Judicial Council of California Civil Jury Instructions

CACI*

* Pronounced "Casey"

Supplement With Revised Instructions

As approved at
the Judicial Council's Rules Committee June 2025 meeting
and the Judicial Council July 2025 Meeting

Judicial Council of California
Advisory Committee on Civil Jury Instructions

Hon. Adrienne M. Grover, Chair

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Preface to CACI Updates

This supplement to the 2025 edition of CACI includes a number of additions and changes to the instructions, which were first published in 2003. In providing these updates, the Judicial Council Advisory Committee on Civil Jury Instructions is fulfilling its charge to maintain CACI. The committee is also striving to add instructions in new areas of the law and to augment existing areas.

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

July 2025

Hon. Adrienne M. Grover
Court of Appeal, Sixth District
Chair, Advisory Committee on Civil Jury Instructions

The Advisory Committee on Civil Jury Instructions welcomes comments. Send comments by email to: civiljuryinstructions@jud.ca.gov

Or you may send print comments by regular mail to:
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Table of Revised Judicial Council of California Civil Jury Instructions (CACI)

July 2025

This supplement to the 2025 Edition of CACI includes all of the new and revised California Civil Jury Instructions approved by the Judicial Council's Rules Committee at its June 2025 meeting and the Judicial Council of California at its July 2025 meeting.

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

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

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

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022, November 2024**

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 273 [283 Cal.Rptr.3d 19, 494 P.3d 487].) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *Ibid.*) If there is a question of fact regarding whether the defendant entrusted the work to the contractor, the instruction should be modified. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

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

Sources and Authority

- "A hirer 'retains control' where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. . . . So 'retained control' refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform. For simplicity we will often call this the 'contracted work'—irrespective of whether it's set out in a written contract or arises from an informal agreement. A hirer's authority over noncontract work—although potentially giving rise to other tort duties—thus does not give rise to a retained control duty unless it has the effect of creating authority over the contracted work." (*Sandoval, supra,* 12 Cal.5th at pp. 274–275.)
- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)
- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette* [*v. Superior Court* (1993) 5 Cal.4th 689], *Toland* [*v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253] and *Camargo* [*v. Tjaarda Dairy* (2001) 25 Cal.4th 1235] because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)
- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)
- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277, internal citation omitted.)
- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)
- "[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278, internal citations omitted.)
- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)
- "[A] hirer may be liable for failing to undertake a promised safety measure." *(Degala v. John Stewart Co.* (2023) 88 Cal.App.5th 158, 168 [304 Cal.Rptr.3d 576].)
- "On facts [showing a contractor's awareness of a hazard], then, it is the contractor's responsibility, not the hirer's responsibility, to take the necessary precautions to protect its employees from a known workplace hazard. And should the contractor fail to take the necessary precautions, . . . its employees cannot fault the hirer for the contractor's own failure." (*McCullar v. SMC Contracting, Inc.* (2022) 83 Cal.App.5th 1005, 1017 [298 Cal.Rptr.3d 785].)
- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure

to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent's injuries 'not [by] active conduct *but . . . in the form of an omission to act*.' Although it is undeniable that [owner]'s failure to equip its building with roof anchors contributed to decedent's death, *McKown* [*v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does not support plaintiffs' suggestion that a passive omission of this type is actionable. . . . Subsequent Supreme Court decisions . . . have repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable. . . . Accordingly, the failure to provide safety equipment does not constitute an 'affirmative contribution' to an injury within the meaning of *McKown*." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594], original italics.)
- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)
- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.' . . . [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

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

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

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

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11, 421.12 (Matthew Bender)

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

1013. Landlord's Liability for Dangerous Dog Kept on Property—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [a] dog[s] kept on property owned by [***name of defendant landlord***]. To succeed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant landlord***] owned the property;**
2. **That before the [attack/***other incident***] by the dog[s], [***name of defendant landlord***] knew or must have known that [a] dog[s] being kept on the premises had a nature or tendency to be dangerous;**
3. **That [***name of plaintiff***] was harmed by the dog[s];**
4. **That before the [attack/***other incident***], [***name of defendant landlord***] could have taken reasonable measures to prevent the harm;**
5. **That [***name of defendant landlord***] failed to take those reasonable measures to prevent the harm; and**
6. **That [***name of defendant landlord***]'s failure to take those reasonable measures was a substantial factor in causing [***name of plaintiff***]'s harm.**

New July 2025

Directions for Use

This instruction is for use when a dog kept on a landlord's property has harmed a third person and that person claims the landlord is liable.

Sources and Authority

- "[W]e believe public policy requires that a landlord who has knowledge of a dangerous animal should be held to owe a duty of care only when he has the right to prevent the presence of the animal on the premises. Simply put, a landlord should not be held liable for injuries from conditions over which he has no control." (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 512 [118 Cal.Rptr. 741].)
- "[W]e hold that a landlord is under no duty to inspect the premises for the purpose of discovering the existence of a tenant's dangerous animal; only when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise." (*Uccello, supra,* 44 Cal.App.3d at p. 514.)
- "The general duty of care owed by a landowner in the management of his or her

property is attenuated when the premises are let because the landlord is not in possession, and usually lacks the right to control the tenant and the tenant's use of the property. Consequently, it is well established that a landlord does not owe a duty of care to protect a third party from his or her tenant's dog unless the landlord has actual knowledge of the dog's dangerous propensities, and the ability to control or prevent the harm." (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1369 [50 Cal.Rptr.3d 40].)

- "[T]he landlord's control of the property from which the dog originated its attack, not his or her control over the property on which the attack occurred, determines the landlord's liability." (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1847 [41 Cal.Rptr.2d 192].)
- "Under California law, a landlord who does not have actual knowledge of a tenant's dog's vicious nature cannot be held liable when the dog attacks a third person. In other words, where a third person is bitten or attacked by a tenant's dog, the landlord's duty of reasonable care to the injured third person depends on whether the dog's vicious behavior was reasonably foreseeable. Without knowledge of a dog's propensities a landlord will not be able to foresee the animal poses a danger and thus will not have a duty to take measures to prevent the attack. [¶] In this court's view, this inquiry into the landlord's duty involves a two-step approach. The first step is to determine the landlord's knowledge of the dog's vicious nature. . . . [¶] The second step involves a landlord's ability to prevent the foreseeable harm." (*Donchin, supra,* 34 Cal.App.4th at p. 1838.)
- " '[A] landlord who does not have actual knowledge of a tenant's dog's vicious nature cannot be held liable when the dog attacks a third person. . . . Without knowledge of a dog's propensities a landlord will not be able to foresee the animal poses a danger and thus will not have a duty to take measures to prevent the attack.' This 'actual knowledge rule' can be satisfied 'by circumstantial evidence the landlord *must* have known about the dog's dangerousness as well as direct evidence he *actually* knew.' " (*Fraser v. Farvid* (2024) 99 Cal.App.5th 760, 763 [318 Cal.Rptr.3d 215], internal citations omitted, original italics.)
- "[W]here a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." ' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735].)

Secondary Sources

3 California Forms of Pleading and Practice, Ch. 23, *Animals – Civil Liability*,

§§ 23.35, 23.36, 23.166 (Matthew Bender)

17 California Points & Authorities Ch. 178, *Premises Liability*, §§ 178.40, 178.41 (Matthew Bender)

VF-1003. Landlord's Liability for Dangerous Dog Kept on Property

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant landlord*] own 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 landlord*] know, or must [*name of defendant landlord*] have known, before the [attack/*other incident*] that [a] dog[s] being kept on the premises had a nature or tendency to be dangerous?**

   _____ **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*] harmed by the dog[s]?**

   _____ **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. **Could [*name of defendant landlord*] have taken reasonable measures before the [attack/*other incident*] to prevent the 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. **Did [*name of defendant landlord*] fail to take reasonable measures to prevent the harm?**

   _____ **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 landlord*]'s failure to take reasonable measures a substantial factor in causing [*name of plaintiff*]'s harm?**

_____ 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].

New July 2025

Directions for Use

This verdict form is based on CACI No. 1013, *Landlord's Liability for Dangerous Dog Kept on Property*.

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 7. 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*.

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

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

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

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

[*or***]**

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

New September 2003

Directions for Use

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

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

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

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

Sources and Authority

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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*New September 2003; Revised December 2013, June 2014, December 2014, December 2015, May 2022, July 2025**

Directions for Use

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

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

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

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

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

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

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

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)
- "As an introductory note, we observe that plaintiffs . . . framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort . . . .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely

related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "For purposes of clearing the awareness threshold for emotional distress recovery, it is awareness of an event that is injuring the victim—not awareness of the defendant's role in causing the injury—that matters. . . . [W]hen a bystander witnesses what any layperson would understand to be an injury-producing event—such as a car accident, explosion, or fire—the bystander may bring a claim for negligent infliction of emotional distress based on the emotional trauma of witnessing injuries inflicted on a close relative. This is true even if the bystander was not aware at the time of the role the defendant played in causing the victim's injury." (*Downey v. City of Riverside* (2024) 16 Cal.5th 539, 544 [323 Cal.Rptr.3d 109, 551 P.3d 1109].)
- "Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a 'plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative', so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child's] abuse, but with their senses technologically extended beyond the walls of their home." (*Ko, supra,* 58 Cal.App.5th at p. 1159, internal citation omitted.)
- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].)
- "[W]e hold the following: Neither our precedent nor considerations of tort policy support requiring plaintiffs asserting bystander emotional distress claims to show contemporaneous perception of the causal link between the defendant's conduct and the victim's injuries. Here, [plaintiff] has alleged that when she was on the phone with her daughter she heard metal crashing against metal, glass shattering, and tires dragging on asphalt—from which she knew immediately that her daughter had been in a car accident. [Plaintiff] has also alleged that she understood that her daughter was seriously injured because she could no longer hear her after the crash and a stranger who rushed to the scene told her to quiet down so that he could find a pulse. *Thing* does not require [plaintiff] to allege that she was aware of how the defendants may have contributed to that injury." (*Downey, supra,* 16 Cal.5th at pp. 560–561.)
- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can

never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when . . . caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489 [185 Cal.Rptr.3d 313].)

- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra,* 235 Cal.App.4th at p. 490.)
- "As *Fortman* itself recognized, it is a different issue whether the bystander must also contemporaneously be aware that the injury-producing event was caused by the conduct of some third party. [¶] *Fortman* had no occasion to decide that issue. But in the course of analyzing the question before the court, *Fortman* did discuss—and distinguish—several cases that suggest the answer to that question is no." (*Downey, supra,* 16 Cal.5th at pp. 555–556; see *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830 [151 Cal.Rptr.3d 320].)
- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)
- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)
- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)
- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra,* 27 Cal.3d at pp. 927–928.)
- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional

distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, 189 Cal.App.4th at p. 1378.)

- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decedent]'s struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing*, that '[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.' The instructions clarify that 'Emotional distress includes suffering, anguish, fright, . . . nervousness, grief, anxiety, worry, shock . . . .' Viewed through this lens there is no question that [plaintiffs'] testimony provides sufficient proof of serious emotional distress." (*Keys, supra*, 235 Cal.App.4th at p. 491, internal citation omitted.)
- "[W]here a participant in a sport has expressly assumed the risk of injury from a defendant's conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant's express assumption of the risk against the bystanders' NIED claims." (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

Secondary Sources

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

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

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

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

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

1803. Misappropriation of Name, Likeness, or Identity—Essential Factual Elements

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

1. **That [***name of defendant***] used [***name of plaintiff***]'s [name/likeness/identity];**
2. **That [***name of plaintiff***] did not consent to this use;**
3. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s [name/likeness/identity];**
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 December 2014, November 2017, May 2020, July 2025

Directions for Use

This instruction states the common law elements of a claim for misappropriation of a person's identity. For related statutory claims under Civil Code section 3344, see CACI No. 1804A, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness*, and No. 1804B, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*.

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. If the plaintiff is asserting misappropriation of more than one aspect of the plaintiff's identity, select the applicable bracketed terms.

Consider giving an instruction explaining consent. See generally CACI No. 1302, *Consent Explained*.

If the alleged "benefit" is not commercial, the court will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If the plaintiff is suing under both the common law and Civil Code section 3344, the court may need to explain that a person's voice, for example, may qualify as

"identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct may be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to the artist's work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Misappropriation of Name, Voice, Signature, Photograph, or Likeness—First Amendment (Comedy III).*) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra,* 94 Cal.App.4th at p. 414 ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest"].)

Sources and Authority

- "A common law misappropriation claim is pleaded by 'alleging: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807].)
- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is . . . a right to prevent others from misappropriating the economic value generated . . . through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)
- "California recognizes the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo, supra,* 94 Cal.App.4th at p. 409.)
- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684–685 [166 Cal.Rptr.3d 359].)
- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness . . . ." (*Cross v.*

Facebook, Inc. (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)
- "Consent to the use of a name or likeness is determined by traditional principles of contract interpretation." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 8 [206 Cal.Rptr.3d 884].)
- "[T]he plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (*Hill, supra,* 7 Cal.4th at p. 26.)
- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 419 [198 Cal.Rptr. 342].)
- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)
- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278–279 [239 P.2d 630].)
- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409–410, internal citations and footnote omitted.)
- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "[T]he fourth category of invasion of privacy, namely, appropriation, 'has been *complemented* legislatively by Civil Code section 3344, adopted in 1971.' " (*Eastwood, supra*, 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

California Civil Practice: Torts § 20:16 (Thomson Reuters)

1804A. Misappropriation of Name, Voice, Signature, Photograph, or Likeness (Civ. Code, § 3344)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to [privacy/publicity/privacy and publicity] by misappropriating [his/her/***nonbinary pronoun***] [name/voice/signature/photograph/likeness]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**
2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**
3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**
4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**
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. 1804 April 2008; Revised April 2009, July 2025

Directions for Use

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. This instruction states a statutory claim for misappropriation under Civil Code section 3344. Select the specific type of misappropriation from the applicable bracketed terms for the aspect of the plaintiff's identity at issue in the case.

One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Misappropriation of Name, Likeness, or Identity*, which sets forth the common law cause of action, may be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of

these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804B should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B.

Consider giving an instruction explaining consent. See generally CACI No. 1302, *Consent Explained*.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Sources and Authority

- Liability for Use of Name, Voice, Signature, Photograph, or Likeness. Civil Code section 3344.
- "Photograph" Defined. Civil Code section 3344(b).
- "Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884].)
- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters v. Matthews* (2000)78 Cal.App.4th 362, 367 [92 Cal.Rptr.2d 713].)
- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)
- "The differences between the common law and statutory actions are: (1) Section

3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra*, 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness . . . ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)
- "Plaintiffs assert that Civil Code section 3344's 'commercial use' requirement does not need to 'involve some form of advertising or endorsement.' This is simply incorrect, as Civil Code section 3344, subdivision (a) explicitly provides for possible liability on '[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising . . . without such person's prior consent.' The statute requires some 'use' by the advertiser aimed at obtaining a commercial advantage for the advertiser." (*Cross*, *supra*, 14 Cal.App.5th at p. 210.)
- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35–429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22–184.24 (Matthew Bender)

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

1804B. Misappropriation of Name, Voice, Signature, Photograph, or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign (Civ. Code, § 3344(d))

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to [privacy/publicity/privacy and publicity] by misappropriating [his/her/***nonbinary pronoun***] [name/voice/signature/photograph/likeness] in connection with a [[news/public affairs/sports] broadcast or account/political campaign]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**
2. **That the use occurred in connection with a [[news/public affairs/sports] broadcast or account/political campaign];**
3. **That the use contained false information;**
4. **[***Use for public figure***: That [***name of defendant***] knew the [broadcast or account/campaign material] was false or that [he/she/***nonbinary pronoun***/it] acted with reckless disregard of its falsity;]**

   [*or***]**

   [*Use for private individual***: That [***name of defendant***] was negligent in determining the truth of the [broadcast or account/campaign material];]**
5. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**
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.**

Derived from former CACI No. 1804 April 2008; Revised April 2009, July 2025

Directions for Use

Give this instruction if the plaintiff's name, voice, signature, photograph, or likeness has been used in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. In this situation, consent is not required. (Civ. Code, § 3344(d).) However, in *Eastwood v. Superior Court,* the court held that the

constitutional standards under defamation law apply under section 3344(d) and that the statute as it applies to news does not provide protection for a knowing or reckless falsehood. (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) Under defamation law, this standard applies only to public figures, and private individuals may sue for negligent publication of defamatory falsehoods. Presumably, the same distinction between public figures and private individuals would apply under Civil Code section 3344(d). Element 4 provides for the standards established and suggested by *Eastwood*.

Select the specific type of misappropriation from the applicable bracketed terms for the aspect of the plaintiff's identity at issue in the case.

Give CACI No. 1804A, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness*, if there is no issue whether one of the exceptions of Civil Code section 3344(d) applies. If plaintiff alleges that the use was not covered by subdivision (d) (e.g., not a "news" account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804A should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth element 2 of CACI No. 1804A, the claim is still viable if the plaintiff proves all the elements of this instruction.

If the plaintiff is asserting more than one privacy right or a right of publicity, give an introductory instruction stating that a person's right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Misappropriation of Name, Likeness, or Identity*, which sets forth the common law cause of action, may be given.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Even though consent is not required, it may be an affirmative defense. CACI No. 1721, *Affirmative Defense—Consent* (to defamation), may be used in this situation.

Sources and Authority

- Liability for Use of Name, Voice, Signature, Photograph, or Likeness. Civil Code section 3344.
- "In 1971, California enacted [Civil Code] section 3344, a commercial appropriation statute which complements the common law tort of appropriation." (*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713].)
- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB*

Enters., supra, 78 Cal.App.4th at p. 367.)

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)
- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)
- "The spacious interest in an unfettered press is not without limitation. This privilege is subject to the qualification that it shall not be so exercised as to abuse the rights of individuals. Hence, in defamation cases, the concern is with defamatory lies masquerading as truth. Similarly, in privacy cases, the concern is with nondefamatory lies masquerading as truth. Accordingly, we do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood." (*Eastwood, supra,* 149 Cal.App.3d at p. 426, internal citations omitted.)
- The burden of proof as to knowing or reckless falsehood under Civil Code section 3344(d) is on the plaintiff. (See *Eastwood, supra,* 149 Cal.App.3d at p. 426.)
- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)
- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. . . . Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307], internal citation omitted.)

- "We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term 'public affairs' was intended to mean something less important than news. Public affairs must be related to real-life occurrences." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 546 [18 Cal.Rptr.2d 790], internal citations omitted.)
- "[N]o cause of action will lie for the 'publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 789–791

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-:L, *Invasion Of Privacy*, ¶¶ 5:1116–5:1118 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

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

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

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

1805. Affirmative Defense to Misappropriation of Name, Voice, Signature, Photograph, or Likeness—First Amendment (*Comedy III*)

[*Name of defendant***] claims that [his/her/***nonbinary pronoun***] use of [***name of plaintiff/other person, e.g., celebrity***]'s [name/voice/signature/photograph/likeness/identity] in the [***insert type of work, e.g., "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed on this defense, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g., "picture"***] adds significant creative elements to [***name of plaintiff/other person, e.g., celebrity***]'s [name/voice/signature/photograph/likeness/identity], giving it a new expression, meaning, or message; or**
2. **That the value of the [***insert type of work, e.g., "picture"***] does not result primarily from [***name of plaintiff/other person, e.g., celebrity***]'s fame.**

New September 2003; Revised October 2008, July 2025

Directions for Use

This instruction sets forth the affirmative defense under the First Amendment to the unauthorized use of a person's name or likeness. Select the corresponding bracketed terms for the aspect of the person's identity at issue in the case.

Use the celebrity's or other person's name rather than the plaintiff's name if the plaintiff is not the person whose name or likeness is the subject of the trial (for example, the plaintiff is an heir to or assignee of the right at issue).

Sources and Authority

- "The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. Because the First Amendment does not protect false and misleading commercial speech, and because even nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection, the right of publicity may often trump the right of advertisers to make use of celebrity figures." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396 [106 Cal.Rptr.2d 126, 133, 21 P.3d 797, 802], internal citations omitted.)
- "[O]ur precedents have held that speech which either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity's image in commercial advertisements is unprotected by the First Amendment against a

California right-of-publicity claim." (*Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 905.)

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)
- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)
- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891–892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)
- "[T]he First Amendment . . . safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 860 [230 Cal.Rptr.3d 625].)
- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)
- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment

protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see . . . whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)
- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)
- "[Defendant] contends the plaintiffs' claims are barred by the transformative use defense formulated by the California Supreme Court in *Comedy III* . . . . 'The defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." ' " (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172, 1177, internal citation omitted.)
- "Simply stated, the transformative test looks at 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.' This transformative test is the court's primary inquiry when resolving a conflict between the right of publicity and the First Amendment." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 686 [166 Cal.Rptr.3d 359], internal citations omitted.)
- "*Comedy III's* 'transformative' test makes sense when applied to products and merchandise—'tangible personal property,' in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs." (*De Havilland, supra,* 21 Cal.App.5th at p. 863, internal citation omitted.)
- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross*, *supra*, 222 Cal.App.4th at p. 687.)
- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise

literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 788

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 4(VII)-C, *Harm to Reputation and Privacy Interests*, ¶ 4:1385 et seq. (The Rutter Group)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.38 (Matthew Bender)

VF-1803. Privacy—Misappropriation of Name, Likeness, or Identity

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We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] use [*name of plaintiff*]'s [name/likeness/identity]?**

   _____ **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*] consent to the use of [his/her/*nonbinary pronoun*] [name/likeness/identity]?**

   _____ **Yes** _____ **No**

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

3. **Did [*name of defendant*] gain a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s [name/likeness/identity]?**

   _____ **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].

New September 2003; Revised April 2007, December 2010, December 2016, November 2017, May 2024, July 2025

Directions for Use

This verdict form is based on CACI No. 1803, *Misappropriation of Name, Likeness, or Identity.*

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*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1804. Privacy—Misappropriation of Name, Voice, Signature, Photograph, or Likeness (Civ. Code, § 3344)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] knowingly use [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] on merchandise or to advertise or sell products or services?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of defendant***] have [***name of plaintiff***]'s consent?**

   _____ **Yes** _____ **No**

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

3. **Was [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] directly connected to [***name of defendant***]'s commercial purpose?**

   _____ **Yes** _____ **No**

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

4. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

[5. Did [*name of plaintiff***] suffer any actual damages or is [***name of plaintiff***] reasonably likely to suffer any actual damages in the future?**

_____ **Yes** _____ **No**

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

[c. Past noneconomic loss, including [humiliation/embarrassment/mental distress including any physical symptoms:] $_____]

[d. Future noneconomic loss, including [humiliation/embarrassment/mental distress including any physical symptoms:] $_____]

TOTAL ACTUAL DAMAGES $_____

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

_____ Yes _____ No

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

8. What amount of those profits did [*name of defendant*] receive from the use of [*name of plaintiff*]'s [name/voice/signature/photograph/likeness]?

TOTAL PROFITS RECEIVED BY DEFENDANT $_____]

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify

the [clerk/bailiff/court attendant].

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*New September 2003; Revised April 2007, April 2008, December 2010, June 2012, December 2012, December 2016, May 2024, July 2025**

Directions for Use

This verdict form is based on CACI No. 1804A, *Misappropriation of Name, Voice, Signature, Photograph, or Likeness,* and CACI No. 1821, *Damages for Use of Name or Likeness.*

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.

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

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

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

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

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

1901. Concealment

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed because [***name of defendant***] concealed certain information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

[1. (a) That [*name of defendant***] and [***name of plaintiff***] were [***insert type of fiduciary relationship, e.g., "business partners"***]; and**

(b) That [*name of defendant***] intentionally failed to disclose certain facts to [***name of plaintiff***];]**

[or]

[1. That [*name of defendant***] disclosed some facts to [***name of plaintiff***] but intentionally failed to disclose [other/another] fact[s], making the disclosure deceptive;]**

[or]

[1. That [*name of defendant***] intentionally failed to disclose certain facts that were known only to [him/her/***nonbinary pronoun***/it] and that [***name of plaintiff***] could not have discovered;]**

[or]

[1. That [*name of defendant***] prevented [***name of plaintiff***] from discovering certain facts;]**

2. That [*name of plaintiff***] did not know of the concealed fact[s];**

3. That [*name of defendant***] intended to deceive [***name of plaintiff***] by concealing the fact[s];**

4. That had the omitted information been disclosed, [*name of plaintiff***] reasonably would have behaved differently;**

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

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

New September 2003; Revised October 2004, December 2012, June 2014, June 2015

Directions for Use

Give this instruction if it is alleged that the defendant concealed certain information to the detriment of the plaintiff. (See Civ. Code, § 1710(3).) Element 2 may be deleted if the third option for element 1 is selected.

Regarding element 1, before there can be liability for concealment, there must

usually be a duty to disclose arising from a fiduciary or confidential relationship between the parties. However, in transactions that do not involve fiduciary or confidential relations, a duty to disclose material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render his disclosure likely to mislead (option 2); (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff (option 3); (3) the defendant actively conceals discovery from the plaintiff (option 4). (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal. Rptr. 444, 466 P.2d 996].) For the second, third, and fourth options, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, the jury should also be instructed to determine whether the requisite relationship existed. (See *Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1187 [175 Cal.Rptr.3d 820].)

If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*. To avoid any possible confusion created by using "rely on the concealment" (see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568]), CACI Nos. 1907 and 1908 may be modified to replace the words "rely," "relied," and "reliance" with language based on "behave differently" from element 4. It must have been reasonable for the plaintiff to have behaved differently had the omitted information been disclosed. (See *Hoffman, supra*, 228 Cal.App.4th at p. 1194 [concealment case].)

Sources and Authority

- Concealment. Civil Code section 1710(3).
- "The required elements for fraudulent concealment are (1) concealment or suppression of a material fact; (2) by a defendant with a duty to disclose the fact; (3) the defendant intended to defraud the plaintiff by intentionally concealing or suppressing the fact; (4) the plaintiff was unaware of the fact and would have acted differently if the concealed or suppressed fact was known; and (5) the plaintiff sustained damage as a result of the concealment or suppression of the material fact." (*Rattagan v. Uber Technologies, Inc.* (2024) 17 Cal.5th 1, 40 [324 Cal.Rptr.3d 433, 553 P.3d 1213].)
- "A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent." (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 860 [143 Cal.Rptr.3d 711].)
- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and

defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp., supra*, 2 Cal.3d at p. 294, footnotes omitted.)

- "[O]ther than the first instance, in which there must be a fiduciary relationship between the parties, 'the other three circumstances in which nondisclosure may be actionable: presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. . . . "[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts." [Citation.]' A relationship between the parties is present if there is 'some sort of *transaction* between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' " (*Hoffman, supra,* 228 Cal.App.4th at p. 1187, original italics, internal citations omitted.)
- "[A] plaintiff may assert a cause of action for fraudulent concealment based on conduct occurring in the course of a contractual relationship, if the elements of the claim can be established independently of the parties' contractual rights and obligations and the tortious conduct exposes the plaintiff to a risk of harm beyond the reasonable contemplation of the parties when they entered into the contract." (*Rattagan, supra,* 17 Cal.5th at p. 45.)
- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)
- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [7 Cal.Rptr.2d 859].)
- "While a reasonable jury could, and in this case did, find these warnings inadequate for product liability purposes given [defendant]'s knowledge of the risk of NFCI's, these statements are not 'misleading "half-truths" ' that give rise to a duty to disclose in the absence of an otherwise sufficient relationship or transaction. To hold otherwise would unduly conflate two distinct areas of law, products liability and fraud, and transform every instance of inadequate product warning into a potential claim for fraud." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 313-314 [213 Cal.Rptr.3d 82].)
- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl*

(2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)
- "[P]laintiffs argue that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of the argument, plaintiffs cite *Affiliated Ute Citizens v. United States, supra*, 406 U.S. 128 (*Ute*) . . . , Interpreting Rule 10b-5, the high court held that 'positive proof of reliance is not a prerequisite to recovery' in a case 'involving primarily a failure to disclose . . . .' [¶] Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin, supra,* 5 Cal.4th at p. 1093.)
- "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception." (*Boschma, supra,* 198 Cal.App.4th at p. 249, original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 912–919

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 11-E, *Damages For Fraud,* ¶ 11:354 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[2][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.26 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.70 et seq. (Matthew Bender)

California Civil Practice: Torts § 22:16 (Thomson Reuters)

1930. Receiving Stolen Property—Civil Liability—Essential Factual Elements (Pen. Code, § 496(c))

[*Name of plaintiff***] claims damages based on [***name of defendant***]'s [***specify the violation of Penal Code section 496(a) alleged, e.g., receiving stolen property***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [bought/received/[***specify other conduct***]] property that was [stolen/obtained by extortion];**
2. **That [***name of defendant***] knew the property was [stolen/obtained by extortion] at the time [he/she/***nonbinary pronoun***] [bought/received/[***specify other conduct***]] the property;**
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.**

Property is stolen if it was obtained by theft. Property is obtained by theft if a person takes possession of property owned by someone else, without the owner's consent, and with the intent either to permanently deprive the owner of that property or to deprive the owner of a major portion of the value or enjoyment of the property for an extended period of time.

[*or*]

Property is obtained by extortion if: (1) the property was obtained from another person with that person's consent, and (2) that person's consent was obtained through the use of force or fear.

[To receive property means to take possession and control of it. Mere presence near or access to the property is not enough.] [Two or more people can possess the property at the same time.] [A person does not have to actually hold or touch something to possess it. It is enough if the person has [control over it] [or] [the right to control it], either personally or through another person.]

New July 2025

Directions for Use

This instruction is intended for use when the plaintiff seeks remedies under Penal Code section 496(c) for a violation of section 496(a). A different instruction will be required if the plaintiff's claim is based on a violation of section 496(b).

For elements 1 and 2, select the conduct that is appropriate for the case. Other

conduct that may establish receiving stolen property includes, for example, withholding or concealing property from its owner or aiding another to do so. (Pen. Code, § 496(a).)

Either the paragraph defining "stolen" or the paragraph defining "obtained by extortion" must be given depending on the method of obtaining the property at issue. Other definitions of theft may also be given (for example, theft by larceny, theft by false pretenses, theft by trick, or theft by embezzlement). See Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 1800, *Theft by Larceny*, No. 1804, *Theft by False Pretense*, No. 1805, *Theft by Trick*, and No. 1806, *Theft by Embezzlement*. See generally CALCRIM No. 1750, *Receipt of Stolen Property*.

The instruction will need to be modified if the defendant is an alleged principal in the alleged theft or extortion of the property or if the defendant was convicted under Penal Code section 496(a) in connection with the property at issue in the case.

Innocent intent or mistake of fact may be a defense. See CALCRIM No. 1751, *Defense to Receiving Stolen Property: Innocent Intent*; *People v. Speck* (2022) 74 Cal.App.5th 784, 787 [289 Cal.Rptr.3d 816] [holding the trial court prejudicially erred in denying defendant's request to instruct the jury on mistake of fact, citing CALCRIM No. 3406, *Mistake of Fact*]. A good faith belief that one is authorized to take the property in question may also be a defense to liability. See CALCRIM No. 1863, *Defense to Theft or Robbery: Claim of Right*.

Sources and Authority

- Civil Action for Receiving or Concealing Stolen Property, Treble Damages, and Attorney Fees. Penal Code section 496(c).
- Elements of Receiving or Concealing Stolen Property. Penal Code section 496(a).
- "Theft" Defined. Penal Code sections 484, 490a.
- "Extortion" Defined. Penal Code section 518.
- "Penal Code section 496 does not state a criminal conviction under section 496(a) is required for a private plaintiff to recover treble damages under section 496(c). Nor does section 496(c) limit recovery of treble damages to a crime victim. Instead, section 496(c) permits '[a]ny person' who 'has been injured by a violation of subdivision (a) or (b)' to 'bring an action' to recover treble damages." (*Bell v. Feibush* (2013) 212 Cal.App.4th 1041, 1045 [151 Cal.Rptr.3d 546].)
- "Although section 496 defines a criminal offense, it also provides an enhanced civil remedy in the event there has been a violation of the statute—that is, where a person has knowingly received, withheld or sold property that has been stolen or that has been obtained in any manner constituting theft. The enhanced civil remedy authorized by the statute is that any party injured by the violation of section 496 may file an action for 'three times the amount of actual damages' sustained, and for costs of suit and reasonable attorney fees." (*Switzer v. Wood*

(2019) 35 Cal.App.5th 116, 119 [247 Cal.Rptr.3d 114].)

- "[T]he Penal Code provides that persons are guilty of theft if they (1) 'feloniously steal . . . [or] take . . . the personal property of another' or (2) 'fraudulently appropriate property which has been entrusted to [them].' The first of these definitions describes theft by larceny. . . . Importantly, larceny requires an 'intent to steal'—in other words, 'the intent, without a good faith claim of right, to permanently deprive the owner of possession.' A jury instruction defining theft by larceny without the requisite specific intent is erroneous as a matter of law. . . . By leaving out any description of the defendant's mental state, the modification effectively turned theft into a strict liability offense.' " (*Garrabrants v. Erhart* (2023) 98 Cal.App.5th 486, 504 [316 Cal.Rptr.3d 792], internal citations omitted.)
- "For property to be 'stolen' or obtained by 'theft,' it must be taken with a specific intent. 'California courts have long held that theft by larceny requires the intent to *permanently* deprive the owner of possession of the property.' An intent to *temporarily* deprive the owner of possession may suffice when the defendant intends 'to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment . . . .' " (*People v. MacArthur* (2006) 142 Cal.App.4th 275, 280 [47 Cal.Rptr.3d 736], internal citation omitted, original italics.)
- "Although we are not asked here to determine whether plaintiff would have been able to prove theft, we observe that not all commercial or consumer disputes alleging that a defendant obtained money or property through fraud, misrepresentation, or breach of a contractual promise will amount to a theft. To prove theft, a plaintiff must establish criminal intent on the part of the defendant beyond 'mere proof of nonperformance or actual falsity.' " (*Siry Investment, L.P. v. Farkhondehpour* (2022) 13 Cal.5th 333, 361–362 [296 Cal.Rptr.3d 1, 513 P.3d 166] internal citation omitted.)
- "[W]hen the Legislature enacted section 496(c), it presumably understood that the phrase 'a violation of subdivision (a)' would include theft by false pretense." (*Bell, supra,* 212 Cal.App.4th at p. 1048.)
- "We also find that section 496(c) applies concerning the conduct at issue in the present case. The unambiguous relevant language covers fraudulent diversion of partnership funds. Defendants' conduct falls within the ambit of section 496(a): They 'receive[d]' 'property' (the diverted partnership funds) belonging to plaintiff, having 'obtained' the diverted funds 'in [a] manner constituting theft.' Defendants also 'conceal[ed]' or 'withh[e]ld[]' those funds (and/or aided in concealing or withholding them) from plaintiff. They did all of this 'knowing' the diverted funds were 'so . . . obtained.' " (*Siry Investment, L.P., supra,* 13 Cal.5th at p. 361, internal citations omitted.)
- "[A] jury reasonably could have found on this record that [defendant] also did not obtain the information in *any other* relevant manner constituting theft. Embezzlement, 'a form of larceny,' similarly requires an intent to deprive an

owner of his or her property. A good faith belief that one is authorized to take the property in question is a defense to liability. For the reasons provided above, a reasonable jury could have found [defendant] lacked the requisite intent and believed in good faith he was authorized to take and retain the information in question." (*Garrabrants, supra,* 98 Cal.App.5th at p. 506, original italics, internal citations omitted.)

Secondary Sources

1-18 California Damages: Law and Proof, Ch. 18, Punitive or Exemplary Damages, § 18.1 (Matthew Bender)

VF-1930. Receiving Stolen Property—Civil Liability

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [buy/receive/[***specify other conduct***]] property that was [stolen/obtained by extortion]?**

   _____ 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 the property was [stolen/obtained by extortion] at the time [he/she/***nonbinary pronoun***] [bought/received/[***specify other conduct***]] 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. **Was [***name of plaintiff***] harmed?**

   _____ 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 [***name of plaintiff***]'s 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/After all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New July 2025

Directions for Use

This verdict form is based on CACI No. 1930, *Receiving Stolen Property—Civil Liability*.

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. The breakdown is optional depending on the circumstances. If the jury finds the defendant liable for actual damages, Penal Code section 496 authorizes an award of three times the amount of actual damages sustained by the plaintiff, costs of suit, and reasonable attorney's fees. (Pen. Code, § 496(c).)

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

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

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 decision maker***] followed a recommendation from or relied on facts provided by another person who had [discriminatory/retaliatory] intent.**

To succeed, [*name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***]'s [***specify protected activity or attribute***] was a substantial motivating reason for [***name of other person***]'s [***specify acts on which decision maker relied***]; and**
2. **That [***name of other person***]'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, May 2020, November 2020

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 another person 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]; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154] [accepting the legal premise that an employer may be held liable on the basis of a non-supervisor's discriminatory motivation].) The cases have not yet defined the scope of the cat's paw rule when the decision maker relies on the acts of a nonsupervisory coworker or other person involved in the employment decision.

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 another person 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 other person'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 other person'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 . . . 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.)
- "In the employment context, ' "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. [Citation.]' Under the 'cat's paw' theory, a showing that any 'significant participant' in the adverse employment decision exhibited discriminatory animus is 'enough to raise an inference that the employment decision itself was discriminatory.' " (*Hoglund v. Sierra Nevada Memorial-Miners Hospital* (2024) 102 Cal.App.5th 56, 76 [321 Cal.Rptr.3d 448], internal citations omitted.)
- "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 p. 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.)
- "[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [87 Cal.Rptr.3d 99]).
- "[W]e accept Employee's implicit legal premise that Employer could be liable for [the outside investigator's] discriminatory motivation if the male executives who actually terminated Employee were merely the cat's paws of a biased female investigator." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154].)
- "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 (11th ed. 2017) Constitutional Law, §§ 1025,

1026, 1052, 1053

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)

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/***nonbinary pronoun***] because of [his/her/***nonbinary pronoun***] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/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/***nonbinary pronoun***] property];**
2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her/***nonbinary pronoun***] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/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, December 2016

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.

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

- Ralph Act. Civil Code section 51.7.
- Protected Characteristics. Civil Code section 51(b).
- Combination of Characteristics, Perception and Perceived Association. Civil Code section 51(e)(7).
- Remedies Under Ralph Act. Civil Code section 52(b).
- "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].)
- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . .' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "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 (11th ed. 2017) Constitutional Law, § 989 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims and Defenses, Ch. 14(IV)-B, *Ralph Civil Rights Act of 1976—Elements*, ¶ 14:940 (The Rutter Group)

Cheng et al., Cal. Fair Housing and Public Accommodations § 914:2, 14:39 (The Rutter Group)

3063

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, §§ 3:1–3:15 (Thomson Reuters)

3064. Threats of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] intimidated [him/her/** *nonbinary pronoun***] by threat of violence because of [his/her/***nonbinary pronoun***] [race/color/religion/ancestry/national origin/political affiliation/ sex/sexual orientation/age/disability/citizenship/primary language/immigration status/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/***nonbinary pronoun***] 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/***nonbinary pronoun***] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/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/** *nonbinary pronoun***] 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, December 2016

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.)

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

- Ralph Act. Civil Code section 51.7.
- Protected Characteristics. Civil Code section 51(b).
- Combination of Characteristics, Perception and Perceived Association. Civil Code section 51(e)(7).
- Remedies Under Ralph Act. Civil Code section 52(b).
- "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].)
- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . .' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "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

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Employment Discrimination—Unruh Civil Rights Act*, ¶¶ 7:1528–7:1529 (The Rutter Group)

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims and Defenses, Ch. 14(IV)-B, *Ralph Civil Rights Act of 1976—Elements*, ¶ 14:940 (The Rutter Group)

Cheng et al., Cal. Fair Housing and Public Accommodations §§ 14:2, 14:3 (The Rutter Group)

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 §§ 3:1–3:15 (Thomson Reuters)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her/***nonbinary pronoun***] civil rights by threat, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That by threat, intimidation, or coercion, [***name of defendant***] interfered [or attempted to interfere] with [***name of plaintiff***]'s exercise or enjoyment of [his/her/***nonbinary pronoun***] right [***e.g., to be free from arrest without probable cause***];]**

   [*or***]**

1. **[That by threat, intimidation or coercion, [***name of defendant***] caused [***name of plaintiff***] to reasonably believe that if [he/she/***nonbinary pronoun***] exercised [his/her/***nonbinary pronoun***] right [***insert right, e.g., to vote***], [***name of defendant***] would commit violence against [[him/her/***nonbinary pronoun***]/ [or] [his/her/***nonbinary pronoun***] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

   [*or***]**

1. **[That [***name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her/***nonbinary pronoun***] from exercising [his/her/***nonbinary pronoun***] right [***e.g., to vote***]/to retaliate against [***name of plaintiff***] for having exercised [his/her/***nonbinary pronoun***] right [***e.g., to vote***]];]**

[2. That [*name of defendant***] [intended to deprive [***name of plaintiff***] of /acted with reckless disregard for] [[his/her/***nonbinary pronoun***]/ [***name of plaintiff***]'s] enjoyment of the interests protected by the right [***e.g., to vote***];]**

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; Renumbered from CACI No. 3025 and Revised December 2012, November 2018, May 2024, July 2025*

Directions for Use

Select the second option for element 1 if the defendant's conduct involved threats of violence based on speech alone. (See Civ. Code, § 52.1(k).) Select the third option if the conduct involved actual violence. An introductory instruction defining the

particular law or constitutional right at issue may be given.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(k).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].)

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code sections 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subdivision of section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subdivision (b) of the Bane Act would seem to indicate that damages may be recovered under both subdivisions (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable. Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages*, and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subdivisions (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (See *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a defendant to act with specific intent to violate protected rights, i.e., to act in reckless disregard of constitutional or statutory prohibitions or guarantees. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by

any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)
- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)
- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)
- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)
- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 956 [137 Cal.Rptr.3d 839].)
- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)
- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)
- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)
- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)
- " '[W]here coercion is inherent in the constitutional violation alleged, . . . the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)
- "The Legislature's purpose suggests to us that the coercive nature of a tax—however exorbitant or unfair that tax may be—was not what the Legislature had in mind when it forbade interference with legal rights by 'threat, intimidation, or coercion.' Plaintiffs have cited no case where economic or monetary pressures alone have been found to constitute coercion under the Bane Act." (*County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 371 [262 Cal.Rptr.3d 1].)
- "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things." (Assembly Bill 2719 (Stats. 2000, ch. 98) [abrogating the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282]].)
- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' . . . The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)
- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)
- "[A] wrongful detention that is 'accompanied by the requisite threats,

intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender, supra,* 217 Cal.App.4th at p. 981, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)
- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)
- "The Bane Act does not require that 'the offending "threat, intimidation or coercion" be "independent" from the constitutional violation alleged.' Rather, where an unlawful arrest is properly pleaded and proved, 'the egregiousness required by [Civ. Code] [s]ection 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion "inherent" in the wrongful detention.' " (*Murchison v. County of Tehama* (2021) 69 Cal.App.5th 867, 896 [284 Cal.Rptr.3d 742], internal citation omitted.)
- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)
- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' . . . The first is a purely legal determination. Is the . . . right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that . . . right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' "

(*Cornell, supra,* 17 Cal.App.5th at p. 803.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Cheng et al., Cal. Fair Housing and Public Accommodations § 14:5 (The Rutter Group)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.20 et seq. (Matthew Bender)

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

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

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

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

New June 2015; Revised May 2020

Directions for Use

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

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

"medical information." (See Civ. Code, § 56.05(j) ["medical information" defined].)

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

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.
- Employee's Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).
- "The first two elements of a prima facie section 56.20(b) claim are 'that defendants asked [plaintiff] to sign an "authorization" and [plaintiff] refused to do so.' An 'authorization' is defined in the CMIA as a written document that allows a health care provider or employer to disclose an individual's medical information to others. Sections 56.11 and 56.21 detail what must be included in an 'authorization' under the CMIA, including typeface size, language clearly separated from any other print on the page, the signature of the patient and date of signature, the name of the employer authorized to disclose the medical information, limitations on the use of the medical information by the person authorized to receive the medical information, the date the document ceases to authorize an employer to release information, and the right of the patient to receive a copy of the authorization." (*Frayo v. Martin* (2024) 102 Cal.App.5th 1025, 1035 [322 Cal.Rptr.3d 188], internal citations omitted.)
- "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21)." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal.Rptr.2d 696, 927 P.2d 1200], original italics.)
- "[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was 'the motivating reason for [his] discharge,' [defendant] 'nevertheless avoids liability by showing that . . . its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.' " (*Kao*, *supra*, 229 Cal.App.4th at p. 453.)

Secondary Sources

3071

3 Wilcox, California Employment Law, Ch. 51, *Confidentiality of Medical Information*, § 51.13

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202[4] (Matthew Bender)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] interfere [or attempt to interfere] with [***name of plaintiff***]'s exercise or enjoyment of [his/her/***nonbinary pronoun***] right [***e.g., to be free from arrest without probable cause***]?**

   _____ **Yes** _____ **No**

   [*or*]

1. **Did [***name of defendant***] make threats of violence against [[***name of plaintiff***]/ [or] [***name of plaintiff***]'s property]?**

   _____ **Yes** _____ **No**

   [*or*]

1. **Did [***name of defendant***] act violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s 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***] [intend to deprive [***name of plaintiff***] of/act with reckless disregard for] [[his/her/***nonbinary pronoun***]/[***name of plaintiff***]'s] enjoyment of the interests protected by the right [***e.g., to vote***]?**

   _____ **Yes** _____ **No**

   [*or*]

2. **Did [***name of defendant***]'s threats cause [***name of plaintiff***] to reasonably believe that if [he/she/***nonbinary pronoun***] exercised [his/her/***nonbinary pronoun***] right [***insert right, e.g., to vote***] [***name of defendant***] would commit violence against [[him/her/***nonbinary pronoun***]/ [or] [his/her/***nonbinary pronoun***] property] and that [***name of defendant***] had the apparent ability to carry out the threat?**

   _____ **Yes** _____ **No**

   [*or*]

2. **Did [***name of defendant***] commit these acts of violence to [prevent [name of plaintiff] from exercising [his/her/***nonbinary pronoun***] right [***insert right, e.g., to vote***]/retaliate against [***name of plaintiff***]**

for having exercised [his/her/*nonbinary pronoun*] right [*insert right*]]?

_____ Yes _____ No

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

3. **Was [*name of defendant*]'s conduct a substantial factor in causing harm to [*name of plaintiff*]?**

_____ Yes _____ No

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

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

[a. Past economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other past economic loss $_____]

Total Past Economic Damages: $_____]

[b. Future economic loss

[lost earnings $_____]

[lost profits $_____]

[medical expenses $_____]

[other future economic loss $_____]

Total Future Economic Damages: $_____]

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

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

TOTAL $_____

[Answer question 5.

5. **What amount 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].

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3015 and Revised December 2012, December 2016, May 2024, July 2025

Directions for Use

This verdict form is based on CACI No. 3066, *Bane Act—Essential Factual Elements.*

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

Give the second option for questions 1 and 2 if the defendant has threatened violence. Give the third option if the defendant actually committed violence.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code sections 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subdivision of section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the Bane Act refers to section 52. (See Civ. Code, § 52.1(c).) This reference would seem to indicate that damages may be recovered under both subdivisions (a) and (b) of section 52. The court should compute the damages under section 52(a) by multiplying actual damages by three, and awarding $4,000 if the amount is less. Questions 5 addresses punitive damages under section 52(b).

If no actual damages are sought, the $4,000 statutory minimum damages may be awarded without proof of harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) In this case, only questions 1 and 2 need be answered.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.

This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

3201. Failure to Promptly Repurchase or Replace New Motor Vehicle After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [***name of defendant***] failed to promptly repurchase or replace [a/an] [***new motor vehicle***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [bought/leased] [a/an] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***];**
2. **That [***name of defendant***] gave [***name of plaintiff***] a written warranty that [***describe alleged express warranty***];**
3. **That the vehicle had [a] defect[s] that [was/were] covered by the warranty and that substantially impaired its use, value, or safety to a reasonable person in [***name of plaintiff***]'s situation;**
4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she/***nonbinary pronoun***] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s];]**
5. **That [***name of defendant***] or its authorized repair facility failed to repair the vehicle to match the written warranty after a reasonable number of opportunities to do so; and**
6. **That [***name of defendant***] did not promptly replace or buy back the vehicle.**

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

[A written warranty need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the vehicle or gave an opinion about the vehicle. General statements concerning customer satisfaction do not create a warranty.]**

New September 2003; Revised February 2005, December 2005, April 2007, December 2007, December 2011

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also CACI No. 1243, *Notification/Reasonable Time*.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of a motor vehicle.

See also CACI No. 3202, *"Repair Opportunities" Explained*, CACI No. 3203, *Reasonable Number of Repair Opportunities—Rebuttable Presumption*, and CACI No. 3204, *"Substantially Impaired" Explained*.

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- Extension of Warranty Period. Civil Code section 1793.1(a)(2).
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- "Express Warranty" Defined. Civil Code section 1791.2.
- Express Warranty Made by Someone Other Than Manufacturer. Civil Code section 1795.
- "New Motor Vehicle" Defined. Civil Code section 1793.22(e)(2).
- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d)(2).
- Buyer's Delivery of Nonconforming Goods. Civil Code section 1793.2(c).

- Extension of Warranty. Civil Code section 1793.1(a)(2).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty . . . . One of the most significant protections afforded by the act is . . . that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer . . . ." . . .' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)
- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties . . . . [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 152 [158 Cal.Rptr.3d 180].)
- "Although the Act treats motor vehicles differently from other types of consumer goods in several ways, we find no indication that the Legislature intended to treat motor vehicles differently with respect to the limitation on the Act's coverage to goods sold in California." (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478, 491 [30 Cal.Rptr.3d 823, 115 P.3d 98].)
- "[W]e hold that the phrase 'other motor vehicle sold with a manufacturer's new car warranty'—considered in the context of the surrounding text of section 1793.22, subdivision (e)(2) and in the broader context of the Song-Beverly Act's provisions distinguishing between new and used goods—means a vehicle for which a manufacturer's new car warranty is issued with the sale." (*Rodriguez v. FCA US LLC* (2024) 17 Cal.5th 189, 206 [326 Cal.Rptr.3d 440, 557 P.3d 735].)
- " 'Nonconformity' is defined as 'a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.' The term

is similar to what the average person would understand to be a 'defect.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249 [40 Cal.Rptr.2d 576], internal citation omitted; see also *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801, fn. 11 [50 Cal.Rptr.3d 731] [nonconformity can include entire complex of related conditions].)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel, supra,* 34 Cal.App.4th at p. 1250.)
- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra,* 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)
- The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement, "[t]he legislative history of [Civil Code section 1793.2] demonstrates beyond any question that . . . a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)
- "[T]he only affirmative step the Act imposes on consumers is to 'permit[] the manufacturer a reasonable opportunity to repair the vehicle.' " (*Oregel, supra,* 90 Cal.App.4th at p. 1103, original italics, internal citation omitted.)
- "[T]he Act does not require consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties—other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle . . . . In reality, . . . , the manufacturer seldom on its own initiative offers the consumer the options available under the Act: a replacement vehicle or restitution. Therefore, as a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1050 [104 Cal.Rptr.3d 853], original italics.)
- "[Defendant] argues allowing evidence of postwarranty repairs extends the term of its warranty to whatever limit an expert is willing to testify. We disagree. Evidence that a problem was fixed for a period of time but reappears at a later

date is relevant to determining whether a fundamental problem in the vehicle was ever resolved. Indeed, that a defect first appears after a warranty has expired does not necessarily mean the defect did not exist when the product was purchased. Postwarranty repair evidence may be admitted on a case-by-case basis where it is relevant to showing the vehicle was not repaired to conform to the warranty during the warranty's existence." (*Donlen, supra,* 217 Cal.App.4th at p. 149, internal citations omitted.)

- "[W]e hold that registration renewal and nonoperation fees are not recoverable as collateral charges under section 1793.2, subdivision (d)(2)(B), part of the Act because they are not collateral to the price paid for the vehicle, but they are recoverable as incidental damages under section 1794, part of the Act if they were incurred and paid as a result of a manufacturer's failure to promptly provide a replacement vehicle or restitution under section 1793.2, subdivision (d)(2)." (*Kirzhner v. Mercedes-Benz USA, LLC* (2020) 9 Cal.5th 966, 987 [266 Cal.Rptr.3d 346, 470 P.3d 56].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 52, 57, 325

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 7.4, 7.8, 7.15, 7.87; *id.,* Prelitigation Remedies, § 13.68; *id.*, Litigation Remedies, § 14.25, *id.*, Division 10: Leasing of Goods, § 17.31

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, §§ 91.15, 91.18 (Matthew Bender)

20 California Points and Authorities, Ch. 206*, Sales*, § 206.104 (Matthew Bender)

California Civil Practice: Business Litigation. §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/***nonbinary pronoun***/it] from committing violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/***nonbinary pronoun***/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**

"Willful" means that [*name of defendant***] knew of [his/her/***nonbinary pronoun***/its] legal obligations and intentionally declined to follow them. However, a violation is not willful if you find that [***name of defendant***] reasonably and in good faith believed that the facts did not require [***describe statutory obligation, e.g., repurchasing or replacing the vehicle***].**

New September 2003; Revised February 2005, December 2005, December 2011, May 2018, November 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

An automobile buyer may also obtain a penalty of two times actual damages without a showing of willfulness under some circumstances. (See Civ. Code, § 1794(e).) However, a buyer who recovers a civil penalty for a willful violation may not also recover a second civil penalty for the same violation. (Civ. Code, § 1794(e)(5).) If the buyer seeks a penalty for either a willful or a nonwillful violation in the alternative, the jury must be instructed on both remedies. (See *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 11 [28 Cal.Rptr.2d 133].) A special instruction will be needed for the nonwillful violation. (See *Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1322 [46 Cal.Rptr.2d 507] (*Suman II*) [setting forth instructions to be given on retrial].)

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not

been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace], disapproved on other grounds in *Rodriguez v. FCA US LLC* (2024) 17 Cal.5th 189, 205 [326 Cal.Rptr.3d 440, 557 P.3d 735.)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).
- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)
- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].)
- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)
- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them"].)
- "[A] violation . . . is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a

standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)
- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra,* 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)
- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan*, *supra,* 23 Cal.App.4th at pp. 184–185, internal citation omitted.)

- "Thus, when the trial court concluded that subdivision (c)'s requirement of willfulness applies also to subdivision (e), and when it, in effect, instructed the jury that subdivision (c)-type willfulness is the sole basis for awarding civil penalties, the court ignored a special distinction made by the Legislature with respect to the seller of new automobiles. In so doing, the court erred. The error was prejudicial because it prevented the jurors from considering the specific penalty provisions in subdivision (e) and awarding such penalties, in their discretion, if they determined the evidence warranted such an award." (*Suman, supra,* 23 Cal.App.4th at p. 11.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) [*Name of defendant***] supplied the equipment, tools, and place of work;**

(b) [*Name of agent***] was paid by the hour rather than by the job;**

(c) [*Name of defendant***] was in business;**

(d) The work being done by [*name of agent***] was part of the regular business of [***name of defendant***];**

(e) [*Name of agent***] was not engaged in a distinct occupation or business;**

(f) The kind of work performed by [*name of agent***] 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 agent***] does not require specialized or professional skill;**

(h) The services performed by [*name of agent***] were to be performed over a long period of time; [and]**

(i) [*Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) [*Specify other factor***].**

*New September 2003; Revised December 2010, June 2015, December 2015, November 2018, May 2020, May 2021, July 2025**

Directions for Use

This instruction is based on *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399] and the Restatement Second of Agency, section 220. It is sometimes referred to as the *Borello* test or the common law test. (See *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 934 [232 Cal.Rprt.3d 1, 416 P.3d 1].) It is intended to address the employer-employee relationship for purposes of assessing vicarious responsibility on the employer for the employee's acts. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355.) Therefore, an "other" option (j) has been included.

Borello was a workers' compensation case. In *Dynamex, supra,* the court, in holding that *Borello* did not control the specific wage order dispute at issue, noted that "it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue." (*Dynamex*, *supra*, 4 Cal.5th at p. 934.) The court also said that "[t]he *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation." (*Id.* at p. 935.) With respondeat superior, there is no statutory provision or social welfare legislation to be considered. (Cf. Lab. Code, § 2775 [codifying *Dynamex* for purposes of the provisions of the Labor Code, the Unemployment Insurance Code, and the wage orders of the Industrial Welfare Commission, with limited exceptions for specified occupations].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer . . . cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost

on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)

- "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." (*S. G. Borello & Sons, Inc.*, *supra,* 48 Cal.3d at p. 350, internal citations omitted.)
- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala*, *supra,* 59 Cal.4th at p. 532.)
- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc.*, *supra*, 48 Cal.3d at p. 351, internal citations omitted.)
- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc.*, *supra,* 48 Cal.3d at p. 354.)
- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc.*, *supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "[A]t common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because ' "[t]he extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . ." ' For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor." (*Dynamex, supra,* 4 Cal.5th at p. 927, internal citations omitted.)
- "[A]lthough we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors, it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue." (*Dynamex, supra,* 4 Cal.5th at p. 934, original italics, internal citation omitted.)
- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact . . . ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761].)
- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)
- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 349.)
- "[A]lthough the Caregiver Contract signed by Plaintiff stated she was an independent contractor, not an employee, there is evidence of other indicia of employment and Plaintiff averred in her declaration that the Caregiver Contract was presented to her 'on a take it or leave it basis.' 'A party's use of a label to describe a relationship with a worker . . . will be ignored where the evidence of the parties' actual conduct establishes that a different relationship exists.' "

(*Duffey v. Tender Heart Home Care Agency, LLC* (2019) 31 Cal.App.5th 232, 257–258 [242 Cal.Rptr.3d 460].)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)
- " '[W]hat matters is whether a hirer has the "legal right to control the activities of the alleged agent" . . . . That a hirer chooses not to wield power does not prove it lacks power.' " (*Duffey, supra,* 31 Cal.App.5th at p. 257.)
- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala*, *supra,* 59 Cal.4th at p. 531.)
- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala*, *supra,* 59 Cal.4th at p. 531 fn. 2.)
- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)
- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)
- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. . . . [¶] . . . [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala*, *supra,* 59 Cal.4th at p. 535.)
- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)
- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], . . . the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor . . . .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)
- "Agency and independent contractorship are not *necessarily* mutually exclusive

legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted.)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)
- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)
- Restatement Second of Agency, section 220, provides: "(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."

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 29A

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (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, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.25, 100A.34 (Matthew Bender)

California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3713. Nondelegable Duty

[*Name of defendant***] has a duty that cannot be delegated to another person arising from [***insert name, popular name, or number of regulation, statute, or ordinance***/a contract between the parties/***other, e.g., the landlord-tenant relationship***]. Under this duty, [***insert requirements of regulation, statute, or ordinance or otherwise describe duty***].**

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by the conduct of [***name of third party***] and that [***name of defendant***] is responsible for this harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] hired [***name of third party***] to [***describe job involving nondelegable duty e.g., assemble a product***];**
2. **That [***name of third party***] [***specify wrongful conduct in breach of duty, e.g., did not comply with this law***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of third party***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New October 2004; Revised June 2010, November 2024, July 2025[*]

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of a third party if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463].)

This instruction should generally not be given in a case brought against the hirer by an injured independent contractor or contractor's employee that is governed by the *Privette* doctrine, which establishes "the basic rule that a hirer is typically not liable for injuries sustained by an independent contractor or its workers while on the job" because "the hirer presumptively delegates to the independent contractor the authority to determine the manner in which the work is to be performed." (*Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635, 650 [314 Cal.Rptr.3d 507, 519]; see *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 48 [282 Cal.Rptr.3d 658, 493 P.3d 212] ["even where an unsafe condition exists on the premises due to the landowner's failure to comply with specific statutory and regulatory duties, the landowner is not liable because it is the contractor who is responsible for its own workers' safety"].)

Sources and Authority

- "As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor.

There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties . . . . ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] . . .' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5], internal citations omitted.)

- "Nondelegable duties 'derive from statutes [,] contracts, and common law precedents.' They 'do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant. [¶] The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 316 [111 Cal.Rptr.3d 787], internal citations omitted.)
- " 'When the manufacturer delegates some aspect of manufacture, such as final assembly or inspection, to a subsequent seller, the manufacturer may be subject to liability under rules of vicarious liability for a defect that was introduced into the product after it left the hands of the manufacturer.' This rule has the laudable effect of encouraging a manufacturer or distributor like [defendant] to act to safeguard proper assembly by its various dealers, including attempting to ensure that negligent conduct in one location does not repeat elsewhere. It further ensures that a plaintiff does not have the burden of discovering and proving *which* entity in the production chain is responsible for negligent assembly: [defendant] for insufficient instructions or safeguards that would ensure proper assembly, or a dealer for failing to execute [defendant's] commands properly." (*Defries v. Yamaha Motor Corp.* (2022) 84 Cal.App.5th 846, 861 [300 Cal.Rptr.3d 670], internal citation omitted.)
- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)
- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and

maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra,* 23 Cal.App.4th at p. 726.)

- "Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)
- "Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513].)
- " '[A] nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or independent contractor.' A California public agency is subject to the imposition of the duty in the same manner as any private individual." (*Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553], citing Gov. Code, § 815.4, internal citations omitted.)
- "It is undisputable that '[t]he question of duty is . . . a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162], internal citation omitted.)
- "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (*Summers, supra,* 69 Cal.App.4th at p. 1187, fn. 5.)
- " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor . . . . It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co*. (1955) 44 Cal.2d 793, 800 [285 P.2d 912], internal citation omitted.)
- "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that " 'he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law' " but also that the failure was not owing to the negligence of any agent, whether employee or independent

contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1401 et seq.

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.42 (Matthew Bender)

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for the person's basic needs for food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following***:] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She/***Nonbinary pronoun***] must be unable to provide for the basic needs of food, clothing, shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism].]**

["Personal safety" means the ability of a person to survive safely in the community without involuntary detention or treatment.]

["Necessary medical care" means care that a licensed health care practitioner, while operating within the scope of their practice, determines to be necessary to prevent serious deterioration of an existing physical medical condition that, if left untreated, is likely to result in serious bodily injury. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including but not limited to hospitalization, surgery, or physical rehabilitation.]

[If you find [*name of respondent***] will not take [his/her/***nonbinary pronoun***] prescribed medication without supervision and that a mental health disorder makes [him/her/***nonbinary pronoun***] unable to provide for [his/her/***nonbinary pronoun***] basic needs for food, clothing, shelter, personal safety, or necessary medical care without such medication, then you may conclude [***name of respondent***] is gravely disabled.**

In determining whether [*name of respondent***] is gravely disabled, you may consider evidence that [he/she/***nonbinary pronoun***] did not take prescribed medication in the past. You may also consider evidence of [his/her/***nonbinary pronoun***] lack of insight into [his/her/***nonbinary pronoun***] mental health condition.]**

In considering whether [*name of respondent***] is gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.**

In determining whether [*name of respondent*] is gravely disabled, you may consider whether [he/she/*nonbinary pronoun*] is unable or unwilling to voluntarily accept meaningful treatment.

New June 2005; Revised January 2018, May 2019, May 2020, May 2022, May 2024, July 2025

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A) and (h)(2), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008, omit from the definition of "gravely disabled" the terms "personal safety" and "necessary medical care," as well as "severe substance use disorder" and "a co-occurring mental health disorder and a severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].) These four terms should not be given in those counties until January 1, 2026, or an earlier date specified in the county's resolution.

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is another standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The Welfare and Institutions Code defines "severe substance use disorder." (Welf. & Inst. Code, § 5008(o).) Give additional information about this term if appropriate. For example, severe substance use disorder requires a diagnosis, so it may be preferable to identify the individual's diagnosed severe substance use disorder.

The next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent's mental health condition. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "Severe Substance Use Disorder" Defined. Welfare and Institutions Code section 5008(o).
- "Personal Safety" Defined. Welfare and Institutions Code section 5008(p).

- "Necessary Medical Care" Defined. Welfare and Institutions Code section 5008(q).
- "Serious Bodily Injury" Defined. Welfare and Institutions Code section 15610.67.
- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)
- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)
- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)
- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra,* 187 Cal.App.3d at p. 909.)
- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)
- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 463, fn. 4.)
- "We . . . hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a

conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)
- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)
- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. . . . Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the . . . [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra,* 27 Cal.App.5th at p. 107.)
- "Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the

fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no treatment that would enable the person to 'survive safely in freedom.' " (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

3 Witkin, California Procedure (6th ed. 2021) Actions, § 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4013. Disqualification From Voting

If you find that [*name of respondent*] is gravely disabled, then you must also decide whether [he/she/*nonbinary pronoun*] should also be disqualified from voting. To disqualify [*name of respondent*] from voting, all 12 jurors must find, by clear and convincing evidence, that [he/she/*nonbinary pronoun*] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.

New June 2005; Revised June 2016, July 2025

Directions for Use

Give this instruction with CACI No. 4000, *Conservatorship—Essential Factual Elements*, in proceedings subject to Elections Code section 2208(b) if the petition prays for this relief.

Sources and Authority

- Disqualification from Voting. Elections Code section 2208.
- Affidavit of Voter Registration. Elections Code section 2150.

Secondary Sources

2 California Conservatorship Practice (Cont.Ed.Bar) § 11.34

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4306. Termination of Month-to-Month Tenancy—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**
2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***] under a month-to-month [lease/rental agreement/sublease];**
3. **That [***name of plaintiff***] gave [***name of defendant***] proper [30/60] days' written notice that the tenancy was ending; and**
4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011, December 2011, May 2020, July 2025[*]

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year, commercial tenancies by qualified commercial tenants of less than a year, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more or commercial tenancies by qualified commercial tenants of a year or more, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).) The Tenant Protection Act of 2019 may impose additional requirements for the termination of a residential tenancy. (Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Defective service may be waived if defendant admits timely receipt of notice. (See

Valov v. Tank (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.3d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* for an instruction on proper advanced written notice.

Sources and Authority

- Unlawful Detainer Based on Holdover After Expiration of Term. Code of Civil Procedure section 1161(1).
- Automatic Renewal Absent Notice of Termination on Expiration of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Presumption That Term Is Based on Period for Which Rent Is Paid. Civil Code section 1944.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Conversion of Unlawful Detainer to Ordinary Civil Action if Possession Not at Issue. Civil Code section 1952.3(a).
- "Commercial Real Property" and "Qualified Commercial Tenant" Defined. Civil Code section 1946.1(k).
- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)
- "Proper service on the lessee of a valid . . . notice . . . is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)
- "Section 1162 does not authorize service of a . . . notice . . . by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the . . . notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a . . . notice . . . provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)
- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the . . . notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, § 707 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶ 8:85 (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21,

210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:147 (Thomson Reuters)

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

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[*Name of plaintiff***] contends that [he/she/***nonbinary pronoun***/it] properly gave [***name of defendant***] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [***name of plaintiff***] must prove all of the following:**

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/***nonbinary pronoun***/it];**
2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**
3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

Notice was properly given if [*select one or more of the following manners of service:***]**

[the notice was delivered to [*name of defendant***] personally[./; or]]**

[the notice was sent by certified or registered mail in an envelope addressed to [*name of defendant***], in which case notice is considered given on the date the notice was placed in the mail[./; or]]**

[[*name of defendant***] was not at [home or work/the commercial rental property], and the notice was left with a responsible person at [[***name of defendant***]'s home or place of work/the commercial property], and a copy was also mailed in an envelope addressed to [***name of defendant***] at [[his/her/***nonbinary pronoun***] residence/the commercial property]. In this case, notice is considered given on the date the second notice was placed in the mail[./; or]]**

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not

be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant*]. In this case, notice is considered given on the date the second notice was placed in the mail.]

[The [30/60]-day notice period begins on the day after the notice was given to [*name of defendant*]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [*name of defendant*]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

New August 2007; Revised December 2010, June 2011, December 2011, May 2020, July 2025[*]

Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year, commercial tenancies by qualified commercial tenants of less than a year, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more or commercial tenancies by qualified commercial tenants of a year or more, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)–(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

Defective service may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested, compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of

the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

The Tenant Protection Act of 2019 and/or local ordinances may impose additional requirements for the termination of a rental agreement. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable.

Sources and Authority

- Automatic Renewal of Tenancy at End of Term. Civil Code section 1946.
- Time and Manner of Giving Notice of Termination. Civil Code section 1946.1.
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Manner of Service of Notice. Code of Civil Procedure section 1162.
- "Commercial Real Property" and "Qualified Commercial Tenant" Defined. Civil Code section 1946.1(k).
- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- "Section 1162 does not authorize service of a . . . notice . . . by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra,* 168 Cal.App.3d at p. 876.)
- "In the cases discussed . . . , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the . . . notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a . . . notice . . . provided in section 1162. Therefore, the judgment

must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the . . . notice may be effected on a residential tenant: . . . . As explained in *Liebovich, supra*, . . . , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)
- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)
- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 707 et seq., 760

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-B, *Unlawful Detainer Complaint*, ¶¶ 8:68, 8:69 (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:119, 7:190 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.69–8.80

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

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23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

Miller & Starr California Real Estate 4th, §§ 34:175, 34:181, 34:182 (Thomson Reuters)

4329. Affirmative Defense—Failure to Provide Reasonable Accommodation

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[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] violated fair housing laws by refusing to provide [[***name of defendant***]/a member of [***name of defendant***]'s household] [a] reasonable accommodation[s] for [his/her/***nonbinary pronoun***] disability as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy [a/an] [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***].**

To establish this defense, [*name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/a member of [***name of defendant***]'s household] has a disability;**
2. **That [***name of plaintiff***] knew of, or should have known of, [[***name of defendant***]/the member of [***name of defendant***]'s household]'s disability;**
3. **That [[***name of defendant***]/a member of [***name of defendant***]'s household/an authorized representative of [***name of defendant***]] requested [an] accommodation[s] on behalf of [himself/herself/***nonbinary pronoun/name of defendant***] [or] [another household member with a disability];**
4. **That [an] accommodation[s] [was/were] necessary to afford [[***name of defendant***]/a member of [***name of defendant***]'s household] an equal opportunity to use and enjoy the [***specify nature of dwelling or public and common use area at issue, e.g., the apartment building's mail room***]; and**
5. **[That [***name of plaintiff***] failed to provide the reasonable accommodation[s]]**

   [or]

   [That [*name of plaintiff***] failed to engage in the interactive process to try to accommodate the disability].**

New May 2021

Directions for Use

An individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action. (Cal. Code Regs., tit. 2, § 12176(c)(8)(A).) The individual with a disability seeking a reasonable

accommodation must make a request for an accommodation. (Cal. Code Regs., tit. 2, § 12176(c)(1).) Such a request may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on the individual's behalf. (Cal. Code Regs., tit. 2, § 12176(c)(2).)

A reasonable accommodation request that is made during a pending unlawful detainer action is subject to the same regulations that govern reasonable accommodation requests made at any other time. (Cal. Code Regs., tit. 2, § 12176(c)(8).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Combination of Characteristics, Perception, and Perceived Association. Government Code section 12926(o).
- Reasonable Accommodations. California Code of Regulations, title 2, section 12176(a), (c).
- Reasonable Accommodation Requests in Unlawful Detainer Actions. Cal. Code Regs., tit. 2, § 12176(c)(8).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 977, 1062–1064

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, § 63.121 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

4401. Misappropriation of Trade Secrets—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] has misappropriated a trade secret. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/was a licensee of] [the following:][***describe each item claimed to be a trade secret that is subject to the misappropriation claim***];**
2. **That [this/these] [select short term to describe, e.g., information] [was/were] [a] trade secret[s] at the time of the misappropriation;**
3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret[s];**
4. **That [[***name of plaintiff***] was harmed/ [or] [***name of defendant***] was unjustly enriched]; and**
5. **That [***name of defendant***]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[***name of plaintiff***]'s harm/ [or] [***name of defendant***] to be unjustly enriched].**

New December 2007; Revised December 2010, December 2014

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. (See *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 43 [171 Cal.Rptr.3d 714].) If more than one item is alleged, include "the following" and present the items as a list. Then in element 2, select a short term to identify the items, such as "information," "customer lists," or "computer code."

In element 1, select the appropriate term, "owned" or "was a licensee of," to indicate the plaintiff's interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets if that issue is disputed.

Read also CACI No. 4402, *"Trade Secret" Defined,* to give the jury guidance on element 2.

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade

secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through "use" if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of "use" if that type of "use" is not asserted and supported by the evidence.

Give also CACI No. 4409, *Remedies for Misappropriation of Trade Secret.*

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1.
- Trade Secrets Must Be Identified With Reasonable Particularity. Code of Civil Procedure section 2019.210.
- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)
- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted, disapproved on other grounds in *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 [120 Cal.Rptr.3d 741, 246 P.3d 877].)
- "A cause of action for misappropriation of trade secrets requires a plaintiff to show the plaintiff owned the trade secret; at the time of misappropriation, the information was a trade secret; the defendant improperly acquired, used, or disclosed the trade secret; the plaintiff was harmed; and the defendant's acquisition, use, or disclosure of the trade secret was a substantial factor in causing the plaintiff harm." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 942 [239 Cal.Rptr.3d 577] [citing CACI].)

- "[F]airly read, CACI No. 4401 does not instruct the jury that it cannot find misappropriation has occurred unless it finds the misappropriation resulted in damages or unjust enrichment. The instruction addresses the issues of damages and unjust enrichment because, by definition, those are the only remedies a jury could consider or award for an adjudicated misappropriation. The other remedies available to a plaintiff whose trade secrets have been misappropriated—reasonable royalty and injunction—may be awarded only by the trial court. (*Applied Medical Distribution Corp. v. Jarrells* (2024) 100 Cal.App.5th 556, 571 [319 Cal.Rptr.3d 205].)
- "It is critical to any [UTSA] cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Altavion, Inc.*, *supra*, 226 Cal.App.4th at p. 43.)
- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)
- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)
- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or

'*was* a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc.*, *supra*, 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

Gaab and Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-A ¶ 10:250 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.51 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 10, 11, 12

4409. Remedies for Misappropriation of Trade Secret

If [*name of plaintiff*] proves that [*name of defendant*] misappropriated [his/her/*nonbinary pronoun*/its] trade secret[s], then [*name of plaintiff*] is entitled to recover damages if the misappropriation caused [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched].

[If [*name of defendant*]'s misappropriation did not cause [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched], [*name of plaintiff*] may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]

New December 2007; Revised July 2025[*]

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, if the plaintiff is seeking damages. For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.

Select the nature of the recovery sought; either for the plaintiff's actual loss or for the defendant's unjust enrichment, or both. If the plaintiff's claim of actual injury or loss is based on lost profits, give CACI No. 3903N, *Lost Profits (Economic Damage)*. If unjust enrichment is alleged, give CACI No. 4410, *Unjust Enrichment*.

If neither actual loss nor unjust enrichment is provable, Civil Code section 3426.3(b) provides for a third, alternate remedy: a reasonable royalty for no longer than the period of time the use could have been prohibited. Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury. (See Civ. Code, § 3426.3(b) [*the court* may order the payment of a reasonable royalty]; *Applied Medical Distribution Corp. v. Jarrells* (2024) 100 Cal.App.5th 556, 571–572 [319 Cal.Rptr.3d 205] [only the court had statutory authority to impose an injunction or assess a reasonable royalty]; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future use of a trade secret on payment of a reasonable royalty].) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.
- "Under subdivision (a), a complainant may recover damages for the actual loss

caused by misappropriation, as well as for any unjust enrichment not taken into account in computing actual loss damages. Subdivision (b) provides for an alternative remedy of the payment of royalties from future profits where 'neither damages nor unjust enrichment caused by misappropriation [is] provable.' " (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 61 [37 Cal.Rptr.3d 221].)

- "In sum, the jury found [defendant] misappropriated [plaintiff's] trade secrets by acquiring, using, or disclosing them by improper means. That constituted a finding by the trier of fact that misappropriation occurred, which in turn permitted the trial court to consider whether to impose an injunction or assess a reasonable royalty. The court had statutory authority to impose those remedies even though the jury found that the legal remedies submitted to it—damages or unjust enrichment—were not proven." (*Applied Medical Distribution Corp., supra,* 100 Cal.App.5th at p. 572, fn. omitted.)
- "To adopt a reasonable royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence *ab initio* of, and declares the *equitable* terms of, a supposititious license, and does this *nunc pro tunc*; it creates and applies retrospectively a compulsory license." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 68 [171 Cal.Rptr.3d 714], original italics.)
- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances." (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr.2d 741].)
- "It is settled that, in fashioning a pecuniary remedy under the CUTSA for past use of a misappropriated trade secret, the trial court may order a reasonable royalty only where 'neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable.' 'California law differs on this point from both the [Uniform Act] and Federal patent law, neither of which require[s] actual damages and unjust enrichment to be unprovable before a reasonable royalty may be imposed.' " (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1308 [115 Cal.Rptr.3d 168], internal citations omitted.)
- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact. To hold otherwise would place the risk of loss on the wronged plaintiff, thereby discouraging innovation and potentially encouraging corporate thievery where anticipated profits might be minimal but other valuable but nonmeasureable

benefits could accrue." (*Ajaxo Inc.*, *supra*, 187 Cal.App.4th at p. 1313 [jury's finding that defendant did not profit from its misappropriation of trade secrets means that unjust enrichment is not "provable" within the meaning of section 3426.3(b)].)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, §§ 92–93

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 10(II)-E ¶¶ 10:370–10:372 (The Rutter Group)

1 Milgrim on Trade Secrets, Ch. 15, *Trial Considerations*, § 15.02 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[6], [7] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 11

4410. Unjust Enrichment

[*Name of defendant*] was unjustly enriched if [his/her/*nonbinary pronoun*/its] misappropriation of [*name of plaintiff*]'s trade secret[s] caused [*name of defendant*] to receive a benefit that [he/she/*nonbinary pronoun*/it] otherwise would not have achieved.

To decide the amount of any unjust enrichment, first determine the value of [*name of defendant*]'s benefit that would not have been achieved except for [his/her/*nonbinary pronoun*/its] misappropriation. Then subtract from that amount [*name of defendant*]'s reasonable expenses[, including the value of the [*specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital*]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [*name of plaintiff*]'s actual loss.]

New December 2007

Directions for Use

Give this instruction with CACI No. 4409, *Remedies for Misappropriation of Trade Secrets*, if unjust enrichment is alleged and supported by the evidence. If it would be helpful to the jury, specify the categories of expenses to be allowed to the defendant. Include the last sentence if both actual loss and unjust enrichment are alleged.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3.
- "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (Rest., Restitution, § 1.) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result . . . is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [¶] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 627–628 [12 Cal.Rptr.2d 741].)
- "A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation. A defendant's profits often represent profits the plaintiff would otherwise have earned. Where the plaintiff's loss does not correlate directly with the misappropriator's benefit, . . . the problem becomes

more complex. There is no standard formula to measure it. A defendant's unjust enrichment might be calculated based upon cost savings or increased productivity resulting from use of the secret. Increased market share is another way to measure the benefit to the defendant. Recovery is not prohibited just because the benefit cannot be precisely measured. But like any other pecuniary remedy, there must be some reasonable basis for the computation." (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1305 [115 Cal.Rptr.3d 168], footnote and internal citations omitted.)

- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 66 [171 Cal.Rptr.3d 714].)
- "Another crucial point is that unjust enrichment, as the phrase is used here, is, in effect, synonymous with restitution. ' " 'The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.' " ' " (*Ajaxo Inc.*, *supra,* 187 Cal.App.4th at p. 1305, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 93

Restatements of the Law 3d, Restitution and Unjust Enrichment, § 1, comments a, b, and c

1 Milgrim on Trade Secrets, Ch. 13, *Issues Prior to Commencement of Action*, § 13.03[2][a] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.54[4] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[7][b] (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) § 11.03

4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] made a protected disclosure in good faith and that [***name of defendant***] [discharged/***specify other adverse action***] [him/her/***nonbinary pronoun***] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse, violation of law, threats to public health, bribery, misuse of government property***];**
2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**
3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remedying the health or safety condition];**
4. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**
5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse 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.**

New December 2014; Renumbered from CACI No. 2442 and Revised June 2015; Revised July 2025

Directions for Use

Under the California Whistleblower Protection Act and the California Whistleblower Protection Enhancement Act (Gov. Code, § 8547 et seq.) (the Act), a state employee, former employee, or applicant for state employment has a right of action against any person who retaliates against them for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

The statute prohibits acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee, former employee, or applicant for state employment. (Gov. Code, § 8547.8(b).) If the case involves an adverse employment action other than termination, specify the action in elements 4 and 5. These elements may also be modified if constructive discharge is alleged. 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 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 4602, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].) However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- California Whistleblower Protection Enhancement Act. Government Code section 8547.2.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Employee" Defined. Government Code section 8547.2(a).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).

- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)
- "The CWPA 'prohibits retaliation against state employees who "report waste, fraud, abuse of authority, violation of law, or threat to public health" [citation].' A protected disclosure under the CWPA is 'a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.' " (*Levi v. Regents of University of California* (2017) 15 Cal.App.5th 892, 902 [223 Cal.Rptr.3d 577], internal citation omitted.)
- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party . . .' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not . . . available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112–1113 [150 Cal.Rptr.3d 405], internal citations omitted.)
- "Exposing conflicts of interest, misuse of funds, and improper favoritism of a near relative at a public agency are matters of significant public concern that go well beyond the scope of a similar problem at a purely private institution. State employees should be free to report violations of those policies without fear of retribution." (*Levi*, *supra,* 15 Cal.App.5th at p. 905.)
- "Complaints made 'in the context of internal administrative or personnel actions, rather than in the context of legal violations' do not constitute protected whistleblowing." (*Levi*, *supra,* 15 Cal.App.5th at p. 904.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 284 et seq., 303–304

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1740 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination*

and Discipline, § 60.03[2][c], [3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her/*nonbinary pronoun*] [discharge/*specify other adverse action*], [*name of defendant*] is not liable if [he/she/*nonbinary pronoun*/it] proves by clear and convincing evidence that [he/she/*nonbinary pronoun*/it] would have discharged [*name of plaintiff*] anyway at that time, for legitimate, independent reasons.

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*New December 2014; Renumbered from CACI No. 2443 and Revised June 2015; Revised July 2025**

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act and the California Whistleblower Protection Enhancement Act. (See Gov. Code, § 8547 et seq.; CACI No. 4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory reason and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order. (Compare Gov. Code, § 8547.8(c) with Gov. Code, § 8547.2(c); see Gov. Code, § 8547.2(b) [defining "illegal order"], (e) [defining "protected disclosure"].) See the Directions for Use to CACI No. 4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- California Whistleblower Protection Enhancement Act. Government Code section 8547.2.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).
- "Illegal Order" Defined. Government Code section 8547.2(b).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- "Guided by *Lawson* [*v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [289 Cal.Rptr.3d 572, 503 P.3d 659]] and applying its reasoning, we conclude

that Government Code section 8547.10, subdivision (e), rather than *McDonnell Douglas*, provides the relevant framework for analyzing claims under Government Code section 8547.10." (*Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904, 916 [291 Cal.Rptr.3d 822].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1790 et seq. (The Rutter Group)

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

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)