplification for a jury. The Sources and Authority provide excellent updates which will serve as helpful guidelines. It is important to be crystal-clear for the jury that the "control" issue is relevant only to extent that such "control" existed at the time of the incident. The way the language is currently drafted suggests that "control" at any time by the second employer could trigger liability for the second employer. For example, an employer may have "control" over a worker during working hours, but not after-hours when the worker is engaged in personal activities. Therefore, paragraphs 1 and 2 should be revised as follows; First paragraph: "…was the temporary employee of [*name of defendant second employer*] **at the time of the incident**, and therefore…" Second paragraph: "The most important factor is whether [*name of defendant second employer*] had the right to fully control the activities of [*name of worker*] **at the time of the incident.**"	The first sentence of the instruction, says "when the incident occurred," so it is unlikely that the jury will be mislead in the way posited. Nevertheless the committee has added the temporal language to the elements also.
		4th Paragraph: The lead-in sentence to the list of factors: ("The following factors, if true, may show that…") is confusing and misleading. First, it falsely suggests that this is an exhaustive list of relevant factors to consider. Second, it provides no guidance on weighing of these factors, nor	The Directions for Use clarify that the list is not exhaustive. Nevertheless, the committee has added an "Other" option. The instruction also tells the jury to

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		whether a jury needs to find one, or all, of these to be "true" or some combination thereof, in determining whether or not the worker was a "temporary employee" of the second employer at the time of the incident. Therefore, recommend changing to: "You should consider all relevant factors in determining whether or not [*name of worker*] was the temporary employee of [*name of defendant second employer*] at the time of the incident, including primary consideration of the following factors:"	"consider all the circumstances," so the committee does not see any serious issue with the weighing of the factors. Nevertheless, the committee has changed "if true, may show" to "if true may tend to show."
		The factors listed are the primary factors gleaned from case law, so they should be referred to as "primary" factors, while keeping open the possibility for other factors to be weighed in.	These factors are considered the secondary factors; the right of control is the primary factor.
		In lead-in sentence to the list of factors, [*name of agent*] should be changed to [*name of worker*]; there is no reason to use "worker" throughout and then suddenly use the word "agent" in this one spot	The committee has made this change.
3903O, *Injury to Pet—Costs of Treatment (Economic Damage)*	State Bar Committee on Administration of Justice	The sentence "Pets are no longer treated as property with regard to damages" should be deleted. Alternatively, if it is not deleted, some clarification should be provided with this sentence. For example, an additional sentence could be added to the Instructions for Use as follows: "Use of this instruction does not preclude use of CACI 3903J in appropriate circumstances such as if the pet has market value." The new cases that form the basis for this new instruction did not find that pets are no longer to be considered as property. What the cases clarify is that the "general standard for damages to personal property based on market value" as set out in CACI No. 3903J is inappropriate when applied to pets. For example, in *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1606−1608, emotional distress	The committee has added the word "exclusively" to the sentence.

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		damages for intentional injury to a pet were allowed pursuant to a cause of action for trespass to chattel. The elements of a cause of action for trespass to chattels as set out in CACI No. 2101 reference an item of personal property. Thus, pets are still considered personal property but case law has set out a special standard for damage to pets. In essence, pets are to be considered a special type of personal property. Further, inclusion of the subject sentence may lead to confusion. If pets are no longer treated as property, does this mean that CACI 3903K (*Loss or Destruction of Personal Property (Economic Damage*) would not apply for the loss or destruction of a pet? If a pet is killed/destroyed and there is no cost for care and treatment, what would be the appropriate jury instruction as to the recoverable damages? If a pet does have monetary value before injury, such as a pure-bred pedigree show dog, and no care or treatment is obtained because the injury can be healed without medical treatment but the injury precludes the dog from ever again being marketed as a show dog, would there be no recoverable damage or would the pet owner still have the option of using 3903J for diminution of value?	
		The second paragraph under Directions for Use for 3903O should be added to the Directions for Use for CACI No. 3905A as follows: Emotional distress damages have been allowed for intentional injury to a pet. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1606−1608 [146 Cal.Rptr.3d 585] [claim for trespass to chattels]; see also CACI No. 2101, *Trespass to Chattels, Essential Factual Elements*.)	An excerpt from *Plotnik* has been added to the Sources and Authority for 3905A.
		The *Plotnik* case should be added to the Directions for Use for CACI No. 2101 to note that a cause of action for trespass to chattels can be made in cases involving injury or	An excerpt from *Plotnik* has also been added to the Sources and Authority for 2101.

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		destruction of a pet. The addition could read as follows: "A cause of action for trespass to chattels has been found to be basis for emotional distress damages for intentional injury to a pet. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1606−1608."	
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	This new instruction sets forth treatment costs, instead of the diminution in market value, as the measure of damages for harm to a pet. The statement in the Directions for Use that "pets generally have no value to anyone except the owner" is overbroad. Many pets have a market value, although they may have a unique value to their owners. A plaintiff should not be precluded from recovering the diminution in value if it exceeds treatment costs. Accordingly, we suggest that the first paragraph of the Directions for Use be modified as follows: "Give this instruction for injury to a pet if the plaintiff seeks to recover treatment costs instead of the diminution in market value. Pets are not ~~longer~~ necessarily treated as property with regard to damages. The general standard for damages to personal property based on market value (see CACI No. 3903J, *Damage to Personal Property (Economic Damage))* ~~is~~ may be inappropriate ~~because pets generally have no value to anyone except~~ if the pet has a unique value to the owner. Therefore, recovery of reasonable medical expenses is allowed in those circumstances. The rule applies regardless of the tortious cause of injury, including what may be referred to as veterinary malpractice. (See *Martinez v. Robledo* (2012) 210 Cal.App.4th 384 [147 Cal.Rptr.3d 921].) If the plaintiff seeks to recover the diminution in value instead of treatment costs, use CACI No. 3903J, which can be modified as appropriate."	The committee has revised the Directions for Use to clarify that diminution of value is still available as a measure of damages for an animal that does have a market value. The comment seems to assume that the owner cannot recover both costs of treatment and diminution of value. The committee does not think that this would necessarily be the case. If a formerly valuable animal is no longer valuable, and has also incurred costs of treatment, the committee sees no reason why both measures of damages could not be recovered.
		We suggest that the title be modified to "Injury to Pet	The committee agreed and has made this

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		(Economic Damages—Treatment Costs)" or a similar title to indicate that treatment costs is not necessarily the exclusive measure of damages.	change.
		The Sources and Authority include this quote from *Martinez*: "There can be little doubt that most pets have minimal to no market value, particularly elderly pets. . . . [W]hile people typically place substantial value on their own animal companions, as evidenced by the large sums of money spent on food, medical care, toys, boarding and grooming, etc., there is generally no market for other people's pets." *Martinez* involved a rather ordinary dog. This statement may not be true for fancy dogs, fancy cats, horses, and other valuable pets and does not seem helpful. We would delete this quote.	The fact that the statement might not be true of every pet is not a reason to exclude it. It is language from a case that is accurate as far as it goes ("most pets" "generally no market"), and would be of interest to a CACI user.
3904A, *Present Cash Value* (The comment also applies to 359, *Present Cash Value of Future Damages*)	Hon. David W. Abbott, Judge of the Superior Court, Sacramento County	If there is no expert testimony on the subject of present cash value, should the jury be instructed to consult CACI No. 3904B for calculating PCV? Can they be so instructed if there is no expert testimony regarding discount rates and inflation rates to guide them? If there is no expert testimony and no stipulation, should they be given CACI Instruction 3904A at all? I have had cases in which evidence of substantial future economic damages is before the jury and there was no expert testimony regarding PCV. The defense wanted the jury instructed on use of CACI Form 3904B to calculate a reduction to PCV. There was no evidence before the jury that would even allow them to use the form in my estimation and therefore I denied the defense request. If the jury has received expert testimony and they want to apply a different discount rate than the one opined by the	The commentator raises some excellent questions, but it is not clear what, if any, changes he is requesting. There are no clearly correct answers to these questions at this time, and thus the committee has not made any revisions in response to the comment.

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		expert(s), shouldn't they be referred to the Form 3904B?	
4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*	California Judges Association, by Jordan Posamentier, Legislative Counsel	This new instruction sets forth the duty of a selling real estate broker to conduct a reasonable inspection and to disclose material information to the buyer, and enumerates the elements to find breach. The foundation for the instruction is Civil Code section 2079(a). The new instruction appears accurate. This change appears useful and unobjectionable. CJA approves.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The duty on which this instruction is based is a statutory duty and not a fiduciary duty. We therefore question whether this instruction belongs in the fiduciary duty series. We suggest that consideration be given to moving this instruction to the professional negligence series, which may be a better fit.	The committee has previously considered this point, but has not yet decided on a course of action. It is possible in the future that the title of the series will be changed to Breach of Fiduciary and Related Duties. The committee does not see the Professional Negligence series as a better fit as other broker duties are in the Breach of Fiduciary Duty series.
		The duties under Civil Code section 2079 apply to a real estate broker or salesperson. We suggest that the term "agent" or "salesperson" be added to the title of the instruction, the first line of the instruction, and the first line of the Directions for Use where only "real estate broker" appears	The committee has made this change everywhere proposed except in the instruction title.
		Civil Code section 2079 states that the duty is owed only to a prospective purchaser. We believe that a new first element should be added stating that the plaintiff was a prospective purchaser. Although this may be undisputed in cases in which the plaintiff later purchased the property, whether the plaintiff was a prospective purchaser may be disputed in other cases if the plaintiff did not follow through with the purchase but allegedly suffered damages as a result of the nondisclosure.	The committee does not believe that a new element is needed, but it has added "before the sale" in several places to clarify that the duty is owed to a prospective buyer.
		We believe that the seller's broker or agent, who represents	This error has been corrected.

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		the seller in selling the property, should be described in element 2 as acting on behalf of the seller for purposes of "e.g., 'selling a residential property' " rather than "e.g., 'purchasing a residential property.'	
		We believe that it would be helpful to add to Sources and Authority a quotation from Civil Code section 2079.2 on the standard of care and a citation to *Coldwell Banker Residential Brokerage Co., Inc. v. Superior Court* (2004) 117 Cal.App.4th 158, 165, on the scope of the statutory of duty. We also suggest adding to the Secondary Sources Miller & Starr, California Real Estate 3d, § 1:41, Duty of Seller of Real Property to Disclose.	As to adding section 2079.2, the committee does not think that this instruction presents a "reasonable broker" standard. Section 2079 says the broker has to do certain things and that the failure to do them is a breach of duty. The jury does not weigh the reasonableness of the broker's failing to make the required inspection. The committee did agree to add an excerpt from *Coldwell Banker* to the Sources and Authority and to add the section from Miller Starr to the secondary sources.
4200, *Actual Intent to Defraud a Creditor—Essential Factual Elements*	Orange County Bar Association, by Wayne R. Gross, president	Make the following changes to cite the correct Civil Code sections: 1) change Civ. Code sec. 3934.04(a)(1) to Civ. Code sec. 3439.04(a)(1) 2) change Civ. Code sec. 3934.08(a) to Civ. Code sec 3439.08(a)	This error has been corrected.
4320, *Affirmative Defense—Implied Warranty of Habitability* (and VF-4301)	Orange County Bar Association, by Wayne R. Gross, president	The OCBA would agree with this proposal if it were modified to include language about the landlord's warranty of habitability only extending to conditions for which (1) the landlord knew about prior to the tenant's failure to pay rent or (2) the landlord should have discovered through reasonable inspections prior to the failure to pay rent. See *Peterson vs. Superior Court* (1995) 10 Cal.4th 1185; *Knight*	The committee has considered this comment on multiple occasions. It continues to feel that the matter is not clearly settled, in which case the best approach is to present the issue in the Directions for Use rather than in the instruction itself.

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		vs. Hallsthammar (1981) 29 Cal.3d 46, 55; Restatement Second of Property, Landlord & Tenant, section 17.6, comment C, at page 233. It makes no sense to change the Directions for Use but not the instruction itself. The two cited Supreme Court cases seem to require that the landlord either have actual notice of the uninhabitable condition or should have discovered it through a reasonable inspection.	*Peterson* is not an unlawful detainer case. *Knight* does not require that the landlord know or should have known of the condition.
4328, *Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, or Stalking, or Elder/Dependent Adult Abuse*	Orange County Bar Association, by Wayne R. Gross, president	The OCBA agrees with this proposal based upon the 2012-2013 amendments to C.C.P. § 1161.3 and the definition of "abuse of an elder or a dependent adult" as set forth in Welfare & Institutions Code § 15610.07.	No response is necessary.
VF-4300, *Termination Due to Failure to Pay Rent*	Orange County Bar Association, by Wayne R. Gross, president	The changes proposed to VF-4300 appear to eliminate the separate requirement that the defendant tenant "actually receive the 3-day notice" and clarifies the requirement that the plaintiff landlord give the defendant a 3-day notice at least three days prior to filing the action. This amendment appears logical in that the requirement for the landlord to actually give a notice to the tenant presupposes that the tenant has actually received the notice. The amendment eliminates an unnecessary step by combining it with the element 2 requirement for actual notice being given to the tenant. The OCBA agrees with the proposed change.	No response is necessary.
VF-4300, *Termination Due to Failure to Pay Rent,* and VF-4301, *Termination Due to Failure to Pay*	State Bar Litigation Section, Jury Instructions Committee, by Reuben A.	The language "fail to make at least one rental payment" in question 1 of this verdict form could be misconstrued to mean that the unpaid amount must be no less than one month's rent. We suggest modifying question 1 as follows:	The committee construes this comment to alert that the current language could be construed to say that the tenant would have to fail to pay the entire rent due in order to be in default; a partial payment would avoid default. The committee

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Rent—Affirmative Defense--Breach of Implied Warranty of Habitability	Ginsburg, chair	"Did [*name of defendant*] fail to ~~make at least one rental payment to [*name of plaintiff*] as required by~~ pay the amount due under the [lease/rental agreement/sublease]?"	does not believe that there is any actual possibility of this misunderstanding.
		The committee agrees with the other proposed revisions to this verdict form.	No response is necessary.
VF-4302, *Termination Due to Violation of Terms of Lease/Agreement*	Orange County Bar Association, by Wayne R. Gross, president	The OCBA agrees with the proposed changes to VF-4302 as they do not appear to be substantive changes. The changes merely eliminate a requirement for "actual notice" to be given to the tenant since that requirement is already included in Question 3 requiring that the landlord/plaintiff properly give the tenant/defendant a 3-day written notice.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	If question 4 is deleted as proposed, new question 4 will not relate to the notice requirements set forth in CACI No. 4305. We therefore would modify the third sentence in the first paragraph of the Directions to Use to begin "Question 3" rather than "Questions 3 and 4."	The committee has made this change.
		The committee agrees with the other proposed revisions to this verdict form.	No response is necessary.
5009, *Predeliberation Instructions*	California Judges Association, by Jordan Posamentier, Legislative Counsel	This adds an instruction that the juror uses his or her common sense and experience in reaching a conclusion, but during deliberations not to make any statements that provide any information to others jurors based on the juror's own special training or unique personal experiences The instruction explains in more detail that jurors are prohibited from sharing their individual expertise with other jurors. The instruction makes sense and is unobjectionable. CJA approves.	No response is necessary
	Consumer Attorneys of San Diego, by Raymond Y. Ryan	I believe the edits are far worse than the already flawed original instruction. The edits now instruct jurors to apply their own "common sense and personal experiences" and then instructs them NOT to tell other jurors about it. This edit reduces the possibility of discovering reasons for mistrials. This edit encourages jurors to make decisions	There appear to be two diametrically opposite views on the question of a juror's reliance on common sense and his or her own experiences. The original proponent of this change (a judicial officer) insisted that jurors should be

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		based on personal experiences and common sense (which almost inextricably invites personal beliefs and biases) and then informs those jurors to refuse to talk to other jurors about why they are voting the way they are! This edit chills speech in the deliberation room and I strongly object.	encouraged to rely on common sense and experience, quoting the expression: "A juror should have an open mind, not an empty mind." Case law is clear that it is juror misconduct to interject one's own experience into the deliberations. (See, e.g., *In re Malone* (1996) 12 Cal.4th 935, 963.) The challenge is in phrasing a right to rely on common sense and experience in a way that does not lead to juror misconduct in deliberations. The committee has elected a slight change to its originally proposed language and has adopted some language from CALCRIM Nos. 105 and 206 to allow the use common sense and experience "in deciding whether testimony is true and accurate." As far as "chilling speech," there is no free speech in the jury room.
		The term "use your common sense" translates into "you do not have to follow the law, you can use common sense instead," and every defense attorney in all 25 of my jury trials has talked about common sense as a way to avoid applying the evidence to the law. The term "common sense" can be loosely interpreted to mean too many different things including personal beliefs, morals, politics, tort reform, personal experience, etc. The term is highly problematic and should be removed from the instruction.	See response above.

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		I suggest the instruction read as follows: "You should use your intellect (or analytical abilities or mental faculties) to apply the law to the evidence that you heard and saw during trial. You may not apply your own specific personal experiences or training in formulating your opinions or during discussions with fellow jurors in matters related to this case.	
	Kevin C. Mayer and Lynn R. Levitan, Crowell & Moring. Los Angeles	We disagree with the proposal as modified. Specifically, we disagree with the addition of the proposed language "and experience" because it would tend to permit individual jurors to disregard the evidence presented at trial and substitute their own experience(s) in inferring what did or did not occur with respect to disputed fact issues. While the proposed language prohibits discussion among jurors, *it does not prohibit and, in fact, allows* for a juror to consider his or her own "experience" (which could be considered additional "expert" opinion) in forming his or her conclusions. The only evidence that can and should be considered, however, is that introduced and admitted at trial.	See response above.
	Orange County Bar Association, by Wayne R. Gross, president	The existing language of the Instruction is preferable to that proposed. This is due, in part, to the proposal's introduction of "experience" at the first sentence of the fourth paragraph. As proposed, this instruction would tell the juror to use their "experience to reach [their] conclusion" and then, by way of the last sentence of the same paragraph, tell them such is not to be considered because their "experience is not a part of the evidence." This would seem likely to confuse many jurors.	The committee hopes that the revisions to the proposed language noted above will resolve any possible confusion..
		This excerpt from *In re Malone* (1996) 12 Cal.4th 935, 963 should be included in Sources and Authority: "It is not improper for a juror, regardless of his or her	The committee found this excerpt to be particularly useful and has added it to the Sources and Authority.

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	Commentator	Summary of Comment	Committee Response
		educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct."	
5090, *Final Instruction on Discharge of Jury*	California Judges Association, by Jordan Posamentier, Legislative Counsel	This new instruction is a final instruction on discharge of jury. It might send a chilling effect on post-trial juror communications by stating, "If you choose to discuss the case with anyone, feel free to discuss it from your own perspective, but be respectful of the other jurors and their views and feelings. Whatever you do say, you should be prepared to repeat under oath at a later time if that becomes necessary." But it is also probably accurate insofar as the potential for post-trial motion use. On the balance, it is reasonable and acceptable.	See response below.
	Hon. Alan S. Rosenfield, Judge of the Superior Court, Los Angeles County	I have always given the substance of this proposed new instruction extemporaneously, and I think this is a good new formatted instruction. However, I might suggest rewording the sentence at the end that states: "Whatever you do say, you should be prepared to repeat under oath at a later time if that becomes necessary." That, in my view, is too provocative. The very first thing that the members of the jury would fire back as a question would be, "What does THAT mean?...First you say it's okay to talk to people, then you warn us that there may be consequences?" In fact, that's exactly what we'd be doing.	In light of this comment and the one above from the CJA, the committee has removed the sentence regarding repeating information under oath. It felt that the likelihood of this happening was insufficient to introduce a possibly frightening event.

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	Commentator	Summary of Comment	Committee Response
		Perhaps something just a bit softer, like: "Occasionally, after a trial, concerns arise about whether a jury properly performed its duty and the court [and counsel for the parties] may have to inquire. If so, it is important that you recall any statements you make to others about your jury experience and understand that you may be called upon to repeat what you have said under other if that becomes necessary. [These instances are rare.]"	
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	The committee agrees that such a final instruction is appropriate, but is concerned that some of the language in the third and fourth paragraphs could discourage jurors from speaking freely with counsel after the trial. We suggest modifying these paragraphs as follows to avoid chilling such consensual contact and for greater clarity and brevity: "You now have the absolute right to discuss or not discuss your deliberations and verdict with anyone[, including members of the media]. It is not inappropriate for the parties, their attorneys or representatives to ask you to discuss the case, but any such discussion <u>requires your consent</u> ~~may only occur with your consent and only if the discussion is at a reasonable time and place. You should immediately report any unreasonable contact to the court.~~ "~~If you choose to discuss the case with anyone, feel free to discuss it from your own perspective, but be respectful of the other jurors and their views and feelings. Whatever you do say, you should be prepared to repeat under oath at a later time if that becomes necessary.~~	The committee saw no reason to remove anything except the "under oath" sentence. The "reasonable time and place" sentence is important; also the remedy of being able to report oppressive contacts to the court. Nor does the committee see any reason not to advise jurors to be respectful of other jurors in any post-trial comments. This language does not discourage jurors from speaking freely with counsel. It just lets them know that they have rights on how and when the discussion can occur.
All	Hicks	Thank you, I enjoyed reading these proposed changes, and found them very well done and admit I can add nothing,	No response is necessary.

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	Commentator	Summary of Comment	Committee Response
		since I see no issues with the changes. I hope you will get them in place quickly.	
	LA Sup Ct	I'm an Assistant Supervising Judge of Civil in LA -- and I've been asked to handle our court's comments on the draft CACIs. We agree with the proposed changes. The revisions are very clear and helpful, especially the employment related instructions.	No response is necessary.
	Orange County Bar Association, by Wayne R. Gross, president	Agree with all proposed new and revised instructions except as noted above.	No response is necessary.
	State Bar Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, chair	Agree with all proposed new and revised instructions except as noted above.	No response is necessary.

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	Commentator	Summary of Comment	Proposed Response (BG)
All	Leighton Koberlein, Ericksen Arbuthnot, Fresno	I agree with the changes regarding the wording "substantial motivating factor." This requires the employee to demonstrate a causal link to the public policy issues allegedly related to their termination.	No response is necessary
		Applying the substantial motivating factor to other similar instances such as CFRA etc appears to be a valid and appropriate extension of the *Harris* decision. They are related to similar adverse employment actions and are based on statutory language similar to FEHA.	No response is necessary.
All	San Francisco Trial Lawyers Association, by John E. Hill	I am the co-chairperson of the committee at San Francisco Trial Lawyers Association that has been asked to respond to your request for comment on the proposed revisions to the Judicial Council civil jury instructions based on the recent California Supreme Court case of *Harris v. City of Santa Monica*. On behalf of SFTLA I am authorized to inform you that our organization agrees with the proposal.	No response is necessary.
All except 2507	Michael Ott, Attorney at Law, Fresno	Agree	No response is necessary.
2430, *Wrongful Discharge in Violation of Public Policy—Essential Factual Elements*	California Employment Lawyers Association, by David diRobertis, chair	The proposed case excerpt from *Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750 in the Sources and Authority incorporates as apparent "black letter law" a concept that *Dutra* misunderstood and misapplied. The excerpt has nothing to do with crafting a jury instruction. The holding re: Labor Code section 132a is wrong.	This comment is not related to the recent California Supreme Court case of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The excerpt is a correct quotation from the case. A user might be interested in knowing about it. That is all that is required to make an excerpt appropriate for the Sources and Authority.
	Leighton Koberlein,	While it is important to allow the modification of the instruction to include demotions or other adverse	This comment is not related to *Harris v. City of Santa Monica*, which was the

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	Commentator	Summary of Comment	Proposed Response (BG)
	Ericksen Arbuthnot, Fresno	employment actions, not including the word "demotion" in the instruction prevents prejudice with respect to what actually needs to be proven. There is potential that a jury in a termination case could become confused by inclusion of the word demotion, and focus on that word as it compares to termination, rather than the more meaningful elements of the case. In other words, one should seek to avoid the thought process that if demotion is enough to prove this case and this Plaintiff was terminated, he should win because termination is far worse than demotion.	sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The commentator misunderstands the committee's intent in deleting references to demotion. The intent was to present the possibility of other adverse employment actions in the Directions for Use rather than in the instruction itself to achieve consistency throughout the series. As assembled, only the action at issue would appear in the instructions.
2505, *Retaliation—Essential Factual Elements*	Association of Defense Counsel of Northern California and Nevada, and Association of Southern California Defense Counsel, by Linda Miller Savitt and Eric C. Schwettmann	The current language of CACI 2505, in addition to its *Harris*-related deficiencies, does not accurately state that intent is a necessary element of a retaliation claim. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1230-1231.)	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The commentators do not mention the fact that the *Joaquin* dicta is addressed in the Directions for Use. The committee disagrees with this dicta, as noted in the Directions for Use.
	Leighton Koberlein, Ericksen Arbuthnot, Fresno	The retaliation instruction should only speak of discharge, similar to the other instructions. At the same time, there should be an opportunity to specify another type of retaliatory action.	This comment is not related to *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The limitation to presenting discharge

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			as the only adverse action is only in the Wrongful Termination series. The FEHA series allows for additional adverse actions.
2507, *"Substantial Motivating Reason" Explained*	Association of Defense Counsel of Northern California and Nevada, and Association of Southern California Defense Counsel, by Linda Miller Savitt and Eric C. Schwettmann	Both pre and post *Harris* forms of CACI 2507 are premised on the idea that the reason at-issue "contributed to the decision to take certain action [the specified adverse employment action]." Thus, the proposed language is essentially no different than the original and instead simply rewords language to state the same thing with slight additions. This is not sufficient in light of *Harris.* Instead, the language must more accurately reflect the heightened burden of proof associated with "substantial." As defined by the Merriam-Webster Unabridged On-Line Dictionary, "substantial" is something that is "big, consequential, earthshaking, earth-shattering, eventful, historic, major, material, meaningful, momentous, monumental, much, significant, important, tectonic, weighty." By way of comparison, BAJI 12.01.1 defines a "motivating factor" as "something that moves the will and induces action [even though other matters may have contributed to the taking of the action]." Given the above, it is clear that the proposed revisions omit proper reference to the "substantial" nature of the reason. Thus, the Judicial Council should consider revising CACI 2507 as follows: "A 'substantial motivating reason' is a reason that a reasonable person would consider to have **meaningfully contributed** to the [specify adverse employment action]. It	The committee does not agree that its proposed revision is insufficient in light of *Harris*. *Harris* does not define "substantial" in the way suggested or in any other way. The dictionary definition, if accurate, is too draconian. The BAJI definition defines "contributed" in a way that is not in plain English. The proposed rewrite says the same thing in several different ways. See also responses to commentators CELA and Leighton Koberlein below.

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		must be more than a remote, **trivial, or insignificant** reason. It does not have to be the only reason motivating the [specify adverse employment action], **but it must be a consequential reason.**"	
	California Employment Lawyers Association, by David diRobertis, chair	CELA concurs with the Committee's proposal to modify CACI 2507 in light of *Harris v.City of Santa Monica* (2013) 56 Cal.4th 203 to incorporate the "substantial factor" test as already defined in CACI 430. However, use of the "reasonable person" phrase within the proposed CACI 2507 is both unnecessary and also confusing. While "reasonable person" concepts are well-embedded in tort law doctrine, they are not typically used in employment discrimination law. The issue in an employment discrimination case is whether the discriminatory animus did indeed contribute to the decision – not whether a "reasonable person" would believe it to have done so. But, more important, the use of the "reasonable person" language in this context creates a risk of juror confusing. By definition, permitting discriminatory or retaliatory animus to infect employment decision-making is not reasonable; it is unlawful and, thus, something that a "reasonable person" would not expect to occur at all. In other words, a "reasonable person" would not consider discriminatory or retaliatory animus to have contributed to employment decisions because allowing such to occur is to engage in unlawful conduct; it is to do precisely that which the law says one should not do.	The committee agreed with this comment and has revised the instruction to remove the reasonable-person language. It is not what a reasonable person believes, it is what actually happened.
	Leighton Koberlein, Ericksen Arbuthnot, Fresno	This definition is a little weak as to the "substantial" portion of the motivating factor. A mere contribution is not necessarily substantial. The court used the word substantial for a reason, it would not be true to the court's decision to leave out anything that would suggest the reason be	The committee does not believe that there is any such thing as a "mere contribution." "Materially" adds nothing. The question is whether the employer actually acted from a

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		substantial. Yet, the explanation given suggests that a mere motivating reason would be sufficient. I would suggest that it read "A 'substantial motivating reason' is a reason that a reasonable person would consider to have **materially** contributed to the [*specify adverse employment action*]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [*adverse employment action*].	discriminatory or retaliatory animus. If so, it's a motivating reason; it's a substantial one and it is a material one.
	Jury Instructions Committee of the State Bar of California's Litigation Section, by Reuben Ginsberg, Chair	Agree	No response is necessary.
		There are revised cross references to CACI No. 2507 in the Directions for Use for several other instructions to reflect its new title, "*Substantial Motivating Reason" Explained*. We note, however, that the title has not been revised in references to the instruction in the Directions for Use for CACI Nos. 2500, 2505, 2511, 2527, 2540, 2560 and 2570, but should be revised in this regard.	These errors have been fixed.
	Michael Ott, Attorney at Law, Fresno	2507 is too weak in its definition of "substantial." It should be the "main" motivating factor, or the "most significant" motivating factor.	That is not what *Harris* says. The discriminatory motive does not have to be more significant than the benign motive. It just has to be "substantial."
2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*	California Employment Lawyers Association, by David diRobertis, chair	CELA has concerns with the following bracketed language: "*specify acts of supervisor on which decision maker relied*," which is found in both elements 1 and 2. In some cases, providing the specific acts on which the decision maker relied and which are alleged to have been influenced by discrimination or retaliation will not be a problem. But in other cases, this requirement may be impractical or even impossible. For example, in some cases, the underlying retaliatory or discriminatory acts of the initial supervisor or supervisors may be a large number of acts spread over a long time	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The committee agreed with the comment and has added sentences to the Directions for Use advising on how to address these problems with specifying the supervisor's acts.

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		period so that it is impractical to list each such 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 allege and have sufficient inferential proof to argue to the jury that the decision maker did rely on such acts (denial notwithstanding). In this circumstance, the acts that should be listed are those which 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, 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).	
2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant,* (and VF-2514)	California Employment Lawyers Association, by David diRobertis, chair	The phrase "in the workplace" in element 2 misstates the law. Harassing conduct need not occur "in the workplace" to be actionable.	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The committee agreed with this comment and has changed "in the workplace" to "In the course of employment."
		The requirement in element 3 that the protected trait be a "substantial motivating reason" for "harassing conduct" misstates the law. Nothing in *Harris* supports adopting a	This comment is now moot in light of the committee's decision made in response to comments submitted in the

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		"substantial factor" test for harassment claims under the FEHA. Those claims are governed by a completely different legal analysis, and they have never incorporated the "motivating reason" causal nexus test that FEHA discrimination and retaliation cases were guided by before *Harris*. Thus, while *Harris* adopted a "substantial factor" test in place of the "motivating" test in the context of FEHA discrimination cases, it did not do so for FEHA harassment cases that are brought under an entirely different statutory provision.	previous Invitation to Comment, which was to remove all of the elements for the underlying discrimination, retaliation, or harassment, and limit the instruction just to "failure to prevent."
	Association of Defense Counsel of Northern California and Nevada, and Association of Southern California Defense Counsel, by Linda Miller Savitt and Eric C. Schwettmann	The introductory paragraph states that plaintiff claims that defendant "failed to prevent harassment/discrimination/retaliation based on [protected class]." Since the statute only provides liability for failure to take **all reasonable steps necessary** to prevent discrimination and harassment, the introductory statement misstates the law. This should be revised.	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The committee agreed with the comment and has used the statutory language "all reasonable steps" in both the introductory paragraph and in Element 3.
		There is no companion instruction advising the jurors what constitutes reasonable steps necessary to prevent discrimination or harassment. 2 CCR § 7287.6 identifies and enumerates reasonable steps. "[S]uch steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under California law, and developing methods to sensitize all concerned." 2 CCR § 7287.6(b)(3). Significantly CACI 2523, which defines "harassing conduct," specifically relies on 2 CCR § 7287 .6(b)(1). If the regulation applies to one jury instruction, it should be used to define reasonable steps.	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. This suggestion will be considered in the next release cycle.

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		There should be no verdict form for the "failure to take reasonable steps" cause of action. (VF 2514) In order to succeed on this claim, the plaintiff must also succeed on the underlying discrimination, harassment, or retaliation claims. See *Thompson v. City of Monrovia* (2010) 186 Cal.App.4th 860, 880 (no cause of action for a failure to investigate unlawful harassment or retaliation unless actionable misconduct occurred). As such, if there is no finding of underlying discrimination, harassment or retaliation, there can be no finding of liability for failure to take reasonable steps, and the verdict form questions on this issue will be skipped. The findings for questions 1 2. and 3 would have been established by the underlying claims and would be unnecessary again and redundant..	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The comment is mostly moot. The committee received a similar comment from the State Bar Litigation Section Jury Instructions committee in the last comment period. It decided to excise everything from the verdict form except question 4 on failure to prevent and question 5 on damages (see next comment). As such, little is left of the verdict form, but question 4 is still relevant.
		Maintaining a separate verdict form runs the risk of double recovery. "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. " (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158-1159.) Any damages would be entirely duplicative and a jury finding on this separate theory adds nothing to plaintiff's case other than the ability to confuse the jury. Moreover, it is improper to allocate damages for a single compensable injury among alternative legal theories of liability. (*Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 555-556.)	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The issue presented by the comment is true for any verdict form if it is used in a case with multiple causes of action. The Directions for Use direct the user to CACI No. VF-3920, *Damages on Multiple Legal Theories,* which addresses the problem that the comment presents.
2730, *Whistleblower Protection—Essential Factual Elements*	California Employment Lawyers	CELA agrees that the proposed CACI 2730 properly states the employee's initial burden under Labor Code section 1102.5 by requiring that the employee demonstrate that the	An additional instruction on the "same decision" affirmative defense will be considered in the next release. Due to

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	Association, by David diRobertis, chair	protected activity was "a contributing factor" in the adverse action. CELA submits, however, that to ensure complete instruction to the jury, the instruction should include (or an additional instruction should be crafted) to address the employer's "clear and convincing" burden to prove that it would have taken the same action "for legitimate, independent reasons" wholly apart from the employee's protected activity. (See Lab. Code, § 1102.6.)	the shifting burden of proof, it should not be incorporated into 2730.
		Omit "The disclosure of actions or policies believed to be merely unwise, wasteful, gross misconduct, or the like, is not protected." (lengthy discussion)	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. CELA submitted this same comment previously when this instruction was originally adopted. The committee reaffirms its previous disagreement with the comment, which was as follows: "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."
		Omit "A report of publicly known facts is not a protected disclosure." (lengthy discussion)	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. CELA submitted this same comment previously when this instruction was

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			originally adopted. The committee reaffirms its previous disagreement with the comment, which was as follows: "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 omit this holding just because there are arguments that support an opposite result."
	Jury Instructions Committee of the State Bar of California's Litigation Section, by Reuben Ginsberg, Chair	We agree with the proposed revision to the instruction, which is consistent with Labor Code section 1102.6.	No response is necessary.
		We believe that the "substantial motivating reason" standard applicable in FEHA cases may differ from the "contributing factor" standard applicable to a claim under Labor Code section 1102.5. We therefore believe that the statement in the first sentence of the second paragraph of the Directions for Use that retaliation under Labor Code section 1102.5 is viewed the same as under FEHA may be inaccurate and is overbroad, and the reference to CACI No. 2505, Retaliation, which states the "substantial motivating reason" standard, may be problematic. We would modify	The committee agreed with the comment and has revised the Directions for Use. The sentence is a slight misstatement of *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387. The court does not say that "retaliation" is the same as under the FEHA; it says to apply the same standard for "adverse employment action."

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		the Directions for Use by striking this sentence.	
3060, *Unruh Civil Rights Act—Essential Factual Elements,* and 3061, *Discrimination in Business Dealings—Essential Factual Elements* (and VF-3030 and VF-3031)	Leighton Koberlein, Ericksen Arbuthnot, Fresno	The language in the Directions for Use: "Note that a successful plaintiff is entitled to an award of up to three times actual damages but not less than minimum recovery of $4,000 regardless of any actual harm/damages. (Civ. Code, § 52(a).)" is not true to the statute. There is not an "entitlement" of three times the damages. This is something the jury may award and not something it is required to award. The language should read "a successful plaintiff may be awarded up to three times the actual damages…" The proper language also occurs in 3061. There is a similar problem with VF 3030 and 3031. The statue reads the jury may award, it should not be referred to as a "right." These descriptions are prejudicial and will likely improperly sway a jury to award more damages than it believes are in order.	This comment is not related to *Harris v. City of Santa Monica*, which was the sole subject of this Invitation to Comment. Nevertheless, the committee has elected to address it. The committee agrees with the comment with regard to CACI No. 3060. It is the jury's discretion to award, not the plaintiff's right to receive, the minimum statutory damages. The committee does not see any problem with the verdict forms. They refer to the right of the jury to award, not the right of the plaintiff to be awarded.
	Alfred G. Rava, Attorney at Law, San Diego	The Advisory Committee acknowledges that there is no legal authority for it to apply FEHA rulings to the jury instructions for a Unruh Civil Rights Act or Civil Code section 51.5 cause of action when the committee writes the following in its Directions for Use for its proposed new CACI 3060 and 3061 instructions: "Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts." Why then is the Advisory Committee applying these FEHA standards to the jury instructions for Unruh Civil Rights Act and Civil Code section 51.5 claims? Especially when the Committee admits there are absolutely no authorities allowing or authorizing the Committee to apply FEHA	As the commentator notes, the committee agrees that the FEHA generally and *Harris* in particular do not necessarily apply to the Unruh Act and other related state civil rights statutes. But the problem is that these instructions must have a causation element, and there is no authority for (and the commentator does not suggest) any different standard. Given that discrimination is discrimination, whether in employment or in public accommodations, the committee believes it most likely that the FEHA

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		standards to these instructions.	standards for causation and mixed motive will be applied under the civil rights statutes.
Same Decision	Jury Instructions Committee of the State Bar of California's Litigation Section, by Reuben Ginsberg, Chair	New instructions and verdict forms should be drafted on the same-decision issue. *Harris* states that a same-decision instruction is appropriate in cases involving mixed motives. *Harris* holds that in a mixed-motive case under FEHA, if the employer proves that it would have made the same decision at the time in the absence of any discrimination (a "same-decision" showing), the plaintiff is not entitled to reinstatement, back pay or noneconomic damages. (Id. at pp. 232−234.) A same-decision showing is only a partial defense, however. A finding that unlawful discrimination was a substantial motivating factor constitutes a finding of unlawful discrimination and can justify declarative relief, injunctive relief and a discretionary award of attorney fees. (Id. at pp. 234−235.)	The committee will consider an instruction and verdict form on same decision in the next release cycle.

CIVIL JURY INSTRUCTIONS (CACI 13–01)
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UNLAWFUL DETAINER SERIES

CONCLUDING INSTRUCTIONS SERIES

303. Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant*] for breach of contract, [*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 doing those things];]

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

[4. That [*name of defendant*] failed to do something that the contract required [him/her/it] to do; and]

[*or*]

[4. That [*name of defendant*] did something that the contract prohibited [him/her/it] from doing; and]

5. That [*name of plaintiff*] was harmed by that failure.

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Element 2 may be needed if there is an issue of performance of the plaintiff's obligations under the contract. Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material;* element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent*, meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 is needed if conditions for performance are at issue. For reasons that the occurrence of a

condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed,* CACI No. 322, *Occurrence of Agreed Condition Precedent,* and CACI No. 323, *Waiver of Condition Precedent*.

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- "A statement of a cause of action for breach of contract requires a pleading of (1) the ~~A complaint for breach of contract must include the following: (1) the existence of a~~ contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff therefrom." (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) ~~Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)~~

- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc.*, *v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524]~~*supra*, 9 Cal.App.4th at p. 380~~, internal citation omitted.)

- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown*, *supra*, ~~*v. Grimes* (2011)~~ 192 Cal.App.4th at pp. ~~265,~~ 277–278 ~~[120 Cal.Rptr.3d 893]~~, internal citations omitted.)

- "Whether breach of the agreement not to molest bars [plaintiff]'s recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. (*Verdier*, *supra*, 133 Cal.App.2d at p. 334.)

- "The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. The trial court relied upon parol evidence to determine the content and interpretation of the fee-sharing agreement between the parties. Accordingly, that determination is a question of fact that must be upheld if based on substantial evidence." (*Brown, supra*, 192 Cal.App.4th at p. 279, internal citation omitted.)

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*, original italics.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847

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

5 California Points and Authorities, Ch. 50*, Contracts,* § 50.10 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.03–22.50

359. Present Cash Value of Future Damages

To recover for future harm, [*name of plaintiff*] must prove that the harm is reasonably certain to occur and must prove the amount of those future damages. The amount of damages for future harm must be reduced to present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [*Name of defendant*] must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future damages.] [You must use [the interest rate of __ percent/ [and] [*specify other stipulated information*]] agreed to by the parties in determining the present cash value of future damages.]

New September 2003; Revised December 2010, June 2013

Directions for Use

Give this instruction if future damages are sought and there is evidence from which a reduction to present value can be made. Give the next-to-last sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, eExpert testimony will usually be required to accurately establish present values for future losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin, supra*, 41 Cal.2d at pp. 598-599, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.09[3]

361. Plaintiff May Not Recover Duplicate Contract and Tort Damages

Revoked June 2013

See CACI No. 3934 and CACI No. VF-3920.

~~**[*Name of plaintiff*] has made claims against [*name of defendant*] for breach of contract and [*insert tort action*]. If you decide that [*name of plaintiff*] has proved both claims, the same damages that resulted from both claims can be awarded only once.**~~

~~*New September 2003; Revised December 2010*~~

~~Directions for Use~~

~~This instruction may be used only with a general verdict. (See *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360–361 [112 Cal.Rptr.3d 455].) For an instruction to be used with a special verdict and special verdict form, see CACI No. 3934, *Damages on Multiple Legal Theories,* and CACI No. VF-3920, *Damages on Multiple Legal Theories*.~~

~~If the issue of punitive damages is not bifurcated, read the following instruction: "You may consider awarding punitive damages only if [*name of plaintiff*] proves [his/her/its] claim for [*insert tort action*].~~"

~~Sources and Authority~~

- ~~"Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful." (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337 [5 Cal.Rptr. 686, 353 P.2d 294].)~~

- ~~"Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action." (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 761, fn. 13 [250 Cal.Rptr. 195], internal citation omitted.)~~

- ~~"The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so." (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181], internal citation omitted.)~~

- ~~"The trial court instructed the jury, with CACI No. 361, that [plaintiff] could not be awarded~~

duplicative damages on different counts, thus suggesting that it was the jury's responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on certain counts, resulting in an inconsistent verdict." (*Singh*, *supra*, 186 Cal.App.4th at p. 360.)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.06

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] and [*name of defendant*] enter into a contract?
____ 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 plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No]

[or]

[Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?
____ Yes ____ No]

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

[3. Did all the conditions that were required for [*name of defendant*]'s performance occur or were they excused?
____ Yes ____ No

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

4. [Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?
____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?

____ Yes ____ No]

If your answer to [either option for] question 4 is yes, then answer question 5. If you

answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Was [*name of plaintiff*] harmed by that failure?
____ Yes ____ No

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

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

[a. Past [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages*]]:

$ _____]

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 April 2004; Revised December 2010, June 2011, June 2013

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow. ~~If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 6.~~

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

Include question 2 if the court has determined that the contract included dependent covenants, such that

the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].)

Include question 3 if conditions for performance are at issue.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 6.

~~This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.~~

If specificity is not required, users do not have to itemize the damages listed in question 6. The breakdown 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*.

462. Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s [*insert type of animal*] harmed [him/her] and that [*name of defendant*] is responsible for that harm.

People who own, keep, or control animals with unusually dangerous natures or tendencies can be held responsible for the harm that their animals cause to others, no matter how carefully they guard or restrain their animals.

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

1. **That [*name of defendant*] owned, kept, or controlled a [*insert type of animal*];**
2. **That the [*insert type of animal*] had an unusually dangerous nature or tendency;**
3. **That before [*name of plaintiff*] was injured, [*name of defendant*] knew or should have known that the [*insert type of animal*] had this nature or tendency;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That the [*insert type of animal*]'s unusually dangerous nature or tendency was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Revised April 2007, June 2013

Directions for Use

Give this instruction to impose strict liability on an animal owner if the owner knew or should have known that the animal had a dangerous propensity. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) There is also strict liability for injuries caused by animals of a type that are inherently dangerous without the need to show the owner's knowledge of dangerousness. (*Baugh v. Beatty* (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671]; see CACI No. 461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*.)

For an instruction on statutory strict liability under the dog-bite statute, see CACI No. 463, *Dog Bite Statute (Civ. Code, § 3342)—Essential Factual Elements.*

Sources and Authority

- "A common law strict liability cause of action may also be maintained if the owner of a domestic animal that bites or injures another person knew or had reason to know of the animal's vicious propensities. If [defendant] knew or should have known of his dog's vicious propensities and failed to inform [plaintiff] of such facts, he could be found to have exposed [plaintiff] to an *unknown risk*

and thereby be held strictly liable at common law for her injuries. Under such circumstances, the defense of primary assumption of risk would not bar [plaintiff]'s claim since she could not be found to have assumed a risk of which she was unaware." (*Priebe v. Nelson* (2006) 39 Cal.4th 1112, 1115–1116 [47 Cal.Rptr.3d 553, 140 P.3d 848], original italics, internal citations omitted.)

- "The doctrine of strict liability for harm done by animals has developed along two separate and independent lines: (1) Strict liability for damages by trespassing livestock, and (2) strict liability apart from trespass (a) for damages by animals of a species regarded as inherently dangerous, and (b) for damages by animals of a species not so regarded but which, in the particular case, possess dangerous propensities which were or should have been known to the possessor." (*Thomas, supra, ~~v. Stenberg (2012)~~* 206 Cal.App.4th at p.~~654,~~ 665~~ [142 Cal.Rptr.3d 24]~~.)

- "California has long followed the common law rule of strict liability for harm done by a domestic animal with known vicious or dangerous propensities abnormal to its class." (*Drake v. Dean* (1993) 15 Cal.App.4th 915, 921 [19 Cal.Rptr.2d 325].)

- Any propensity that is likely to cause injury under the circumstances is a dangerous or vicious propensity within the meaning of the law. (*Talizin v. Oak Creek Riding Club* (1959) 176 Cal.App.2d 429, 437 [1 Cal.Rptr. 514].)

- The question of whether a domestic animal is vicious or dangerous is ordinarily a factual one for the jury. (*Heath v. Fruzia* (1942) 50 Cal.App.2d 598, 601 [123 P.2d 560].)

- " 'The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case.' " (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033], internal citations omitted.)

- "The absolute duty to restrain the dog could not be invoked unless the jury found, not only that the dog had the alleged dangerous propensity, but that defendants knew or should have known that it had." (*Hillman, supra,* 44 Cal.2d at p. 628.)

- "[N]egligence may be predicated on the characteristics of the animal which, although not abnormal to its class, create a foreseeable risk of harm. As to those characteristics, the owner has a duty to anticipate the harm and to exercise ordinary care to prevent the harm." (*Drake, supra,* 15 Cal.App.4th at p. 929.)

- "It is well settled in cases such as this (the case involved a bull) that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: 1. That the animal in fact was vicious, and 2. That the owner knew it." (*Mann v. Stanley* (1956) 141 Cal.App.2d 438, 441 [296 P.2d 921].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1414–1427

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 3.3–3.6

1 Levy et al., California Torts, Ch. 6, *Strict Liability for Injuries Caused by Animals*, §§ 6.01–6.10 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.33 (Matthew Bender)

1 California Civil Practice: Torts §§ 2:20–2:21 (Thomson Reuters West)

503A. Psychotherapist's Duty to Protect Intended Victim From Patient's Threat

[*Name of plaintiff*] claims that [*name of defendant*]'s failure to protect [*name of plaintiff/decedent*] was a substantial factor in causing [injury to [*name of plaintiff*]/the death of [*name of decedent*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] was a psychotherapist;**
2. **That [*name of patient*] was [*name of defendant*]'s patient;**
3. **That [*name of patient*] communicated to [*name of defendant*] a serious threat of physical violence;**
4. **That [*name of plaintiff/decedent*] was a reasonably identifiable victim of [*name of patient*]'s threat;**
5. **That [*name of patient*] [injured [*name of plaintiff*]/killed [*name of decedent*]];**
6. **That [*name of defendant*] failed to make reasonable efforts to protect [*name of plaintiff/decedent*]; and**
7. **That [*name of defendant*]'s failure was a substantial factor in causing [[*name of plaintiff*]'s injury/the death of [*name of decedent*]].**

Derived from former CACI No. 503 April 2007; Revised June 2013

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist for failure to protect a victim from a patient's act of violence after the patient ~~made~~ communicated to the therapist a threat ~~to the therapist~~ against the victim. (See *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334].) The liability imposed by *Tarasoff* is modified by the provisions of Civil Code section 43.92(a). First read CACI No. 503B, *Affirmative Defense—Psychotherapist's ~~Warning~~ Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) ~~by having~~because he or she made reasonable efforts to ~~warn~~communicate the threat to the victim and to a law enforcement agency ~~of the threat~~.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(a) provides:

  "There shall be no monetary liability on the part of, and no cause of action shall arise against, any

person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to ~~warn of and~~ protect from a patient's threatened violent behavior or failing to predict and ~~warn of and~~ protect from a patient's violent behavior except ~~where~~ if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

- "[T]herapists cannot escape liability merely because [the victim] was not their patient. When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." (*Tarasoff, supra,* 17 Cal.3d at p. 431.)

- Civil Code section 43.92 was enacted to limit the liability of psychotherapists under *Tarasoff* regarding a therapist's duty to warn an intended victim. (*Barry v. Turek* (1990) 218 Cal.App.3d 1241, 1244–1245 [267 Cal.Rptr. 553].) Under this provision, "[p]sychotherapists thus have immunity from *Tarasoff* claims except where the plaintiff proves that the patient has communicated to his or her psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (*Barry, supra,* 218 Cal.App.3d at p. 1245.)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

- "Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist. However, the requirement is imposed upon the therapist only after he or she determines that the patient has made a credible threat of serious physical violence against a person." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231 [31 Cal.Rptr.3d 707].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

~~26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, § 304.93 (Matthew Bender)~~
32 California Forms of Pleading and Practice, Ch. 361A, *Mental Heath and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

503B. Affirmative Defense—Psychotherapist's ~~Warning~~ Communication of Threat to Victim and Law Enforcement

[*Name of defendant***] is not responsible for [[***name of plaintiff***]'s injury/the death of [***name of decedent***]] if [***name of defendant***] proves that [he/she] made reasonable efforts to communicate the threat to [***name of plaintiff/decedent***] and to a law enforcement agency.**

Derived from former CACI No. 503 April 2007; Revised June 2013

Directions for Use

Read this instruction for a *Tarasoff* cause of action for professional negligence against a psychotherapist (*Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14, 551 P.2d 334]) if there is a dispute of fact regarding whether the defendant made reasonable efforts to communicate to the victim and to a law enforcement agency ~~of~~ a threat made by the defendant's patient. The therapist is immune from liability under *Tarasoff* if he or she makes reasonable efforts to communicate the threat to the victim and to a law enforcement agency. (Civ. Code, § 43.92(b).) CACI No. 503A, *Psychotherapist's Duty to ~~Warn and~~ Protect Intended Victim From Patient's Threat*, sets forth the elements of a *Tarasoff* cause of action if the defendant is not immune.

In a wrongful death case, insert the name of the decedent victim where applicable.

Sources and Authority

- Civil Code section 43.92(b) provides:

  "There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified ~~above~~in subdivision (a), discharges his or her duty to ~~warn and~~ protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."

- Failure to inform a law enforcement agency concerning a homicidal threat made by a patient against his work supervisor did not abrogate the "firefighter's rule" and, therefore, did not render the psychiatrist liable to a police officer who was subsequently shot by the patient. (*Tilley v. Schulte* (1999) 70 Cal.App.4th 79, 85–86 [82 Cal.Rptr.2d 497].)

- "When the communication of the serious threat of physical violence is received by the therapist from a member of the patient's immediate family and is shared for the purpose of facilitating and furthering the patient's treatment, the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 817 [15 Cal.Rptr.3d 864].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1050, 1051

~~26 California Forms of Pleading and Practice, Ch. 304, *Insane and Other Incompetent Persons*, § 304.93 (Matthew Bender)~~
32 California Forms of Pleading and Practice, Ch. 361A, *Mental Heath and Mental Disabilities: Judicial Commitment, Health Services and Civil Rights*, § 361A.93 (Matthew Bender)

11 California Points and Authorities, Ch. 117, *Insane and Incompetent Persons: Actions Involving Mental Patients*, § 117.30 (Matthew Bender)

1511. Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client

When filing a lawsuit for a client, an attorney is entitled to rely on the facts and information provided by the client.

[*Name of attorney defendant***] claims that [he/she] had reasonable grounds for bringing the lawsuit against [***name of plaintiff***] because [he/she] was relying on facts and information provided by [his/her] client. To succeed on this defense, [***name of attorney defendant***] must prove all of the following:**

1. **That [***name of client***] provided [***name of attorney defendant***] with the following information [***specify information on which attorney relied***];**

2. **That [***name of attorney defendant***] did not know that this information was false or inaccurate; and**

3. **That [***name of attorney defendant***] relied on the facts and information provided by the client.**

New June 2013

Directions for Use

Give this instruction if an attorney defendant alleges that he or she relied on information provided by the client to establish probable cause. The presence or absence of probable cause on undisputed facts is a question of law for the court. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498]; CACI No. 1501, *Wrongful Use of Civil Proceedings*.) The questions here for the jury to resolve are what information was communicated to the attorney that established apparent probable cause, and whether the attorney knew that the information was inaccurate.

The attorney generally has no obligation to investigate the information provided by the client before filing suit. (See *Sheldon Appel Co., supra,* 47 Cal.3d at pp. 882–883.) Therefore, there is no liability under a theory that the attorney should have known that the information was false. Actual knowledge is required.

If a civil proceeding other than a lawsuit is involved, substitute the appropriate word for "lawsuit" throughout.

Sources and Authority

- "In general, a lawyer 'is entitled to rely on information provided by the client.' If the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 223 [105 Cal.Rptr.3d 683], internal citation omitted.)

- "[W]hen evaluating a client's case and making an initial assessment of tenability, the attorney is entitled to rely on information provided by the client. An exception to this rule exists where the attorney is on notice of specific factual mistakes in the client's version of events. Absent such notice, an attorney 'may, without being guilty of malicious prosecution, vigorously pursue litigation in which he is unsure of whether his client or the client's adversary is truthful, so long as that issue is genuinely in doubt.' A respected authority has summed up the issue as follows: 'Usually, the client imparts information upon which the attorney relies in determining whether probable cause exists for initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false.' " (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512–513 [126 Cal.Rprt.2d 747], disapproved on other grounds in *Zamos v. Stroud* (2004) 32 Cal.4th 958, 972 [12 Cal.Rptr.3d 54, 87 P.3d 802], internal citations omitted.)

- "The trial court found the undisputed facts establish that the lawyers had probable cause to assert the fraudulent inducement claim. We agree. It is undisputed that the allegations in the complaint accurately reflected the facts as given to the lawyers by [client] and that she never told them those facts were incorrect. The information provided to the lawyers, if true, was sufficient to state a cause of action … ." (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 625 [124 Cal.Rptr.2d 556], disapproved on other grounds in *Zamos, supra,* 32 Cal.4th at p. 972.)

- "Normally, the adequacy of a prefiling investigation is not relevant to the determination of probable cause." (*Swat-Fame, Inc., supra,* 101 Cal.App.4th at p. 627, disapproved on other grounds in *Zamos, supra,* 32 Cal.4th at p. 972.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 471 et seq., 510.

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.05 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.27 et seq. (Matthew Bender)

1530. Apportionment of Attorney Fees and Costs Between Proper and Improper Claims

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[*Name of plaintiff***] claims damages for attorney fees and costs reasonably and necessarily incurred in defending the underlying lawsuit.**

If you find that [*name of plaintiff***] is entitled to recover damages from [***name of defendant***], [***name of plaintiff***] is only entitled to attorney fees and costs reasonably and necessarily incurred in defending those claims that were brought without reasonable grounds. Those claims are [***specify***]. [***Name of plaintiff***] is not entitled to recover attorney fees and costs incurred in defending against the following claims: [***specify***].**

[*Name of defendant***] must prove the amount of attorney fees and costs that should be apportioned to those claims for which recovery is not allowed.**

New June 2013

Directions for Use

Give this instruction if the court has found as a matter of law that some, but not all, of the claims in the underlying action were brought without probable cause. The elements of probable cause and favorable termination are to be decided by the court as a matter of law. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498] [probable cause]; *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [favorable termination]; see also the Directions for Use to CACI No. 1501, *Wrongful Use of Civil Proceedings*.)

If there are disputed facts that the jury must resolve before the court can make a finding on probable cause, this instruction should not be presented to the jury until after it has determined the facts on which the court's finding will be based.

Sources and Authority

- "Having established the liability of … defendants … , the [plaintiffs] were entitled to recover as part of their compensatory damage award the costs of defending the [underlying] action including their reasonable attorney fees." (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 90 [101 Cal.Rptr.3d 303].)

- "As in the case of the assertion of a maliciously prosecuted complaint with one for which there was probable cause, the burden of proving such an apportionment must rest with the party whose malicious conduct created the problem. To place the burden on the injured party rather than upon the wrongdoer would, in effect, clothe the transgressor with immunity when, because of the interrelationship of the defense and cross-action, the injured party could not apportion his damages." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 60 [118 Cal.Rptr. 184, 529 P.2d 608], internal citation omitted.)

- "Defendants also charge that under the *Bertero* rule the apportionment of damages between the

theories of liability that are and are not supported by probable cause is difficult and 'highly speculative.' There is no showing, however, that juries cannot perform that task fairly and consistently if they are properly instructed--they draw more subtle distinctions every day. Moreover, any difficulty in this regard is chargeable to the tortfeasor … ." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 690 [34 Cal.Rptr.2d 386, 881 P.2d 1083].)

- "It was the defendants' burden, however, not the [plaintiffs]', to prove such an allocation, just as it generally is the burden of the defendant in a malicious prosecution action to prove certain attorney fees incurred in the underlying action are not recoverable because they are attributable to claims that had been properly pursued." (*Jackson, supra,* 179 Cal.App.4th at p. 96.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 471 et seq.

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-D, *Costs,* ¶ 17:91 et seq. (The Rutter Group)

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-E, *Attorney Fees As Costs,* ¶¶ 17:150 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process*, § 43.08 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.18 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.45 (Matthew Bender)

1707. Fact Versus Opinion

For [*name of plaintiff***] to recover, [***name of defendant***]'s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is ~~a statement~~one that can be proved to be true or false. In some circumstances, [***name of plaintiff***] may recover if a statement phrased as an ~~An~~ opinion implies that a false statement of fact is true~~may be considered a statement of fact if the opinion suggests that facts exist~~.**

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [*name of defendant***] was ~~making a statement of fact~~implying that a false statement of fact is true.**

New September 2003; Revised June 2013

Directions for Use

Give this instruction only if ~~This instruction may not be necessary in all cases: "The critical determination of whether an allegedly defamatory statement constitutes fact or opinion is a question of law for the court and therefore suitable for resolution by demurrer. If~~ the court concludes that a~~the~~ statement could reasonably be construed as ~~either fact or opinion~~implying a false assertion of fact.~~, the issue should be resolved by a jury."~~ (See *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891]~~, internal citations omitted~~.)

Sources and Authority

- " 'Because [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]' That does not mean that statements of opinion enjoy blanket protection. On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. The 'crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]' 'Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]'~~ The question is ' "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact. …' [Citation.]' ~~ " (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–696 [142 Cal.Rptr.3d 40], internal citations omitted.)

- "Thus, our inquiry is not merely whether the statements are fact or opinion, but ' "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." ' " (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289 [147 Cal.Rptr.3d 88].)

- ~~The statutory definitions of libel in slander~~ "In defining libel and slander, Civil Code sections 45 and 46 both refer to a 'false . . . publication . . ..' This statutory definition can be meaningfully applied

only to statements that are capable of being proved as false or true." (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)

- "Thus, 'rhetorical hyperbole,' 'vigorous epithet[s],' 'lusty and imaginative expressions[s] of ... contempt,' and language used 'in a loose, figurative sense' have all been accorded constitutional protection." (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)

- "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)

- "California courts have developed a 'totality of the circumstances' test to determine whether an alleged defamatory statement is one of fact or of opinion. First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. Where the language of the statement is 'cautiously phrased in terms of apparency,' the statement is less likely to be reasonably understood as a statement of fact rather than opinion."~~California courts use a "totality of the circumstances" test to determine if a statement is one of fact or of opinion.~~ (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].)

- "The court must put itself in the place of an average reader and decide the natural and probable effect of the statement." (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)

- "[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. 'In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion … .' " (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)

- "Whether a challenged statement 'declares or implies a provable false assertion of fact is a question of law for the court to decide …, unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.' " (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1261 [119 Cal.Rptr.3d 127].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 546, 547, 549

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05–45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.16 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.86 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:20–21:21 (Thomson Reuters West)

2000. Trespass—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] [intentionally/, although not intending to do so, [recklessly [or] negligently]], ~~recklessly, or negligently~~ entered [***name of plaintiff***]'s property] [or]**

   [intentionally/, although not intending to do so, [recklessly [or] negligently]] ~~recklessly, or negligently~~ caused [another person/[*insert name of thing***]] to enter [***name of plaintiff***]'s property];**

3. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission]; ~~[and]~~**

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

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

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003; Revised June 2013

Directions for Use

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act,; for example, an automobile accident. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that he or she had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*.

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 4, add "and" at the end of element 2, and adjust punctuation accordingly:

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

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

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. …" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.) For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

~~Intent to commit the act constituting the trespass is a necessary element, but intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321 [43 Cal.Rptr. 542].)~~

Sources and Authority

- "As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 [18 Cal.Rptr.2d 530], internal citation omitted.)

- "Trespass is an unlawful interference with possession of property. The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples, supra, ~~v. Hoefke (1987)~~* 189 Cal.App.3d at p.~~1397,~~ 1406 ~~[235 Cal.Rptr. 165]~~, internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.' " California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory-not necessarily ownership-interests in land from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal

citations omitted.)

- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)

- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)

- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218-219 [147 Cal.Rptr. 77], internal citations omitted.)

- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)

- " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [¶] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos, supra, ~~v. Union Oil Co. (1993)~~* 14 Cal.App.4th at p.~~1770,~~ 1780~~ [18 Cal.Rptr.2d 574]~~, internal citations omitted.)

- " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller, supra, ~~v. National Broadcasting Corp. (1986)~~* 187 Cal.App.3d at pp.~~1463,~~ 1480-1481~~ [232 Cal.Rptr. 668]~~, internal citation omitted.)

- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.'" (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 693–695

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters West)

2002. Trespass to Timber—Essential Factual Elements (Civ. Code, § 3346~~; Code Civ. Proc., § 733~~)

[*Name of plaintiff*] claims that [*name of defendant*] trespassed on [his/her/its] property and [cut down or damaged trees/took timber]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [owned/leased/occupied/controlled] the property;**

2. **That [*name of defendant*] intentionally~~, recklessly, or negligently~~ entered [*name of plaintiff*]'s property and [cut down or damaged trees/took timber] located on the property;**

   [*or*]

   That [*name of defendant*], although not intending to do so, [recklessly [or] negligently] entered [*name of plaintiff*]'s property and damaged trees located on the property;

3. **That [*name of plaintiff*] did not give permission to [cut down or damage the trees/take timber] [or that [*name of defendant*] exceeded [*name of plaintiff*]'s permission];**

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

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

[In considering whether [*name of plaintiff*] was harmed, you may take into account the lost aesthetics and functionality of an injured tree.~~,~~]

New September 2003; Revised June 2013

Directions for Use

Give this instruction for loss of timber or damages to trees. Note that actual damages are to be doubled regardless of the defendant's intent. (See Civ. Code, § 3346(a).) If treble damages for willful and malicious conduct are sought, also give CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity.[22] (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act; for example an automobile accident that damages a tree. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965)

233 Cal.App.2d 321 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that he or she had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained*. See also the Sources and Authority to CACI No. 2000, *Trespass*.

Include the last paragraph if the plaintiff claims harm based on lost aesthetics and functionality.~~Note that the affirmative defense of reliance on a survey could be raised by defendant.~~

Sources and Authority

- Civil Code section 3346(a) provides~~, in part~~: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment.~~For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment ... .~~"

- ~~Code of Civil Procedure section 733 provides: "Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."~~

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391], internal citation omitted.)

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor

tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- ~~"Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)~~

- ~~"Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)~~

- ~~"A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.'" (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764.)~~

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. ... [¶] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

- "The rule precluding recovery of restoration costs in excess of diminution in value is, however, not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value if 'there is a reason personal to the owner for restoring the original condition,' or 'where there is reason to believe that the plaintiff will, if fact, make the repairs.' " (*Heninger, supra*, 101 Cal.App.3d at p. 863, internal citations omitted.)

- "Courts have stressed that only reasonable costs of replacing destroyed trees with identical or substantially similar trees may be recovered." (*Heninger, supra,* 101 Cal.App.3d at p. 865.)

- "As a tree growing on a property line, the Aleppo pine tree was a 'line tree.' Civil Code section 834 provides: 'Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.' As such, neither owner 'is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree.' " (*Kallis v. Sones* (2012) 208 Cal.App.4th 1274, 1278 [146 Cal.Rptr.3d 419].)

- "[W]hen considering the diminished value of an injured tree, the finder of fact may account for lost aesthetics and functionality." (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 755 [148 Cal.Rptr.3d 642].)

- "Although [plaintiff] never quantified the loss of aesthetics at $15,000, she need not have done so. As

with other hard-to-quantify injuries, such as emotional and reputational ones, the trier of fact court was free to place any dollar amount on aesthetic harm, unless the amount was ‘ “so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the [trier of fact] was under the influence of passion or prejudice.” ’ ” (*Rony, supra,* 210 Cal.App.4th at p. 756.)

- “[P]laintiffs here showed (i) the tree's unusual size and form made it very unusual for a ‘line tree’—it functioned more like two trees growing on the separate properties; (ii) the tree's attributes, such as its broad canopy, provided significant benefits to the [plaintiffs’] property; and (iii) the [plaintiffs] placed great personal value on the tree. The trial court correctly recognized that it could account for these factors when determining damages, including whether or not damages should be reduced.” (*Kallis, supra*, 208 Cal.App.4th at p. 1279.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1732−1734

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.10 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2004. "Intentional Entry" Explained

[An entry is intentional if a person knowingly goes onto the property of another or knowingly causes something to go onto that property.]

[An entry is ~~[also]~~ intentional if a person engages in conduct that is substantially certain to cause something to go onto that property.]

[Intent to trespass means only that a person intended to be in the particular location where the trespass is alleged to have occurred. An entry is ~~[also]~~ intentional even if ~~a~~ the person reasonably but mistakenly thought~~inks~~ that he or she ~~has~~ had a right to come onto that property.]

An intent to do harm to the property or to the owner is not required.

New September 2003; Revised June 2013

Directions for Use

This instruction is not intended for general use in every case. ~~Read a~~Give one of the three bracketed ~~sentence or sentences~~options ~~only in unusual cases where~~if an issue regarding the intent of the entry is raised and further explanation is required. The third option should be given if the entry could appear to the jury to be unintentional, such as if the defendant was not aware that he or she was trespassing. (See *Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480–1481 [232 Cal.Rptr. 668].)

Sources and Authority

- "The doing of an act which will to a substantial certainty result in the entry of foreign matter upon another's land suffices for an intentional trespass to land upon which liability may be based. It was error to instruct the jury that an 'intent to harm' was required." (*Roberts v. Permanente Corp*. (1961) 188 Cal.App.2d 526, 530-531 [10 Cal.Rptr. 519], internal citation omitted.)

- An instruction on the definition of intentional trespass is considered a proper statement of law. Failure to give this instruction on request where appropriate is error. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1407 [235 Cal.Rptr. 165].)

- "As Prosser and Keeton on Torts ... explained, '[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller*, *supra*, ~~*v. National Broadcasting Corp.* (1986)~~ 187 Cal.App.3d at pp.~~1463,~~ 1480–1481 ~~[232 Cal.Rptr. 668]~~, internal citation omitted.)

- "Intent to cause damage was not, however, an element of [trespass] and … the trespasser was liable

for such damage as he caused even though that damage was not intended or foreseen by him." (*Meyer v. Pacific Employers Ins. Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

Secondary Sources

~~5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 663, 664~~

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20[3] (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass,* § 550.15 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass,* § 225.40 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 18:4 (Thomson Reuters West)

VF-2000. Trespass

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**
____ 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*] ~~[~~intentionally ~~or negligently~~ [enter/ ~~[*name of plaintiff*]'s property]~~ [or] ~~[intentionally or negligently~~ cause [another person/[*insert name of thing*]] to enter] [*name of plaintiff*]'s property~~]~~?]**

[or]

[Did [*name of defendant*], although not intending to do so, [recklessly [or] negligently] [enter/ [or] cause [another person/[*insert name of thing*]] to enter] [*name of plaintiff*]'s property?]

____ Yes ____ No

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

3. **Did [*name of defendant*] enter the property without [*name of plaintiff*]'s permission?**
____ 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 [entry/conduct] a substantial factor in causing [actual] 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. **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 February 2005, April 2007, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2000, *Trespass—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.

~~This verdict form is based on CACI No. 2000, *Trespass*.~~

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2000.

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.

VF-2001. Trespass—Affirmative Defense—Necessity

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/lease/occupy/control] the property?**
   ____ 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***] ~~[~~intentionally~~ or negligently~~ [enter/ ~~[***name of plaintiff***'s property~~]~~ [or] ~~[intentionally or negligently~~ cause [another person/[***insert name of thing***]] to enter] [***name of plaintiff***]'s property~~]~~?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] enter the property without [***name of plaintiff***]'s permission?**
   ____ 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 it necessary, or did it reasonably appear to [***name of defendant***] to be necessary, to enter the land to prevent serious harm to a person or property?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s [entry/conduct] a substantial factor in causing [actual] harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

   [a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised February 2005, April 2007, October 2008, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2000, *Trespass—Essential Factual Elements*, and CACI No. 2005, *Affirmative Defense—Necessity*.

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. 2000, *Trespass*, and CACI No. 2005, Affirmative *Defense — Necessity*.~~

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2000.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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.

VF-2003. Trespass to Timber (Civ. Code, § 3346~~; Code Civ. Proc., § 733~~)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**
   ____ 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*] intentionally~~, recklessly, or negligently~~ enter [*name of plaintiff*]'s property and [cut down or damage trees/take timber] located on the property?]**

   [*or*]

   [Did [*name of defendant*], although not intending to do so, [recklessly [or] negligently] enter [*name of plaintiff*]'s property and damage trees located on the property?]

   ____ Yes ____ No

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

3. **Did [*name of plaintiff*] give permission to [cut down or damage the trees/take timber]?**
   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, 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. **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, June 2013

Directions for Use

This verdict form is based on CACI No. 2002, *Trespass to Timber—Essential Factual Elements*. The amount of actual damages found by the jury is to be doubled. (See Civ. Code, § 3346(a).) The court can do the computation based on the jury's award.

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

If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2002.

~~This verdict form is based on CACI No. 2002, *Trespass to Timber.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

~~If there is an issue regarding whether the defendant exceeded the scope of plaintiff's consent, question 3 can be modified, as in element 3 in CACI No. 2002.~~

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.

VF-2004. Trespass to Timber—Willful and Malicious Conduct (Civ. Code, § 3346; Code Civ. Proc., § 733)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] [own/lease/occupy/control] the property?**
   ____ 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*] intentionally~~, recklessly, or negligently~~ enter [*name of plaintiff*]'s property and [cut down or damage trees/take timber] located on the property?]**
   [*or*]

   [Did [*name of defendant*], although not intending to do so, recklessly enter [*name of plaintiff*]'s property and damage trees located on the property?]

   ____ Yes ____ No

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

3. **Did [*name of plaintiff*] give permission to [cut down or damage the trees/take timber]?**
   ____ Yes ____ No

   If your answer to question 3 is no, then answer question 4. If you answered yes, 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 defendant*] act willfully and maliciously?**
   ____ Yes ____ No

   Answer question 6.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2002, *Trespass to Timber—Essential Factual Elements*, and CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.

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

If there is an issue regarding whether the defendant exceeded the scope of the plaintiff's consent, question 3 can be modified as in element 3 in CACI No. 2002.

~~This verdict form is based on CACI No. 2002, *Trespass to Timber*, and CACI No. 2003, *Damage to Timber—Willful and Malicious Conduct*.~~

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

~~If there is an issue regarding whether the defendant exceeded the scope of the plaintiff's consent, question 3 can be modified as in element 3 in CACI No. 2002.~~

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.

2202. Intentional Interference With Prospective Economic Relations—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with an economic relationship between [him/her/it] and [*name of third party*] that probably would have resulted in an economic benefit to [*name of plaintiff*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] and [*name of third party*] were in an economic relationship that probably would have resulted in an economic benefit to [*name of plaintiff*];**

2. **That [*name of defendant*] knew of the relationship;**

~~3. That [*name of defendant*] intended to disrupt the relationship;~~

43. **That [*name of defendant*] engaged in ~~wrongful conduct through~~ [~~*insert grounds for wrongfulness, e.g., misrepresentation, fraud, violation of statute*~~*specify conduct determined by the court to be wrongful*];**

4. **That by engaging in this conduct, [*name of defendant*] intended to disrupt the relationship;**

5. **That the relationship was disrupted;**

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

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

New September 2003; Revised June 2013

Directions for Use

Regarding element 4, the interfering conduct must be wrongful by some legal measure other than the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740].)~~court must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard~~. This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877] , disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937];~~ *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740]~~.) Whether the conduct alleged qualifies as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law. If the court lets the case go to trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct.~~The jury must then decide whether the defendant engaged in the conduct as defined by the judge.~~ If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "The five elements for intentional interference with prospective economic advantage are: (1) [a]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294, 729 P.2d 728].)

- "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, 'it is sufficient for the plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ' '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' '[A]n act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544–1545 [67 Cal.Rptr.3d 54], internal citations omitted.)

- "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he or she certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract then certainly the result should be no different where the 'conspiracy' is to disrupt a relationship which has not even risen to the dignity of an existing contract and the party to that relationship was entirely free to 'disrupt' it on his or her own without legal restraint or penalty." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45

Cal.Rptr.2d 90], original italics.)

- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst, supra,* 43 Cal.3d at p. 71, internal citations omitted.)

- "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna, supra,* 11 Cal.4th at p. 393.)

- "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539].)

- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' ... Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477-478 [54 Cal.Rptr.2d 888], internal citations omitted.)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- "It is insufficient to allege the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference." (*Limandri, supra,* 52 Cal.App.4th at p. 342.)

- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co., supra,* 47 Cal.App.4th at p. 477.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- "[I]n the absence of other evidence, timing alone *may be sufficient* to prove causation … . Thus, … the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the fact finder to decide." (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1267 [119 Cal.Rptr.3d 127], original italics.)

- There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege." (See *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391-1392 [77 Cal.Rptr.2d 383].)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741–754, 759

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-E, *Intentional Interference With Contract Or Prospective Economic Advantage*, ¶¶ 5:463, 5:470 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-G, *Intentional Interference With Contract Or Economic Advantage*, ¶ 11:138.5 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.100–40.105 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, §§ 122.23, 122.32 (Matthew Bender)

2205. Intentional Interference With Expected Inheritance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [his/her] expectation of receiving an inheritance from the estate of [***name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] expected to receive an inheritance from the estate of [***name of decedent***];**

2. **That [***name of defendant***] knew of the expectation;**

3. **That [***name of defendant***] engaged in [***specify conduct determined by the court to be wrongful***];**

4. **That by engaging in this conduct, [***name of defendant***] intended to interfere with [***name of plaintiff***]'s expected inheritance;**

5. **That there was a reasonable certainty that [***name of plaintiff***] would have received the inheritance if [***name of defendant***] had not interfered;**

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.**

[*Name of plaintiff***] does not have to have been named as a beneficiary in the will or trust or have been named to receive the particular property at issue. A reasonable certainty of receipt is sufficient.**

New June 2013

Directions for Use

California recognizes the tort of intentional interference with expected inheritance (IIEI). (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039 [141 Cal.Rptr.3d 142].)

The wrongful conduct alleged in element 3 must have been directed toward someone other than the plaintiff. If the defendant's tortious conduct was directed at the plaintiff rather than at the testator, the plaintiff has an independent tort claim against the defendant and asserting the IIEI tort is unnecessary. It also must be wrongful for some reason other than the fact of the interference. (*Beckwith, supra,* 205 Cal.App.4th at pp. 1057–1058.) Whether the conduct alleged qualifies as wrongful if proven will be resolved by the court as a matter of law. The jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct. If the conduct is tortious, the judge should

instruct on the elements of the tort.

Sources and Authority

- "To state a claim for IIEI, a plaintiff must allege five distinct elements. First, the plaintiff must plead he had an expectancy of an inheritance. It is not necessary to allege that 'one is in fact named as a beneficiary in the will or that one has been devised the particular property at issue. [Citation.] That requirement would defeat the purpose of an expectancy claim. [¶] … [¶] It is only the expectation that one will receive some interest that gives rise to a cause of action. [Citations.]' Second, as in other interference torts, the complaint must allege causation. 'This means that, as in other cases involving recovery for loss of expectancies … there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator … if there had been no such interference.' Third, the plaintiff must plead intent, i.e., that the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it. Fourth, the complaint must allege that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference. Finally, the plaintiff must plead he was damaged by the defendant's interference." (*Beckwith, supra,* 205 Cal.App.4th at p. 1057, internal citations omitted.)

- "Additionally, an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff. The cases firmly indicate a requirement that '[t]he fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is.' In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance." (*Beckwith, supra,* 205 Cal.App.4th at pp. 1057–1058, internal citations omitted.)

- "[W]e conclude that a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy. The integrity of the probate system and the interest in avoiding tort liability for inherently speculative claims are very important considerations. However, a court should not take the 'drastic consequence of an absolute rule which bars recovery in all … cases[]' when a new tort cause of action can be defined in such a way so as to minimize the costs and burdens associated with it. As discussed above, California case law in analogous contexts shields defendants from tort liability when the expectancy is too speculative. In addition, case law from other jurisdictions bars IIEI claims when an adequate probate remedy exists. By recognizing similar restrictions in IIEI actions, we strike the appropriate balance between respecting the integrity of the probate system, guarding against tort liability for inherently speculative claims, and protecting society's interest in providing a remedy for injured parties." (*Beckwith, supra,* 205 Cal.App.4th at p. 1056, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 741

14 Witkin, Summary of California Law (10th ed. 2005) Wills, § 553

Ross et al., California Practice Guide: Probate, Ch. 15-A, *Will Contests,* ¶ 15:115.6 et seq. (The Rutter Group)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133[2][b] (Matthew Bender)

VF-2202. Intentional Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***]?**
____ 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***] know of the relationship?**
____ Yes ____ No

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

~~**3. Did [*name of defendant*] intend to disrupt the relationship?**~~
~~**____ 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~~3. **Did [***name of defendant***] engage in ~~wrongful conduct through~~ [~~*insert grounds for wrongfulness*~~*specify conduct determined by the court to be wrongful if proved*]?**
____ Yes ____ No

If your answer to question ~~4~~ 3 is yes, then answer question ~~5~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. By engaging in this conduct, did [*name of defendant*] intend to disrupt the relationship?
____ Yes ____ No

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

5. **Was the relationship disrupted?**
____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop

here, answer no further questions, and have the presiding juror sign and date this form.

6. Was [*name of defendant***]'s ~~wrongful~~ conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

[a. 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, June 2013

Directions for Use

This verdict form is based on CACI No. 2202, *Intentional Interference With Prospective Economic Relations.*

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. 2202, *Intentional Interference With Prospective Economic Relations.*~~

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

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

2430. Wrongful Discharge~~/Demotion~~ in Violation of Public Policy—Essential Factual Elements

[*Name of plaintiff***] claims [he/she] was ~~[~~discharged~~/demoted]~~ from employment for reasons that violate a public policy. It is a violation of public policy to discharge someone from employment for [*specify claim in case, e.g., refusing to engage in price fixing*]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**
2. **That [***name of defendant***] ~~[~~discharged~~/demoted]~~ [***name of plaintiff***];**
3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s ~~[~~discharge~~/demotion]~~; and**
4. **That the ~~[~~discharge~~/demotion]~~ caused [***name of plaintiff***] harm.**

New September 2003; Revised June 2013

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term "substantial motivating reason" to express causation between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases alleging a violation of public policy has not been addressed by the courts.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* If plaintiff alleges he or she was forced or coerced to resign, then CACI No. 2431, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*, or CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*, should be given instead. See also CACI No. 2510, *"Constructive Discharge" Explained.*

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1093 [4 Cal. Rptr. 2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken

by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*. ~~The California Supreme Court has extended employment claims to encompass demotions or other similar employment decisions. (See *Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 473–474 [46 Cal.Rptr.2d 427, 904 P.2d 834].) The bracketed language regarding an alleged wrongful demotion may be given, depending on the facts of the case, or other appropriate language for other similar employment decisions~~.

Sources and Authority

- " '[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy. Any other conclusion would sanction lawlessness, which courts by their very nature are bound to oppose.' " (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138–1139 [69 Cal.Rptr.3d 445], internal citations omitted.)

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt, supra, ~~v. Sentry Insurance~~ (1992)* 1 Cal.4th at pp.~~1083,~~ 1090-1091 ~~[4 Cal.Rptr.2d 874, 824 P.2d 680]~~, internal citations and footnote omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

- "In the context of a tort claim for wrongful discharge, tethering public policy to specific constitutional or statutory provisions serves not only to avoid judicial interference with the legislative domain, but also to ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees they discharge ... ." (*Stevenson, supra,* 16 Cal.4th at p. 889.)

- "[A]n employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity." (*Green, supra,* 19 Cal.4th at p. 87, internal citation omitted.)

- "[A]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... ." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- Employees in both the private and public sector may assert this claim. (*See Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407 [4 Cal.Rptr.2d 203].)

- "Sex discrimination in employment may support a claim of tortious discharge in violation of public policy." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 214 [126 Cal.Rptr.3d 651].)

- "That [defendant]'s decision not to renew her contract for an additional season *might* have been influenced by her complaints about an unsafe working condition … does not change our conclusion in light of the principle that a decision not to renew a contract set to expire is not actionable in tort." (*Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682 [145 Cal.Rptr.3d 766], original italics.)

- " ' "[P]ublic policy' as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … ." [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law." [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 5-A, *Wrongful Discharge In Violation Of Public Policy (Tameny Claims),* ¶¶ 5:2, 5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220, 5:235 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, § 5.45

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.50–249.52 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.52–100.58 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters West)

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

Revoked June 2013 (See Stats 2012 ch 647, § 5 (AB 2492))

This instruction may be revised and restored in the next release cycle.

[*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 [[current/past] service in the armed forces/need to report for required military [duty/training]] was a substantial 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; Revised June 2013

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 the term "substantial motivating reason" to express both intent and causation between the

the employee's military service and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases alleging military service discrimination has not been addressed by the courts. ~~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)

VF-2406. Wrongful Discharge~~/Demotion~~ in Violation of Public Policy

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff***] employed by [***name of defendant***]?**
____ Yes ____ No

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

2. Was [*name of plaintiff***] ~~[~~discharged~~/demoted]~~?**
____ Yes ____ No

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

3. Was [*name of plaintiff***]'s [***insert alleged activity protected by public policy, e.g., "refusal to engage in price fixing"***] a substantial motivating reason for [***name of defendant***]'s decision to ~~[~~discharge~~/demote]~~ [***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. Did the ~~[~~discharge~~/demotion]~~ cause [*name of plaintiff***] harm?**
____ 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. 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, June 2013

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. 2430, *Wrongful Discharge~~/Demotion~~ in Violation of Public Policy—Essential Factual Elements.*

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

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

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

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

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

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

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***]'s [***protected status-for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

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

Directions for Use

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

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment

agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

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

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

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

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in

McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp., supra,* 411 U.S. 792], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of*

Corrections (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra*, 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra*, 56 Cal.4th at p. 229.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to

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

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

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

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

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

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 substantial 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, June 2013

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.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

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)

2507. "Substantial Motivating Reason" Explained

~~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.~~**A "substantial motivating reason" is a reason that actually contributed to the [***specify adverse employment action***]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [***adverse employment action***].**

New December 2007; Revised June 2013

Directions for Use

Read this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, CACI No. 2505, *Retaliation—Essential Factual Elements*, ~~or~~ CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements*, *CACI No. 2560, Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements*.

Sources and Authority

- Government Code section 12940(a) provides:

  > It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
  >
  > (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

- Title 42 United States Code section 2000e-2(m) (a provision of the Civil Rights Action of 1991 amending Title VII of the Civil Rights Act of 1964) provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1319 [237 Cal.Rptr. 884].)

- "The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to the alleged deficiencies. ...' In other words, 'while a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.' " (*Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 [8 Cal.Rptr.2d 151], citing *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, fn. 10 [96 S.Ct. 2574, 49 L.Ed.2d 493, 502] and *Mixon*, *supra*, 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49], original italics.) ~~But see *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 377 [33 Cal.Rptr.3d 644] ("A plaintiff's burden is … to produce evidence that, taken as a whole, permits a rational inference that intentional discrimination was a *substantial* motivating factor in the employer's actions toward the plaintiff"), italics added.~~

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:485–7:508 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.61–2.65, 2.87

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11[1] (Matthew Bender)

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

1 California Civil Practice: Employment Litigation Discrimination in Employment, §§ 2:20–2:21, 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 substantial 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 substantial motivating reason for [***name of decision maker***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***].**

New December 2012; Revised June 2013

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.)

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the supervisor's improper motive be a substantial motivating reason for the decision maker's action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained.*)

In both elements 1 and 2, all of the supervisor's specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed, the list should include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

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.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at pl 232, original italics.)

- "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)

2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] ~~[~~was~~/was believed to be/was associated with a person who was/was associated with a person who was believed to be]~~ [***protected status***, *e.g., a woman*];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [~~*describe member of protected group,*~~ *e.g., woman*] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or*

Entity Defendant. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*.

Sources and Authority

- Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides that for purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

  (B) The person is customarily engaged in an independently established business.

  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily

used in the course of the employer's work.

- Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the

conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment,* ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

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

2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [*e.g., women*];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [That [*name of defendant***] [or [his/her/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer*

or Entity Defendant. For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) vicarious liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.*

Sources and Authority

- Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer . . . or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(4)(A) provides: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract 'means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

  (B) The person is customarily engaged in an independently established business.

  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(j)(4)(C) provides, in part: " '[H]arassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions."

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- Under the FEHA, an employer is strictly liable for all acts of sexual harassment by a supervisor. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections*

(1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

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

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

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

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

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

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status, e.g., race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of employer***];**

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] ~~[~~was~~/was believed to be/was associated with a person who was/was associated with a person who was believed to be]~~ [***protected status***, *e.g., a woman*];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [~~*describe member of protected group,*~~ *e.g., woman*] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive;**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from Former CACI No. 2522 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment

because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

Sources and Authority

- Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(3) provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

  (B) The person is customarily engaged in an independently established business.

  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics

or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "[A] cause of action for sexual harassment in violation of Government Code section 12940, subdivision (h) may be stated by a member of the same sex as the harasser … ." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1418 [26 Cal.Rptr.2d 116].)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a

weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The *Singleton* court found evidence that Singleton was disparately treated because of his sex because the statements 'targeted Singleton's heterosexual identity, and attacked it by and through their comments' thereby treating him ' "differently" ' than they would have treated a woman. 'It follows that the harassment was "because of sex," i.e., it employed attacks on Singleton's identity as a heterosexual male as a tool of harassment.' [¶] We respectfully disagree. *Singleton* finds that the gender-specific nature of the harassment establishes disparate treatment based on sex. *Singleton's* reasoning inevitably leads to the conclusion that any hostile, offensive and harassing comment or conduct, with or without sexual content or innuendo, made to one gender and which would not be made to the other, would constitute discrimination because of sex within the scope of FEHA. What matters, however, is not whether the two sexes are treated *differently* in the workplace, but whether one of the sex is treated *adversely* to the other sex in the workplace because of their sex." (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 206–207 [126 Cal.Rptr.3d 651], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

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

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

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

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

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters West)

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

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/a person providing services under a contract with] [***name of employer***];**

2. **That [***name of plaintiff***] although not personally subjected to unwanted harassing conduct, personally witnessed harassing conduct that took place in [his/her] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile or abusive toward [***e.g., women***];**

6. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

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

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

Derived from former CACI No. 2522 December 2007; Revised June 2013

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. For an employer defendant, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe*

or Pervasive" Explained.

Sources and Authority

- Government Code section 12940(j)(1) provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, or a person providing services pursuant to a contract by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

- Government Code section 12940(j)(3) provides: "An employee of an entity ... is personally liable for any harassment prohibited by this section that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

- Government Code section 12940(j)(4)(A) provides, in part: "For purposes of this subdivision only, 'employer' means any person regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities."

- Government Code section 12940(j)(5) provides: "For purposes of this subdivision, 'a person providing services pursuant to a contract' means a person who meets all of the following criteria:

  (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance.

  (B) The person is customarily engaged in an independently established business.

  (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

- Government Code section 12940(i) provides that it is an unlawful employment practice "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or

to attempt to do so."

- Government Code section 12926(n) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)

- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

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

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464-465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 340, 346

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

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

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

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

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

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

2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on [***describe protected status—e.g., race, gender, or age***]]. 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***]/applied to [***name of defendant***] for a job/was a person providing services under a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to [harassment/discrimination/retaliation~~either:~~] in the course of employment;**

   ~~**[[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [***protected status***];]**~~

   ~~**[***or***]**~~

   ~~**[retaliation because [he/she] [opposed [***name of defendant***]'s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]];]**~~

3. **That [***name of defendant***] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**

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

5. **That [***name of defendant***]'s failure to take reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; *Revised April 2007, June 2013*

Directions for Use

~~If harassment is at issue, this instruction should be read in conjunction with CACI No. 2523, *"Harassing Conduct" Explained*. If retaliation is alleged, read this instruction in conjunction with CACI No. 2505, *Retaliation—Essential Factual Elements*.~~

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).) Read the bracketed language in the opening paragraph beginning with "based on" ~~and the first option for element 2~~ if the claim is for failure to prevent

harassment or discrimination.

For guidance for a further instruction on what constitutes "reasonable steps," see section 7287.6(b)(3) of Title 2 of the California Code of Regulations.~~Choose the second option in element 2 if the claim is based on failure to prevent retaliation because the plaintiff (1) opposed practices forbidden by the FEHA; (2) filed a complaint with the Department of Fair Employment and Housing (DFEH); (3) testified in a DFEH proceeding; or (4) assisted in a DFEH proceeding. (See Gov. Code, § 12940(h).)~~

Sources and Authority

- Government Code section 12940(k) provides that it is an unlawful employment practice for "an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring."

- ~~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 employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal. Rptr. 2d 285].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo, supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "Employers should not be held liable to employees for failure to take necessary steps to prevent such conduct, except where the actions took place and were not prevented. Plaintiffs have not shown this duty was owed to them, under these circumstances. Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory

violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

- "In accordance with … the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008), 42 Cal. 4th 1158 [72 Cal. Rptr. 3d 624, 177 P.3d 232].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, Title VII And The California Fair Employment and Housing Act, ~~(The Rutter Group)~~ ¶¶ 7:670–7:672 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

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

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [perceived] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];] [or]**

   [That [*name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

5. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

6. **[That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];]**

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.**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013

Directions for Use

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

In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, 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).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had." (See Gov. Code, § 12926(j)(4), (*l*)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

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

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 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 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (*l*).)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "medical condition," see Government Code section 12926(i).

- For a definition of "mental disability," see Government Code section 12926(j).

- For a definition of "physical disability," see Government Code section 12926(*l*).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which

one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … .” ’ ” …’ The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff’s prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination.” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

- “If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either ‘untrue or pretextual,’ or that the employer acted with discriminatory animus, in order to raise an inference of discrimination.” (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- “Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the ‘qualified individual with a disability’ requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion.” (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- “[Defendant] asserts the statute's ‘regarded as’ protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the ‘myths, fears or stereotypes’ frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA’s protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer’s failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the ‘regarded as’ definition casts a broader net and protects *any* individual ‘regarded’ or ‘treated’ by an employer ‘as having, or having had, any physical condition that makes achievement of a major life activity difficult’ or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer’s ‘mistaken’ perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA’s protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement.” (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra*, 52 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra*, 52 Cal.4th at p. 229.)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [-- Cal.Rptr.3d --].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters West)

2543. Disability Discrimination—Affirmative Defense—Inability to Perform Essential Job Duties

Revoked June 2013

This instruction may be revised and restored in the next release cycle.

~~**[*Name of defendant*] claims that [his/her/its] conduct was lawful because [*name of plaintiff*] was unable to perform an essential job duty even with reasonable accommodations. To succeed, [*name of defendant*] must prove both of the following:**~~

~~**1. That [*describe job duty*] was an essential job duty; and**~~

~~**2. That [*name of plaintiff*] could not perform it, even with reasonable accommodations.**~~

~~**In deciding whether a job duty is essential, you may consider, among other factors, the following:**~~

~~**a. Whether the reason the job exists is to perform that duty;**~~

~~**b. The number of employees available who can perform that duty; and**~~

~~**c. Whether the job duty is highly specialized.**~~

~~*New September 2003*~~

~~Sources and Authority~~

- ~~Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."~~

- ~~Government Code section 12926(f) provides, in part, that " 'essential functions' means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position."~~

- ~~Government Code section 12926(f) provides, in part:~~

  ~~(1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:~~

  ~~(A) The function may be essential because the reason the position exists is to perform that function.~~

(B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

(C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's judgment as to which functions are essential.

(B) Written job descriptions prepared before advertising or interviewing applicants for the job.

(C) The amount of time spent on the job performing the function.

(D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 8:744, 9:2298, 9:2402-9:2403, 9:2405, 9:2420

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:86

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***]'s ~~for failing~~ failure to comply with the conflicting job requirement was a substantial motivating reason for

[***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]];]

[**or**]

[~~That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action for failing to comply with the conflicting job requirement~~[***name of defendant***]'s subjecting [him/her] to an adverse employment action;]**

[**or**]

[~~That [*name of plaintiff***] was constructively discharged for failing to comply with the conflicting job requirement~~[his/her] constructive discharge;]**

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, June 2013

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).)

Element 7 requires that the plaintiff's failure to comply with the conflicting job requirement be a substantial motivating reason for the employer's adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) 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*) 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."

- Government Code section 12926(p) provides: "'Religious creed,' 'religion,' 'religious observance,' 'religious belief,' and 'creed' include all aspects of religious belief, observance, and practice."

- 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.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra*,56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra*, 56 Cal.4th at p. 229.)

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 (Gov. Code, §§ 12940(*l*)(1), 12926(t))

Please see CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship.*

New September 2003; Revoked December 2012; Restored and Revised June 2013

Directions for Use

"Undue hardship" for purposes of religious creed discrimination is defined in the same way that it is defined for disability discrimination. (See Gov. Code, §§ 12940(*l*)(1), 12926(t).) CACI No. 2545, *Disability Discrimination—Affirmative Defense—Undue Hardship,* may be given in religious accommodation cases also.

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." (emphasis added)

- Government Code section 12926(t) provides:
  "Undue hardship" means an action requiring significant difficulty or expense, when considered in light of the following factors:

  (1) The nature and cost of the accommodation needed,

  (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility,

  (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities,

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity, and

(5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

- "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.' ..." (*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." (*TWA 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, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act,* ¶¶ 7:215, 7:305, 7:610, 7:631, 7:640−7:641 (The Rutter Group)

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 §§ 2:71–2:73 (Thomson Reuters West)

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

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

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

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

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

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

5. **That [***name of plaintiff***]'s age was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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.**

New June 2011; Revised June 2012, June 2013

Directions for Use

~~Give also CACI No. 2507, *"Motivating Reason" Explained.* See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*~~

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact

for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 5 if the either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 5 requires that age discrimination be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a substantial motivating reason for the action. (See *Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

See also the Sources and Authority to CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the …*age*… of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (emphasis added)

- Government Code section 12926(b) provides: " 'Age' refers to the chronological age of any individual who has reached his or her 40th birthday."

- Government Code section 12941 provides: "The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v Loral Corp.* (1997) 57 Cal. App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations."

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse

employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris*, *supra*, 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris*, *supra*, 56 Cal.4th at p. 229.)

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra,* 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and*

Housing Act, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.31 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

VF-2500. Disparate Treatment (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [***protected status***] a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—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.

~~This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements.*~~

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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.

VF-2501. Disparate Treatment ~~(Gov. Code, § 12940(a))~~ —Affirmative Defense—Bona fide Occupational Qualification (Gov. Code, § 12940(a))

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] an [employer/[***other covered entity***]]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [***protected status***] a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
   ____ Yes ____ No

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

5. **Was the job requirement regarding [***protected status***] reasonably necessary for the operation of [***name of defendant***]'s business?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer question 6. If you answered no, skip questions 6, 7, and 8, and answer question 9.

6. **Did [***name of defendant***] have a reasonable basis for believing that substantially all [***members of protected group***] are unable to safely and efficiently perform that job?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip questions 7 and 8, and answer question 9.

7. Was it impossible or highly impractical for [*name of defendant***] to consider whether each [applicant/employee] was able to safely and efficiently perform the job?**
____ 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. Was it impossible or highly impractical for [*name of defendant***] to rearrange job responsibilities to avoid using [***protected status***] as a job requirement?**
____ Yes ____ No

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

9. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. 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, June 2013

Directions for Use

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification.*

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. 2500, *Disparate Treatment—Essential Factual Elements*, and CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification.*~~

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question 10 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*.

VF-2504. Retaliation (Gov. Code, § 12940(h))

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [***describe protected activity***]?**
____ 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***] [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]?]**

[or]

[**Did [***name of defendant***] engage in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [***name of plaintiff***]'s employment?**]

____ Yes ____ No

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

3. **Was [***name of plaintiff***]'s [***describe protected activity***] a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct]?**
____ 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. **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, August 2007, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2505, *Retaliation—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.

~~This verdict form is based on CACI No. 2505, *Retaliation—Essential Factual Elements.*~~

Read the second option for question 2 in cases involving 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. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select "conduct" in question 3 if the second option or both options are included for question 2.

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

VF-2506A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] subjected to unwanted harassing conduct because [he/she] ~~[~~was~~/was believed to be/was associated with a person who was/was associated with a person who was believed to be]~~ [***protected status***, *e.g., a woman*]?**
   ____ 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 the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [~~*describe member of protected group,*~~ *e.g., woman*] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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***] consider the work environment to be hostile or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?
____ Yes ____ No

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

7. Did [*name of defendant*] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

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

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

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

~~This verdict form is based on CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*~~

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

Modify question 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

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

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

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 before judgment.

VF-2506B. Hostile Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, § 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her] immediate work environment?**
   ____ 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 the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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***] consider the work environment to be hostile or abusive toward [***e.g., women***]?**
   ____ 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*] [or [his/her/its] supervisors or agents] know or should [he/she/it/they] have known of the harassing conduct?
____ Yes ____ No

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

7. Did [*name of defendant*] [or [his/her/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

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

8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others--Essential Factual Elements—Employer or Entity Defendant.*

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

~~This verdict form is based on CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others--Essential Factual Elements—Employer or Entity Defendant.*~~

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

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

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 before judgment.

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

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with] [***name of employer***]?**
   ____ 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***] subjected to unwanted harassing conduct because [he/she] ~~[~~was~~/was believed to be/was associated with a person who was/was associated with a person who was believed to be]~~ [***protected status***, *e.g., a woman*]?**
   ____ 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 the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [~~*describe member of protected group,*~~ *e.g., woman*] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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***] consider the work environment to be hostile or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013

Directions for Use

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

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

Modify question 2 if plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

If specificity is not required, users do not have to itemize all the damages listed in question 8 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 before judgment.

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

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/a person providing services under a contract with] [***name of employer***]?**
   ____ 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 plaintiff***] personally witness harassing conduct that took place in [his/her] immediate work environment?**
   ____ 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 the harassment severe or pervasive?**
   ____ 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. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ 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***] consider the work environment to be hostile or abusive toward [***e.g., women***]?**
   ____ 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*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

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

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013

Directions for Use

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

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 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 before judgment.

VF-2508. Disability Discrimination—Disparate Treatment

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**
____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
____ Yes ____ No

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

3. **Did [***name of defendant***] [know that [***name of plaintiff***] had/treat [***name of plaintiff***] as if [he/she] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
____ Yes ____ No

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

4. **Was [***name of plaintiff***] able to perform the essential job duties [with reasonable accommodation] for [his/her] [***e.g., physical condition***]?**
____ 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***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**
____ Yes ____ No

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

6. **Was [***name of plaintiff***]'s [perceived] [history of [a]] [***e.g., physical condition***] a**

substantial motivating reason for [*name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

____ Yes ____ No

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

7. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

____ 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 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 2007, December 2009, June 2010, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment—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.

~~This verdict form is based on CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements.*~~

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she] had."

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 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.

VF-2511. Religious Creed Discrimination—Failure to Accommodate (Gov. Code, § 12940(*l*))

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***] [discharge/refuse to hire/[***other adverse employment action***]]**~~ **[***name of plaintiff***]** ~~**because**~~**Was [***name of plaintiff***]'s** ~~**failed**~~ **failure to comply with the conflicting job requirement a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

____ Yes ____ No

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

8. **Was [***name of defendant***]'s failure to 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 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—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.

~~This verdict form is based on CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements.*~~

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

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

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.

VF-2512. Religious Creed Discrimination—Failure to Accommodate ~~(Gov. Code, § 12940(l))~~ — Affirmative Defense—Undue Hardship (Gov. Code, §§ 12926(t), 12940(*l*))

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~~ Was [*name of plaintiff*]'s failure~~d~~ to comply with the conflicting job requirement a substantial motivating reason for [*name of defendant*]'s [discharge of/refusal to hire/[*other adverse employment action*]] [*name of plaintiff*]?
____ 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, June 2013

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*~~.~~ (~~S~~see ~~also~~ Gov. Code, §§ 12926(t), 12940(*l*))~~;~~ and CACI No. ~~2545~~2561, ~~*Disability*~~ *Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship.*

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

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

VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

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/a person providing services under a contract with [*name of 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. Was [*name of plaintiff*] subjected to [*either*]**~~

~~**[[harassing conduct/discrimination] [[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status*]?]**~~
~~**[*or*]**~~

~~**[retaliation because [he/she] [opposed [*name of defendant*]'s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]?]**~~
~~**____ 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<u>1</u>. Did [*name of defendant*] fail to take <u>all</u> reasonable steps to prevent the [harassment/discrimination/retaliation]?
____ Yes ____ No

If your answer to question ~~4~~ <u>1</u> is yes, then answer question ~~5~~<u>2</u>. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~2. Was [*name of defendant*]'s failure to prevent the [harassment/discrimination/retaliation] a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

If your answer to question ~~5~~ 2 is yes, then answer question ~~6~~3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~3. 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 June 2010; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.* These questions should be added to the verdict form that addresses the underlying claim of discrimination, retaliation, or harassment if the plaintiff also asserts a separate claim against the employer for failure to prevent the underlying conduct. The jury should not reach these questions unless it finds that the underlying claim is proved.

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. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.*~~

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~ 3 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 before judgment.

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(*l*))

[*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 substantial 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, June 2013

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(*l*).) 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.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to

CFRA retaliation cases has not been addressed by the courts.

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)

VF-2602. CFRA Rights Retaliation

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] eligible for family care or medical leave?**
   ____ 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 plaintiff***] [[request/take] [family care/medical] leave/[***other protected activity***]]?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] [discharge/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [[request for/taking] [family care/medical] leave/[***other protected activity***]] a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]]?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s retaliatory conduct a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss
[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2013

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. 2620, *CFRA Rights Retaliation—Essential Factual Elements.*

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

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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.

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~~contributing factor in [***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; Revised June 2013

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~~ "Adverse employment action" 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—Essential Factual Elements*.) 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, 960 P.2d 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, 847 [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, original italics.)

- "[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].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "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

3 Witkin, Summary of California Law (10th ed. 2005) Agency § 349

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)
4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

2923. Borrowed Servant/Dual Employee

[[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was [***name of defendant***]'s employee at the time of the incident even though [he/she] was primarily employed by [***name of primary employer***].]**

[*or*]

[[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was employed by both [***name of defendant***] and [***name of primary employer***] at the time of the incident.]**

In deciding whether [*name of plaintiff/decedent***] was [***name of defendant***]'s employee, ~~you must first decide~~the most important factor is whether [***name of defendant***] had the right to control the work of [***name of plaintiff/decedent***], rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control. Sharing information or coordinating efforts between employees of two companies, by itself, is not enough to establish the right to control.**

~~If you decide that [*name of defendant***] did not have~~In addition to the right of control, ~~then~~ you must also consider all the circumstances in deciding whether [***name of plaintiff/decedent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of plaintiff/decedent***] was the employee of [***name of defendant***]:**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of plaintiff/decedent***] was paid by the hour rather than by the job;**

(c) **The work being done by [***name of plaintiff/decedent***] was part of the regular business of [***name of defendant***];**

(d) **[***Name of defendant***] had the right to end its relationship with [***name of plaintiff/decedent***];**

(e) **The work being done by [***name of plaintiff/decedent***] was [his/her] only occupation or business;**

(f) **The kind of work performed by [***name of plaintiff/decedent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of plaintiff/decedent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of plaintiff/decedent***] were to be performed over a long period of time;**

(i) **[***Name of defendant***] and [***name of plaintiff/decedent***] acted as if they had an employer-**

employee relationship;

(j) [*Name of plaintiff/decedent*]'s duties to [*name of defendant*] were only for its benefit;

(k) [*Name of plaintiff/decedent*] consented to the employment with [*name of defendant*].

New September 2003; Revised June 2013

Directions for Use

Read the first bracketed paragraph for cases raising the borrowed-servant theory. Read the second bracketed paragraph for cases involving dual employment.

Secondary factors (a)–(k) come from the Restatement Second of Agency, section 220. ~~It may not be necessary to read all of the listed factors. Read only the factors for which evidence exists~~.

Sources and Authority

- "Under common-law principles, there are basically three methods by which a plaintiff can establish his 'employment' with a rail carrier for FELA purposes even while he is nominally employed by another. First, the employee could be serving as the borrowed servant of the railroad at the time of his injury. Second, he could be deemed to be acting for two masters simultaneously. Finally, he could be a subservant of a company that was in turn a servant of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498], internal citations omitted.)

- "When the nominal employer furnishes a third party with ' "men to do the work and places them under his exclusive control in the performance of it, [then] those men become *pro hac vice* the servants of him to whom they are furnished," ' under the loaned servant doctrine." (*Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 879 [143 Cal.Rptr.3d 949], original italics.)

- "An employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relation is held to exist." (*Collins, supra,* 207 Cal.App.4th at p. 877.)

- "[A] finding of agency is not tantamount to a finding of a master-servant relationship." (*Kelley, supra*, 419 U.S. at p. 325.)

- "In this case ... the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed *pro hac vice* employees of the railroad." (*Kelley, supra,* 419 U.S. at p. 330.)

- "The determination of whether a worker is a borrowed servant is accomplished by ascertaining who

has the power to control and direct the servants in the performance of their work, distinguishing between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking. There is thus a distinction between 'authoritative direction and control' by a railroad, and the 'minimum cooperation necessary to carry out a coordinated undertaking' which does not amount to control or supervision. The control need not be exercised; it is sufficient if the right to direct the details of the work is present. *Collins, supra,* 207 Cal.App.4th at p. 879.)

"The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355] [not a FELA case].)

- "The question of whether a special employment relationship exists is generally a question of fact reserved for the jury." (*Collins, supra,* 207 Cal.App.4th at p. 878.)

- Contract terms are not conclusive evidence of the existence of the right to control. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176 [151 Cal.Rptr. 671, 588 P.2d 811] [not a FELA case].)

- Restatement Second of Agency, section 220~~(1)~~ provides:~~, defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:~~

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

  (d) the skill required in the particular occupation;

  (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

  (f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

- "Section 220 (1) of the Restatement defines a servant as 'a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.' In § 220 (2), the Restatement recites various factors that are helpful in applying that definition. While that sectionWhile [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley, supra*, 419 U.S. at p. 324.)

- "'Following common law tradition, California decisions … uniformly declare that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. …" [Citations.] [¶] However, the courts have long recognized that the "control" test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the "most important" or "most significant" consideration, the authorities also endorse several "secondary" indicia of the nature of a service relationship.' Those 'secondary indicia' 'have been derived principally from the Restatement Second of Agency.' They generally ' "cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." ' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 301 [111 Cal.Rptr.3d 787] [not a FELA case], internal citation omitted.)

- "In 2006 the Restatement (Second) of Agency was superseded by the Restatement (Third) of Agency, which uses 'employer' and 'employee' rather than 'master' and 'servant,' Restatement (Third) of Agency, § 2.04, comment a, and defines an employee simply as a type of agent subject to a principal's control. Id., § 7.07(3)(a)." (*Schmidt v. Burlington Northern & Santa Fe Ry.* (9th Cir. 2010) 605 F.3d 686, 690 fn. 3.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.15 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

3005. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of supervisor defendant***] is personally liable for [his/her] harm. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of supervisor defendant***] knew, or in the exercise of reasonable diligence should have known, of [***name of subordinate employee defendant***]'s wrongful conduct;**

2. **That [***name of supervisor defendant***] knew that the wrongful conduct created a substantial risk of harm to [***name of plaintiff***];**

3. **That [***name of supervisor defendant***] disregarded that risk by [expressly approving/impliedly approving/ [or] failing to take adequate action to prevent] the wrongful conduct; and**

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

New April 2007; Renumbered from CACI No. 3013 December 2010; Revised December 2011; Renumbered from CACI No. 3017 December 2012; Revised June 2013

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

For certain constitutional violations, deliberate indifference based on knowledge and acquiescence is insufficient to establish the supervisor's liability. The supervisor must act with the purpose necessary to establish the underlying violation. (*Ashcroft v. Iqbal* (2009) 556 U.S. 662, 676–677 [129 S.Ct. 1937, 173 L.Ed.2d 868] [for claim of invidious discrimination in violation of the First and Fifth Amendments, plaintiff must plead and prove that defendant acted with discriminatory purpose].) In such a case, element 3 requires not only express approval, but also discriminatory purpose. The United States Supreme Court has found constitutional torts to require specific intent in three situations: (1) due process claims for injuries caused by a high-speed chase; (See *Cnty. of Sacramento v. Lewis* (1998) 523 U.S. 833, 836 [118 S.Ct. 1708, 140 L.Ed.2d 1043].); (2) Eighth Amendment claims for injuries suffered during the response to a prison disturbance; (See *Whitley v. Albers* (1986) 475 U.S. 312, 320−321 [106 S.Ct. 1078, 89 L.Ed.2d 251].); and (3) invidious discrimination under the equal protection clause and the First Amendment free exercise clause. (See *Iqbal, supra*, 556 U.S. at pp. 676−677.)

The Ninth Circuit has held that deliberate indifference based on knowledge and acquiescence is still sufficient to support supervisor liability if the underlying constitutional violation does not require purposeful discrimination. (*OSU Student Alliance v. Ray* (9th Cir. 2012) 699 F.3d 1053, 1070−1075 [knowing acquiescence is sufficient to establish supervisor liability for free-speech violations because intent to discriminate is not required]; see also *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1207 [same for 8th Amendment violation for cruel and unusual punishment].)

Sources and Authority

- "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. … [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)

- "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." (*Starr*, *supra*, ~~*v. Baca* (9th Cir. 2011)~~ 652 F.3d at p.~~1202,~~ 1207.)

- "[A] plaintiff may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates. " (*Starr, supra,* 652 F.3d at p. 1207.)

- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response ' " was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices' " '; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)

- "A supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.' [Defendants] testified that they were mere observers who stayed at the end of the [plaintiffs'] driveway. But based on the [plaintiffs'] version of the facts, which we must accept as true in this appeal, we draw the inference that [defendants] tacitly endorsed the other Sheriff's officers' actions by failing to intervene. … On this appeal we do not weigh the evidence to determine whether [defendants'] stated reasons for not intervening are plausible." (*Maxwell v. County of San Diego* (9th Cir. 2013) – F.3d --, --, internal citation omitted.) 2013 U.S. App. LEXIS 3106

- "We have found supervisorial liability under § 1983 where the supervisor 'was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.' Thus, supervisors 'can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.' " (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 961, internal citations omitted.)

- "~~A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection~~

~~between the supervisor's wrongful conduct and the constitutional violation.'~~ '[A] plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury. The law clearly allows actions against supervisors under section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color of law of a federally secured right.' " (*Starr, supra,* 652 F.3d at p. 1207, internal citation omitted.)

- "Respondent … argues that, under a theory of 'supervisory liability,' petitioners can be liable for 'knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.' That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action--where masters do not answer for the torts of their servants--the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of a clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities." (*Ashcroft v. Iqbal, supra,* 556 U.S. at ~~p~~pp. ~~676–~~676–677, internal citations omitted.)

- "The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. Under extant precedent purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.' " (*Ashcroft v. Iqbal, supra,* 556 U.S at pp. 676–677, internal citations omitted.)

- "*Iqbal* … holds that a plaintiff does not state invidious racial discrimination claims against supervisory defendants by pleading that the supervisors knowingly acquiesced in discrimination perpetrated by subordinates, but this holding was based on the elements of invidious discrimination in particular, not on some blanket requirement that applies equally to all constitutional tort claims. *Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim — and, more specifically, on the state of mind required by the particular claim — not on a generally applicable concept of supervisory liability. 'The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.' Allegations that the [defendants] knowingly acquiesced in their subordinates' discrimination did not suffice to state invidious racial discrimination claims against them, because such claims require specific intent — something that knowing acquiescence does not establish. On the other hand, because Eighth Amendment claims for cruel and unusual punishment generally require only deliberate indifference (not specific intent), a Sheriff is liable for prisoner abuse perpetrated by his subordinates if he knowingly turns a blind eye to the abuse. The Sheriff need not act with the purpose that the prisoner be abused. Put simply, constitutional tort liability after *Iqbal* depends primarily on the requisite mental state for the violation alleged."

(*OSU Student Alliance*, *supra*, 699 F.3d at p. 1071, internal citations omitted.)

- "When a supervisory official advances or manages a policy that instructs its adherents to violate constitutional rights, then the official specifically intends for such violations to occur. Claims against such supervisory officials, therefore, do not fail on the state of mind requirement, be it intent, knowledge, or deliberate indifference. *Iqbal* itself supports this holding. There, the Court rejected the invidious discrimination claims against [supervisory defendants] because the complaint failed to show that those defendants advanced a policy of purposeful discrimination (as opposed to a policy geared simply toward detaining individuals with a 'suspected link to the [terrorist] attacks'), not because it found that the complaint had to allege that the supervisors intended to discriminate against [plaintiff] in particular. Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability, no matter what the required mental state, so long as the policy proximately causes the harm — that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy." (*OSU Student Alliance*, *supra*, 699 F.3d at p. 1076.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 347

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

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles*, ¶ 7.10 (Matthew Bender)

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.20[4] (Matthew Bender)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff*] claims that [*name of defendant*] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [*name of plaintiff*];**

2. [**That a substantial motivating reason for** [*name of defendant*]**'s conduct was [its perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/[*insert other actionable characteristic*]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/[*insert other actionable characteristic*]] of a person whom [*name of plaintiff*] was associated with was a substantial motivating reason for [*name of defendant*]'s conduct;]

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

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

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

~~–~~Note that ~~this instruction~~ element 2 uses the term "substantial~~includes a~~ motivating ~~-~~reason" to express both intent and causation between the protected classification and the defendant's conduct ~~element (see element 2)~~. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.~~The possible effect of a mixed motive (both discriminatory and nondiscriminatory) is still an open issue under this statute.~~

With the exception of claims that are also violations of the Americans With Disabilites Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional

discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff ~~is entitled to a~~up to three times actual damages but not less than ~~minimum recovery of~~ $4,000 regardless of any actual ~~harm~~damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious]; Civ. Code, § ~~Section~~ 52(a) [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].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393[127 Cal.Rptr.3d 794]; see *Harris, supra,* 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Civil Code section 51 provides:

> (a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.
>
> (b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(c) This section shall not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information.

(d) Nothing in this section shall be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall anything in this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(e) For purposes of this section:

(1) "Disability" means any mental or physical disability as defined in Section 12926 of the Government Code.

(2)
(A) "Genetic information" means, with respect to any individual, information about any of the following:
(i) The individual's genetic tests.
(ii) The genetic tests of family members of the individual.
(iii) The manifestation of a disease or disorder in family members of the individual.
(B) "Genetic information" includes any request for, or receipt of, genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual.
(C) "Genetic information" does not include information about the sex or age of any individual.

(3) "Medical condition" has the same meaning as defined in subdivision (h) of Section 12926 of the Government Code.

(4) "Religion" includes all aspects of religious belief, observance, and practice.

(5) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. "Sex" also includes, but is not limited to, a person's gender. "Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.

(6) "Sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation" includes a

perception that the person has any particular characteristic or characteristics within the listed categories or that the person is associated with a person who has, or is perceived to have, any particular characteristic or characteristics within the listed categories.

(7) "Sexual orientation" has the same meaning as defined in subdivision (r) of Section 12926 of the Government Code.

(f) A violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) shall also constitute a violation of this section.

- Civil Code section 52 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.

(c) Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section, and that conduct is of that nature and is intended to deny the full exercise of those rights, the Attorney General, any district attorney or city attorney, or any person aggrieved by the conduct may bring a civil action in the appropriate court by filing with it a complaint. The complaint shall contain the following:

(1) The signature of the officer, or, in his or her absence, the individual acting on behalf of the officer, or the signature of the person aggrieved.

(2) The facts pertaining to the conduct.

(3) A request for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this section.

(d) Whenever an action has been commenced in any court seeking relief from the denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on account of race, color, religion, sex, national origin, or disability, the Attorney General or any district attorney or city attorney for or in the name of the people of the State of California may intervene in the action upon timely application if the Attorney General or any district attorney or city attorney certifies that the case is of general public importance. In that action, the people of the State of California shall be entitled to the same relief as if it had instituted the action.

(e) Actions brought pursuant to this section are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law.

(f) Any person claiming to be aggrieved by an alleged unlawful practice in violation of Section 51 or 51.7 may also file a verified complaint with the Department of Fair Employment and Housing pursuant to Section 12948 of the Government Code.

(g) This section does not require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor does this section augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

(h) For the purposes of this section, "actual damages" means special and general damages. This subdivision is declaratory of existing law.

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33

Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* § 35.20 et seq. (Matthew Bender)

3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/ employees/business associates/suppliers/customers];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] of a person with whom [***name of plaintiff***] was associated;]**

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

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

New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case. Note that this instruction includes a motivating-reason element (element 2). The possible effect of a mixed motive

(both discriminatory and nondiscriminatory) is still an open issue under this statute.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term "substantial motivating reason" to express causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that ~~a successful plaintiff is entitled to a minimum recovery of $4,000 regardless of any actual harm.~~the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a).); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) ~~(Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (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].)~~

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Civil Code section 51.5 provides:

  (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

  (b) As used in this section, "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company.

  (c) This section shall not be construed to require any construction, alteration, repair, structural or otherwise, or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure, nor shall this section be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that the State Architect otherwise possesses pursuant to other laws.

- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)

- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30

Cal.App.4th at p. 941, internal citation and footnote omitted.)

- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)

- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* § 35.20 (Matthew Bender)

3062. Gender Price Discrimination—Essential Factual Elements (Civ. Code, § 51.6)

[*Name of plaintiff*] claims that [*name of defendant*] charged [him/her] a higher price for services because of [his/her] gender. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] charged [*name of plaintiff*] more for services of similar or like kind because of [his/her] gender;**

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

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

It is not improper to charge a higher price for services if the price difference is based on the amount of time, difficulty, or cost of providing the services.

New September 2003; Renumbered from CACI No. 3022 December 2012; Revised June 2013

Directions for Use

For an instruction on damages under Civil Code section 51.6, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a)-); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 2 and 3 are not needed if only the statutory minimum $4000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Sources and Authority

- Civil Code section 51.6 provides:

  (a) This section shall be known, and may be cited, as the Gender Tax Repeal Act of 1995.

(b) No business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender.

(c) Nothing in subdivision (b) prohibits price differences based specifically upon the amount of time, difficulty, or cost of providing the services.

(d) Except as provided in subdivision (f), the remedies for a violation of this section are the remedies provided in subdivision (a) of Section 52. However, an action under this section is independent of any other remedy or procedure that may be available to an aggrieved party.

(e) This act does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws that govern health care service plan or insurer underwriting or rating practices.

(f) (1) The following business establishments shall clearly and conspicuously disclose to the customer in writing the pricing for each standard service provided:

(A) Tailors or businesses providing aftermarket clothing alterations.

(B) Barbers or hair salons.

(C) Dry cleaners and laundries providing services to individuals.

(2) The price list shall be posted in an area conspicuous to customers. Posted price lists shall be in no less than 14-point boldface type and clearly and completely display pricing for every standard service offered by the business under paragraph (1).

(3) The business establishment shall provide the customer with a complete written price list upon request.

(4) The business establishment shall display in a conspicuous place at least one clearly visible sign, printed in no less than 24-point boldface type, which reads: "CALIFORNIA LAW PROHIBITS ANY BUSINESS ESTABLISHMENT FROM DISCRIMINATING, WITH RESPECT TO THE PRICE CHARGED FOR SERVICES OF SIMILAR OR LIKE KIND, AGAINST A PERSON BECAUSE OF THE PERSON'S GENDER. A COMPLETE PRICE LIST IS AVAILABLE UPON REQUEST."

(5) A business establishment that fails to correct a violation of this subdivision within 30 days of receiving written notice of the violation is liable for a civil penalty of one thousand dollars ($1,000).

(6) For the purposes of this subdivision, "standard service" means the 15 most frequently requested services provided by the business.

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 905

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.44 (Matthew Bender)

3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff*] claims that [*name of defendant*] committed an act of violence against [him/her] because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] committed a violent act against [*name of plaintiff*] [or [his/her] property];**

2. **That a substantial motivating reason for [*name of defendant*]'s conduct was [[his/her] perception of] [*name of plaintiff*]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]];**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's acts. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.~~Note that this instruction uses the standard of "a motivating reason." The causation standard is still an open issue under this statute.~~

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Civil Code section 51.7 provides:

(a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

(b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

- Civil Code section 52(b) provides:

  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.

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1–3:15

3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff*] claims that [*name of defendant*] intimidated [him/her] by threat of violence because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally threatened violence against [*name of plaintiff*] [or [his/her] property], [whether or not [*name of defendant*] actually intended to carry out the threat];**

2. **That a substantial motivating reason for [*name of defendant*]'s conduct was [[his/her] perception of] [*name of plaintiff*]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[*insert other actionable characteristic*]];**

3. **That a reasonable person in [*name of plaintiff*]'s position would have believed that [*name of defendant*] would carry out [his/her] threat;**

4. **That a reasonable person in [*name of plaintiff*]'s position would have been intimidated by [*name of defendant*]'s conduct;**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012, Revised June 2013

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's threats. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

No published California appellate opinion establishes elements 3 and 4. However the Ninth Circuit Court

of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, 55–56.)

~~Note that this instruction uses the standard of "a motivating reason." The causation standard is still an open issue under this statute.~~

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Civil Code section 51.7 provides:

  (a) All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive. This section does not apply to statements concerning positions in a labor dispute which are made during otherwise lawful labor picketing.

  (b) As used in this section, "sexual orientation" means heterosexuality, homosexuality, or bisexuality.

- Civil Code section 52(b) provides:

  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.

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra,* 274 F.3d at pp. 1289–1290, internal citation omitted.)

- "When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra,* 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶ 5:892.11, ¶¶ 7:1528–7:1529

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

California Civil Practice: Civil Rights Litigation (Thomson West) §§ 3:1–3:15

3067. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 52(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 [him/her] for the harm. This compensation is called "damages."

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

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

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

In addition, you may award [*name of plaintiff*] up to three times the amount of [his/her] actual damages as a penalty against [*name of defendant*].

New September 2003; Revised June 2012; Renumbered from CACI No. 3026 December 2012; Revised June 2013

Directions for Use

Give this instruction for violations of the Unruh Civil Rights Act in which actual damages are claimed. (See Civ. Code, § 51; CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.*) This instruction may also be given for claims under Civil Code section 51.5 (see CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements*) and Civil Code section 51.6 (see CACI No. 3062, *Gender Price Discrimination—Essential Factual Elements*). If the only claim is for statutory damages of $4,000 (see Civ. Code, § 52(a)), this instruction is not needed. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious; Civ. Code, § 52(a) provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

See the instructions in the Damages series (CACI Nos. 3900 et seq.) for additional instructions on actual damages and punitive damages. Note that the statutory minimum amount of recovery for a plaintiff is $4,000 in addition to actual damages. If the verdict is for less than that amount, the judge should modify the verdict to reflect the statutory minimum.

Sources and Authority

- Civil Code section 52(a) provides: "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]y passing the Unruh Act, the Legislature established that arbitrary sex discrimination by businesses is *per se* injurious. Section 51 provides that all patrons are entitled to *equal* treatment. Section 52 provides for minimum statutory damages … for *every* violation of section 51, *regardless* of the plaintiff's actual damages." (*Koire*, *supra*, 40 Cal.3d at p. 33, original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 898, 1548–1556

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law § 898 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.15 (Matthew Bender)

VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [deny/aid or incite a denial of/discriminate or make a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***]?**
   ____ 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 defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**
   ____ 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***]?**

$ _____

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, June 2012~~,~~; Renumbered from CACI No.VF-3010 December 2012; Revised June 2013

Directions for Use

This verdict form is based on CACI No. 3060, *Unruh Civil Rights 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.

If the plaintiff's association with another is the basis for the claim, modify question 2 as in element 2 of CACI No. 3060.

Questions 3 and 4 may be omitted if only the statutory minimum of $4,000 damages is sought. Harm is ~~assumed~~ presumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

~~Because t~~The ~~award of a~~ penalty in question 5 ~~can be~~ refers to the right of the jury to award a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code, § 52(a).)~~, the~~ The judge should correct the verdict if the jury award goes over that limit. Also, if the jury awards nothing or~~inserts~~ an amount less than $4,000 in question 5, the judge should increase that award to $4,000 to reflect the statutory minimum.

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*.

VF-3031. Discrimination in Business Dealings (Civ. Code, §§ 51.5, 52(a))

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [discriminate against/boycott/blacklist/refuse to buy from/refuse to contract with/refuse to sell to/refuse to trade with] [***name of plaintiff***]?**
   ____ 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 defendant***]'s perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**
   ____ 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***]?**

$ _____

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, June 2012, Renumbered from CACI No. VF-3011 December 2012; Revised June 2013

Directions for Use

This verdict form is based on CACI No. 3061, *Discrimination in Business Dealings—Essential Factual Elements.*

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

If an alternative basis for the defendant's alleged motivation is at issue, modify question 2 as in element 2 of CACI No. 3061.

~~Question 3 may be omitted if only the statutory minimum of $4,000 damages is sought. Harm is assumed for this amount. (See Civ. Code, § 52(a); *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)~~

~~Because t~~The award of a penalty in question 5 refers to the right of the jury to award~~can be~~ a maximum of three times the amount of actual damages but not less than $4,000. (Civ. Code, § 52(a).)~~,~~ ~~the~~ The judge should correct the verdict if the jury award goes over that amount. Also, if the jury awards nothing or~~inserts~~ an amount less than $4,000 in question 5, then the judge should increase that award to $4,000 to reflect the statutory minimum.

It is possible that questions 3 and 4 may be omitted if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

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*.

VF-3032. Gender Price Discrimination (Civ. Code, § 51.6)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] charge [***name of plaintiff***] more for services of similar or like kind because of [his/her] gender?**

____ 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 defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

____ 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. 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 4.

4. What amount, if any, do you award as a penalty against [*name of 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, December 2010; Renumbered from CACI No. VF-3012 December 2012; Revised June 2013

Directions for Use

This verdict form is based on CACI No. 3062, *Gender Price Discrimination—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.

~~Because t~~The award of a penalty in question 4 refers to the right of the jury to award~~can be~~ a maximum of three times the amount of actual damages but not less than $4,000. (See Civ. Code, § 52(a).), ~~the~~ The judge should correct the verdict if the jury award goes over that amount. Also, if jury ~~inserts~~ awards nothing or an amount less than $4,000 in question 4 then the judge should increase that award to $4,000 to reflect the statutory minimum.

It is possible that questions 2 and 3 may be omitted if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

If specificity is not required, users do not have to itemize all the damages listed in question 3 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*.

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [threaten/commit] violent acts against [***name of plaintiff***] [or [his/her] property]?**
____ 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 defendant***]'s perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/position in a labor dispute/[***insert other actionable characteristic***]] a substantial motivating reason for [***name of defendant***]'s conduct?**
____ 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. **Would a reasonable person in [***name of plaintiff***]'s position have believed that [***name of defendant***] would carry out [his/her] threats?**
____ 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. **Would a reasonable person in [***name of plaintiff***]'s position have been intimidated by [***name of defendant***]'s conduct?**
____ Yes ____ No

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

5. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other past economic loss $ _____]
Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings $ _____]
[lost profits $ _____]
[medical expenses $ _____]
[other future economic loss $ _____]
Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

[7. 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 2009, December 2010; Renumbered from CACI No. VF-3013 December 2012; Revised June 2013

Directions for Use

This verdict form is based on CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements,* and CACI No. 3064, *Threats of Violence—Ralph 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.

Include questions 3 and 4 in a case of threats of violence.

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

Punitive damages (question 7) are authorized by Civil Code section 52(b)(2). For instructions on punitive damages, see instructions in the Damages series (CACI No. 3900 et seq.)

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*.

3706. Special Employment—General Employer and/or Special Employer Denies Responsibility

[*Name of plaintiff***] claims that [***name of worker***] was the employee of [***name of defendant first employer***] when the incident occurred, and that [***name of defendant first employer***] is therefore responsible for [***name of worker***]'s conduct. [***Name of defendant first employer***] claims that [***name of worker***] was the temporary employee of [***name of defendant second employer***] when the incident occurred, and therefore [***name of defendant second employer***] is solely responsible for [***name of worker***]'s conduct.**

In deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred, ~~you must first decide~~the most important factor is whether [***name of defendant second employer***] had the right to fully control the activities of [***name of worker***], rather than just the right to specify the result.**

It does not matter whether [*name of defendant second employer***] exercised the right to control. ~~If [*name of defendant first employer*] gave [*name of defendant second employer*] full authority to supervise the details of [*name of worker*]'s work, then [he/she] was the temporary employee of [*name of defendant second employer*], and [he/she/it] is responsible for [*name of worker*]'s conduct.~~**

~~If you decide that [*name of defendant second employer*] did not have the right of control, then~~ In addition to the right of control, you must consider all the circumstances in deciding whether [*name of worker***] was [***name of defendant second employer***]'s temporary employee when the incident occurred. The following factors, if true, may tend to show that [***name of ~~agent~~worker***] was the temporary employee of [***name of defendant second employer***]:**

(a) **[***Name of defendant second employer***] supplied the equipment, tools, and place of work;**

(b) **[***Name of worker***] was paid by the hour rather than by the job;**

(c) **The work being done by [***name of worker***] was part of the regular business of [***name of defendant second employer***];**

(d) **[***Name of defendant second employer***] had an unlimited right to end the relationship with [***name of worker***];**

(e) **The work being done by** [***name of worker***] **was the only occupation or business of [***name of worker***];**

(f) **The kind of work performed by [***name of worker***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of worker***] does not require specialized or professional skill;**

(h) The services performed by [*name of worker*] were to be performed over a long period of time;

~~**(i) [*Name of defendant second employer*] and [*name of worker*] acted as if they had an employer-employee relationship;**~~

(~~j~~i) [*Name of worker*]'s duties to [*name of defendant second employer*] were only for the benefit of [*name of defendant second employer*];

(~~k~~j) [*Name of worker*] consented to the temporary employment with [*name of defendant second employer*]; and

(~~l~~k) [*Name of worker*] and [*name of defendant second employer*] acted as if they had a temporary employment relationship.

(l) [*Specify any other relevant factors.*]

New September 2003; Revised June 2013

Directions for Use

~~Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.~~

This instruction is for use if the worker's regular (general) employer claims that at the time of injury, the worker was actually working for a different (special) employer. It may be adapted for use if the plaintiff's claim is against the special employer. The terms "first and second employer" have been substituted for "special and general employer" to make the concept more straightforward. Also, the term "temporary employee" has been substituted for the term "special employee" for the same reason.

In addition to the alleged special employer's control over the employee, there are a number of ~~other~~ relevant secondary factors to use in deciding whether a special employment relationship existed. They are similar, but not identical, to the factors from the Restatement Second of Agency, section 220 to be used in an independent contractor analysis. (See CACI No. 3704, *Existence of "Employee" Status Disputed.*) See also *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [162 Cal.Rptr. 320, 606 P.2d 355] and *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 176–177 [151 Cal.Rptr. 671, 588 P.2d 811] for additional factors. In the employee-contractor context, it has been held to be error not to give the secondary factors. (See *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 303–304 [111 Cal.Rptr.3d 787].)

Sources and Authority

- "[W]here the servants of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of his own master and does not thereby become the special employee of the other." (*Marsh, supra, ~~v. Tilley Steel Co.~~ (1980)* 26 Cal.3d at p.~~486,~~ 493 ~~[162~~

~~Cal.Rptr. 320, 606 P.2d 355]~~.)

- "When an employer -- the 'general' employer -- lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a 'special employment' relationship arises between the borrowing employer and the employee. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh*, *supra*, 26 Cal.3d at p. 492.)

- "The law of agency has long recognized that a person generally the servant of one master can become the borrowed servant of another. If the borrowed servant commits a tort while carrying out the bidding of the borrower, vicarious liability attaches to the borrower and not to the general master." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 455-456 [183 Cal.Rptr. 51, 645 P.2d 102], internal citations omitted.)

- "Liability in borrowed servant cases involves the exact public policy considerations found in sole employer cases. Liability should be on the persons or firms which can best insure against the risk, which can best guard against the risk, which can most accurately predict the cost of the risk and allocate the cost directly to the consumers, thus reflecting in its prices the enterprise's true cost of doing business." (*Strait v. Hale Construction Co.* (1972) 26 Cal.App.3d 941, 949 [103 Cal.Rptr. 487].)

- "In determining whether a special employment relationship exists, the primary consideration is whether the special employer has " '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. ...' " However, '[whether] the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown.' " (*Kowalski*, *supra*, ~~*v. Shell Oil Co.* (1979)~~ 23 Cal.3d at p.~~168,~~ 175 ~~[151 Cal.Rptr. 671, 588 P.2d 811]~~, internal citations omitted.)

- "[S]pecial employment is most often resolved on the basis of 'reasonable *inferences* to be drawn from the circumstances shown.' Where the evidence, though not in conflict, permits conflicting inferences, ... ' "the existence or nonexistence of the special employment relationship barring the injured employee's action at law is generally a question reserved for the trier of fact." ' " (*Marsh, supra,* 26 Cal.3d at p. 493.)

- "[I]f neither the evidence nor inferences are in conflict, then the question of whether an employment relationship exists becomes a question of law which may be resolved by summary judgment." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1248-1249 [250 Cal.Rptr. 718], internal citations omitted.)

- "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work. Mere instruction by the borrower on the result to be achieved will not suffice." (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a

different position from that which he actually held~~Contract terms are not conclusive evidence of the existence of the right to control~~." (*Kowalski, supra,* 23 Cal.3d at p. 176.)

- "California courts have held that evidence of the following circumstances tends to negate the existence of a special employment: The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer.~~The "secondary" factors may be more important in the special employment analysis than in the independent contractor analysis: "[S]pecial employment is most often resolved on the basis of 'reasonable inferences to be drawn from the circumstances shown.' ~~" (*Marsh, supra,* 26 Cal.3d at p. 492.)

- "Evidence that the alleged special employer has the power to discharge a worker 'is strong evidence of the existence of a special employment relationship. … The payment of wages is not, however, determinative.' Other factors to be taken into consideration are 'the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools.' Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship. [¶¶] In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship." ~~The existence of a special employment relationship may be supported by evidence that: (1) the alleged special employer paid wages to the employee, (2) the alleged special employer had the power to discharge the employee, (3) the work performed by the employee was unskilled, (4) the work tools were provided by the alleged special employer, (5) the work was part of the alleged special employer's regular business, (6) the employee expressly or impliedly consented to a special employment relationship, (7) the parties believed they were creating a special employment relationship, and (8) the alleged special employment period was lengthy.~~ (*Kowalski, supra,* 23 Cal.3d at pp. 176-178~~7~~, footnotes and internal citations omitted.)

- [T]~~t~~he jury need not find that [the worker] remained exclusively defendant's employee in order to impose liability on defendant. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh, supra,* 26 Cal.3d at pp. 494–495.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2][e] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.22 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine*, § 239.28 (Matthew Bender)

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

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 3:26–3:27 (Thomson Reuters West)

3903O. Injury to Pet—Costs of Treatment (Economic Damage)

[Insert number, e.g., "15."] The harm to [*name of plaintiff*]'s pet [*specify kind of pet, e.g., dog*].

To recover damages for injury to [*name of plaintiff*]'s pet, [he/she] must prove the reasonable costs that [he/she] incurred for the care and treatment of the pet because of [*name of defendant*]'s conduct.

New June 2013

Directions for Use

Give this instruction to recover the expenses of treating a tortious injury to a pet. Pets are no longer exclusively treated as property with regard to damages. The general standard for damages to personal property based on market value (see CACI No. 3903J, *Damage to Personal Property (Economic Damage)*) is often inappropriate because pets generally have no value to anyone except the owner. Therefore, recovery of reasonable medical expenses is allowed. The rule applies regardless of the tortious cause of injury, including what may be referred to as veterinary malpractice. (See *Martinez v. Robledo* (2012) 210 Cal.App.4th 384 [147 Cal.Rptr.3d 921].) CACI No. 3903J may be given if diminution in value is alleged.

Emotional distress damages have been allowed for intentional injury to a pet. (See *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1606−1608 [146 Cal.Rptr.3d 585] [claim for trespass to chattels]; see also CACI No. 2101, *Trespass to Chattels--Essential Factual Elements*.) CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, may also be given.

Sources and Authority

- "There can be little doubt that most pets have minimal to no market value, particularly elderly pets. … [W]hile people typically place substantial value on their own animal companions, as evidenced by the large sums of money spent on food, medical care, toys, boarding and grooming, etc., there is generally no market for *other people's* pets." (*Martinez, supra,* 210 Cal.App.4th at p. 390, original italics.)

- "[T]he determination of a pet's value cannot be made solely by looking to the marketplace. If the rule were otherwise, an injured animal's owner would bear most or all of the costs for the medical care required to treat the injury caused by a tortfeasor, while the tortfeasor's liability for such costs would in most cases be minimal, no matter how horrific the wrongdoer's conduct or how gross the negligence of a veterinarian or other animal professional. [¶] Moreover, allowing a pet owner to recover the reasonable costs of the care and treatment of an injured pet reflects the basic purpose of tort law, which is to make plaintiffs whole, or to approximate wholeness to the greatest extent judicially possible." (*Martinez, supra,* 210 Cal.App.4th at p. 390.)

- "In this case, plaintiff is not plucking a number out of the air for the sentimental value of damaged property; he seeks to present evidence of costs incurred for [the cat]'s care and treatment by virtue

of the shooting—a 'rational way' of demonstrating a measure of damages apart from the cat's market value. That evidence is admissible as proof of plaintiff's compensable damages, and the trial court erred in granting the motions to exclude it. Plaintiff is entitled to have a jury determine whether the amounts he expended for [the cat]'s care because of the shooting were reasonable." (*Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1561–1562 [126 Cal.Rptr.3d 581], internal citations omitted.)

- "Plaintiff is not seeking loss of companionship, unique noneconomic value, or the emotional value of the cat, but rather the costs incurred as a result of the shooting." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, fn. 3.)

- "We recognize the love and loyalty a dog provides creates a strong emotional bond between an owner and his or her dog. But given California law does not allow parents to recover for the loss of companionship of their children, we are constrained not to allow a pet owner to recover for loss of the companionship of a pet." (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1519–1520 [97 Cal.Rptr.3d 555].)

- "We believe good cause exists to allow the recovery of damages for emotional distress under the circumstances of this case. In the early case of *Johnson v. McConnell, supra,* 80 Cal. 545, the court noted 'while it has been said that [dogs] have nearly always been held "to be entitled to less regard and protection than more harmless domestic animals," it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt.' " (*Plotnik, supra,* 208 Cal.App.4th at p. 1607, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1718

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:220 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.33 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 23, *Animals: Civil Liability*, § 23.15 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

3904A. Present Cash Value

If you decide that [*name of plaintiff*]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[*insert other economic damages*]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [*Name of defendant*] must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [*name of plaintiff*] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.] [[You must [use the interest rate of __ percent/ [and] [*specify other stipulated information*]] as agreed to by the parties in determining the present cash value of future [economic] damages.]

New September 2003; Revised April 2008; Revised and renumbered from former CACI No. 3904 December 2010; Revised June 2013

Directions for Use

Give this instruction if future economic damages are sought and there is evidence from which a reduction to present value can be made. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

Give the next-to-last sentence if there has been expert testimony on reduction to present value. Unless there is a stipulation, eExpert testimony will usually be required to accurately establish present values for future economic losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- ~~The Supreme Court has held that~~ "~~it~~ [I]t is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... ." " ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 California Civil Practice: Torts § 5:22 (Thomson Reuters West)

4108. Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements (Civ. Code, § 2079)

[*Name of defendant***], as the real estate [broker/salesperson] for [***name of seller***], must conduct a reasonably competent and diligent visual inspection of the property offered for sale. Before the sale, [***name of defendant***] must then disclose to [***name of plaintiff***], the buyer, all facts that materially affect the value or desirability of the property that the investigation revealed or should have revealed.**

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of this duty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of seller***]'s real estate [broker/salesperson];**

2. **That [***name of defendant***] acted on [***name of seller***]'s behalf for purposes of [***insert description of transaction, e.g., "selling a residential property"***];**

3. **That [***name of defendant***] failed to conduct a reasonably competent and diligent visual inspection of the property;**

4. **That before the sale, [***name of defendant***] failed to disclose to [***name of plaintiff***] all facts that materially affected the value or desirability of the property that such an inspection would have revealed;**

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 June 2013

Directions for Use

Give this instruction if the seller's real estate broker or salesperson did not conduct a visual inspection of the property and make disclosures to the buyer as required by Civil Code section 2079(a). For an instruction on the fiduciary duty of a real estate broker to his or her own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*.

The duty created by Civil Code section 2079 is not a fiduciary duty; it is strictly a limited duty created by statute. (See *Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797].)

Sources and Authority

- Civil Code section 2079(a) provides:

> It is the duty of a real estate broker or salesperson, licensed under Division 4 (commencing with Section 10000) of the Business and Professions Code, to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home as defined in Section 18007 of the Health and Safety Code, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal, if that broker has a written contract with the seller to find or obtain a buyer or is a broker who acts in cooperation with that broker to find and obtain a buyer.

- Civil Code section 2079.3 provides:

> The inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property comprises a unit in a planned development as defined in Section 11003 of the Business and Professions Code, a condominium as defined in Section 783, or a stock cooperative as defined in Section 11003.2 of the Business and Professions Code, does not include an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of Section 1368.

- "Section 2079 requires sellers' real estate brokers, and their cooperating brokers, to conduct a 'reasonably competent and diligent visual inspection of the property,' and to disclose all material facts such an investigation would reveal to a prospective buyer." (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 23 [73 Cal.Rptr.2d 784], footnote omitted.)

- "Section 2079 was enacted to codify and focus the holding in *Easton v. Strassburger, supra,* 152 Cal. App. 3d 90. In *Easton,* the court recognized that case law imposed a duty on *sellers'* brokers to disclose material facts *actually known* to the broker. *Easton* expanded the holdings of former decisions to include a requirement that sellers' brokers must diligently inspect residential property and disclose material facts they obtain from that investigation. Further, the case held sellers' brokers are chargeable with knowledge they *should have known* had they conducted an adequate investigation." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics.)

- "Section 2079 statutorily limits the duty of inspection recognized in *Easton* to one requiring only a *visual* inspection. Further, the statutory scheme expressly states a selling broker has no obligation to purchasers to investigate public records or permits pertaining to title or use of the property." (*Field, supra,* 63 Cal.App.4th at p. 24, original italics; see Civ. Code, § 2079.3.)

- "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].)

- "In accordance with the clear and unambiguous language of section 2079, the inspection and disclosure duties of residential real estate brokers and their agents apply exclusively to prospective buyers, and not to other persons who are not parties to the real estate transaction. Only a transferee, that is, the ultimate purchaser, can recover from a broker or agent for breach of these duties."

(*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 165 [11 Cal.Rptr.2d 564].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency, § 66

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties,* ¶ 2:173 et seq. (The Rutter Group)

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.20 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons*, § 31.142 et seq. (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20 (Matthew Bender)

Miller & Starr, California Real Estate (3d ed. 2008) Ch. 1, *Duty of Seller of Real Property to Disclose,* § 1:41 (Thomson Reuters West)

4200. Actual Intent to Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] fraudulently [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**

2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**

3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

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

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

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013

Directions for Use

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence in cases in which the plaintiff is asserting causes of action for both actual and constructive fraud. Read the last bracketed sentence in cases in which the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's fraudulent intent is required. (See Civ. Code, § 3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns a fraudulently incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523], internal citation omitted.) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even where a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of fraudulent intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Civil Code section 3439.04 provides:
  - (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:
    - (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.
    - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:
      - (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
      - (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
  - (b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:
    - (1) Whether the transfer or obligation was to an insider.
    - (2) Whether the debtor retained possession or control of the property transferred after the transfer.
    - (3) Whether the transfer or obligation was disclosed or concealed.
    - (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
    - (5) Whether the transfer was of substantially all the debtor's assets.
    - (6) Whether the debtor absconded.

(7) Whether the debtor removed or concealed assets.
(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

(c) The amendment to this section made during the 2004 portion of the 2003–04 Regular Session of the Legislature, set forth in subdivision (b), does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter.

- Civil Code section 3439.01(b) provides: " 'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

- Civil Code section 3439.07 provides, in part:
(a) In an action for relief against a transfer or obligation ... a creditor ... may obtain
(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
(2) An attachment or other provisional remedy against the asset transferred or its proceeds ... .
(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:
(A) An injunction against further disposition by the debtor ... of the asset transferred or its proceeds.
(B) Appointment of a receiver ... .
(C) Any other relief the circumstances may require.
(b) If a creditor has commenced an action on a claim against the debtor, the creditor may attach the asset transferred or its proceeds ... .
(c) If a creditor has obtained a judgment on a claim against the debtor, the creditor may levy execution on the asset transferred or its proceeds.

- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "A fraudulent conveyance under the UFTA involves 'a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' 'A transfer made ... by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer as follows: [¶] (1) With actual intent to hinder, delay, or defraud any creditor of the debtor.' " (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked'; they 'may also be attacked by, as it were, a common law action.' " (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 758 [21 Cal.Rptr.3d 523], internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

~~9 California Forms of Pleading and Practice, Ch. 94, *Bankruptcy*, § 94.55[4][b] (Matthew Bender)~~

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

4320. Affirmative Defense—Implied Warranty of Habitability

[*Name of defendant***] claims that [he/she] does not owe [any/the full amount of] rent because [***name of plaintiff***] did not maintain the property in a habitable condition. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] failed to provide one or more of the following:**

a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]

b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

f. [building, grounds, and all areas under the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or quit cannot be a defense to the previous nonpayment.**

[Even if [*name of defendant***] proves that [***name of plaintiff***] substantially failed to meet any of these requirements, [***name of defendant***]'s defense fails if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the condition or interfered substantially with [***name of plaintiff***]'s ability to make the necessary repairs:**

[substantially failed to keep [his/her] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]

The fact that [*name of defendant***] has continued to occupy the property does not necessarily mean that the property is habitable.**

New August 2007; Revised June 2010, June 2013

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

~~There is no requirement that the tenant give notice of the condition to the landlord (See *Knight, supra*, 29 Cal.3d at p. 54).~~ In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].)

Sources and Authority

- Civil Code section 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine."

- Code of Civil Procedure section 1174.2 provides:

  (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

  (b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

  (c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

  (d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

- Civil Code section 1941.1(a) provides:

  A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:

  (~~a~~1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
  (~~b~~2) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.
  (~~c~~3) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
  (~~d~~4) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.
  (~~e~~5) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.
  (~~f~~6) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.
  (~~g~~7) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.
  (~~h~~8) Floors, stairways, and railings maintained in good repair.

- Civil Code section 1941.2 provides:

  (a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:

  (1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.
  (2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.
  (3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.
  (4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or

dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

- Civil Code section 1942.4(a) provides:

(a) A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure, if all of the following conditions exist prior to the landlord's demand or notice:

(1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling.

(2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions.

(3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. For purposes of this subdivision, service shall be complete at the time of deposit in the United States mail.

(4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2.

- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)

- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful

detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)

- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)

- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)

- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)

- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)

- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra,* 29 Cal.3d at p. 57.)

- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra,* 29 Cal.3d at p. 58.)

- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)

- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. ~~2006~~2005) Real Property, § 625

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General*, ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109-8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Miller & Starr, California Real Estate ~~(Thomson Reuters West)~~ Ch. 19, *Landlord-Tenant*, § 19:224 (Thomson Reuters West)

4328. Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, ~~or~~ Stalking, or Elder/Dependent Adult Abuse (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult];**

2. **That the act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult] [was/were] documented in a [court order/law enforcement report];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult] is not also a tenant of the same living unit as [***name of defendant***]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult].**

Even if [*name of defendant***] proves all of the above, [***name of plaintiff***] may still evict [***name of defendant***] if [***name of plaintiff***] proves both of the following:**

1. **[Either] [***Name of defendant***] allowed the person who committed the act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult] to visit the property after [the taking of a police report/issuance of a court order] against that person;**

   [or]

   [*Name of plaintiff***] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/stalking [or] ~~stalking~~abuse of an elder or dependent adult] posed a physical threat to [other persons with a right to be on the property/ [or] another tenant's right of quiet possession];**

and

2. **[***Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation.**

New December 2011; Revised June 2013

Directions for Use

This instruction is a tenant's affirmative defense alleging that he or she is being evicted because he or she was the victim of domestic violence, sexual assault, ~~or~~ stalking, or elder or dependent adult abuse. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.

The tenant must prove that the perpetrator is not a tenant of the same "dwelling unit" (see Code Civ. Proc., § 1161.3(a)(2)), which is expressed in element 3 as "living unit." Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. "The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.

Sources and Authority

- Code of Civil Procedure section 1161.3 provides:

  (a) Except as provided in subdivision (b), a landlord shall not terminate a tenancy or fail to renew a tenancy based upon an act or acts against a tenant or a tenant's household member that constitute domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 1219, or stalking as defined in Section 1708.7 of the Civil Code, ~~or~~ Section 646.9 of the Penal Code, or abuse of an elder or a dependent adult as defined in Section 15610.07 of the Welfare and Institutions Code, if both of the following apply:

  (1) The act or acts of domestic violence, sexual assault, ~~or~~ stalking, or abuse of an elder or a dependent adult have been documented by one of the following:

  (A) A temporary restraining order, ~~or~~ emergency protective order, or protective order lawfully issued within the last 180 days pursuant to Section 527.6, Part 3 (commencing with Section 6240), Part 4 (commencing with Section 6300), or Part 5 (commencing with Section 6400) of Division 10 of the Family Code, Section 136.2 of the Penal Code, or Section 213.5 or 15657.03 of the Welfare and Institutions Code that protects the tenant or household member from domestic violence, sexual assault, ~~or~~ stalking, or abuse of an elder or a dependent adult.

  (B) A copy of a written report, written within the last 180 days, by a peace officer employed by a state or local law enforcement agency acting in his or her official capacity, stating that the tenant or household member has filed a report alleging that he or she or the household member is a victim of domestic violence, sexual

assault, ~~or~~ stalking, or abuse of an elder or dependent adult.

(2) The person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, ~~or~~ stalking, or abuse of an elder or dependent adult is not a tenant of the same dwelling unit as the tenant or household member.

(b) A landlord may terminate or decline to renew a tenancy after the tenant has availed himself or herself of the protections afforded by subdivision (a) if both of the following apply:

(1) Either of the following:

(A) The tenant allows the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, ~~or~~ stalking, or abuse of an elder or dependent adult to visit the property.

(B) The landlord reasonably believes that the presence of the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, ~~or~~ stalking, or abuse of an elder or dependent adult poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to Section 1927 of the Civil Code.

(2) The landlord previously gave at least three days' notice to the tenant to correct a violation of paragraph (1).

(c) Notwithstanding any provision in the lease to the contrary, the landlord shall not be liable to any other tenants for any action that arises due to the landlord's compliance with this section.

(d) For the purposes of this section, "tenant" means tenant, subtenant, lessee, or sublessee.

(e) The Judicial Council shall, on or before January 1, ~~2012~~2014, develop a new form or revise an existing form that may be used by a party to assert in the responsive pleading the grounds set forth in this section as an affirmative defense to an unlawful detainer action.

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 683A

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Rights And Obligations During The Tenancy—Other Issues*, ¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint*, ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

VF-4300. Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] fail to make at least one rental payment~~s~~ to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
____ 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 plaintiff***] properly give [***name of defendant***] a ~~three-day~~ written notice to pay the rent or vacate the property at least three days before [*date on which action was filed*]?**
____ Yes ____ No

If your answer to question 2 is ~~no~~yes, then answer question 3. If you answered ~~yes~~no, stop here, answer no further questions, and have the presiding juror sign and date this form~~skip to question 4~~.

~~**3. Did [*name of defendant*] actually receive the notice at least three days before [*date on which action was filed*]?**~~
~~**____ 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~~3. Was the amount due stated in the notice no more than the amount that [*name of defendant***] actually owed?**
____ Yes ____ No

If your answer to question ~~4~~ 3 is yes, then answer question ~~5~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~4. Did [*name of defendant***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
____ Yes ____ No

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

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. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent.*~~

If ~~actual~~ the day of receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question ~~3~~ 2 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense--Breach of Implied Warranty of Habitability

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make at least one rental payments to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
____ 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 plaintiff*] maintain the property in a habitable condition during the period for which rent was not paid?**~~
~~**____ 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**~~**2. Did [***name of plaintiff***] properly give [***name of defendant***] a ~~three-day~~ written notice to pay the rent or vacate the property at least three days before [***date on which action was filed***]?**
____ Yes ____ No

If your answer to question ~~3~~ 2 is ~~no~~yes, then answer question 43. If you answered ~~yes~~no, ~~skip to question 5~~stop here, answer no further questions, and have the presiding juror sign and date this form.

~~**4. Did [*name of defendant*] actually receive the notice at least three days before [*date on which action was filed*]?**~~
~~**____ 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**~~**3. Was the amount due stated in the notice no more than the amount that [***name of defendant***] actually owed?**
____ Yes ____ No

If your answer to question ~~5~~ 3 is yes, then answer question ~~6~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~4. Did [*name of defendant*] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?
____ Yes ____ No

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

5. When [*name of defendant*] failed to pay the rent that was due, was the property in a habitable condition?
Yes No

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*, and CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*. See also the Directions for Use for those instructions.

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. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*, and CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*. See also the Directions for Use for those instructions.~~If the existence of a landlord-tenant relationship is at issue, additional preliminary questions will be needed based on elements 1 and 2 of CACI No. 4302. Questions 2 and 3~~ and 4~~ incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

If ~~actual~~ the day of receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question ~~4~~ 2 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

If a breach of habitability is found, the court may order the landlord to make repairs and correct the conditions that constitute a breach. (Code Civ. Proc., § 1174.2(a).) The court might include a special interrogatory asking the jury to identify those conditions that it found to create inhabitability.

VF-4302. Termination Due to Violation of Terms of Lease/Agreement

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to [***insert description of alleged failure to perform***] as required by the [lease/rental agreement/sublease]?**
   ____ 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 defendant***]'s failure to [***insert description of alleged failure to perform***] a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease]?**
   ____ Yes ____ No

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

3. **Did [***name of plaintiff***] properly give [***name of defendant***] a ~~three-day~~ written notice to [either [***describe action to correct failure to perform***] or] vacate the property at least three days before [***date on which action was filed***]?**
   ____ Yes ____ No

   [If your answer to question 3 is ~~no~~yes, then answer question 4. ~~[~~If you answered ~~yes~~no, stop here, answer no further questions, and have the presiding juror sign and date this form~~skip to question 5~~.]

~~4. Did [*name of defendant*] actually receive the notice at least three days before [*date on which action was filed*]?~~
~~____ 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~~4. **Did [***name of defendant***] [***describe action to correct failure to perform***] within three days after service or receipt of the notice?]**
   ____ Yes ____ No

Signed: _____
Presiding Juror

Dated: _____

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

New December 2007; Revised December 2010, June 2013

Directions for Use

This verdict form is based on CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. See also the Directions for Use for that instruction. Question 3 incorporates the notice requirements set forth in CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.

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. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 3 and 4 incorporate the notice requirements set forth in CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*.~~

Include question ~~5~~4~~, and the bracketed reference to corrective action in question 3,~~ if the breach can be cured.

If ~~actual~~ the day of receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question ~~4~~ 3 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense~~, but~~ and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors ~~use or consider~~ based on any special training or unique personal experiences that you may have had related to~~any of you have in~~ matters involved in this case. What you may know or have learned through y~~Y~~our training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you [or ask to see any exhibits admitted into evidence that have not already been provided to you]. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.]

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June 2011, June 2013

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

Read the sixth paragraph if a general verdict form is to be used. If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony if the proceedings are not being recorded.

Sources and Authority

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

- Code of Civil Procedure section 657 provides in part:

  > The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. [*omitted*]

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' "" (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)

- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis, supra,* 14 Cal.App.4th at p. 1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)

- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct … . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)

- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' "(*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 318, 321, 380

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *Jury Deliberations: General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32[3] (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.33

5090. Final Instruction on Discharge of Jury

Members of the jury, this completes your duties in this case. On behalf of the parties and their attorneys, thank you for your time and your service. It can be a great personal sacrifice to serve as a juror, but by doing so you are fulfilling an extremely important role in California's system of justice. Each of us has the right to a trial by jury, but that right would mean little unless citizens such as each of you are willing to serve when called to do so. You have been attentive and conscientious during the trial, and I am grateful for your dedication.

Throughout the trial, I continued to admonish you that you could not discuss the facts of the case with anyone other than your fellow jurors and then only during deliberations when all twelve jurors were present. I am now relieving you from that restriction, but I have another admonition.

You now have the absolute right to discuss or not to discuss your deliberations and verdict with anyone[, including members of the media]. It is appropriate for the parties, their attorneys or representatives to ask you to discuss the case, but any such discussion may occur only with your consent and only if the discussion is at a reasonable time and place. You should immediately report any unreasonable contact to the court.

If you do choose to discuss the case with anyone, feel free to discuss it from your own perspective, but be respectful of the other jurors and their views and feelings.

Thank you for your time and your service; you are discharged.

New June 2013

Directions for Use

In the third paragraph, include the reference to members of the media if the case has received media attention and coverage.