Item number: 01

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Recommend JC approval (has circulated for comment)**

RUPRO Meeting: October 8, 2021

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Amend Standards of Judicial Administration, standard 10.20: Court's Duty to Prohibit Bias

Committee or other entity submitting the proposal:
Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings

Staff contact (name, phone and e-mail): Mike Etchepare, 916-643-7019, michael.etchepare@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO:
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
In November 2020, Chief Justice Tani G. Cantil-Sakauye appointed the Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings to promptly identify improvements and propose amendments to standard 10.20. The work group was charged with ensuring that the standard reflects current law and current understandings regarding the elimination of bias. The work group was asked to report back to the Chief Justice and Judicial Council in fall 2021, and is planning to present its proposal at the November 18-19, 2021 Judicial Council meeting, with the goal of having the amended standard become effective on January 1, 2022.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
N/A

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-175
For business meeting on: November 19, 2021

Title
Judicial Branch Administration: Court's Duty to Prevent Bias

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Stds. Jud. Admin., std. 10.20

Recommended by
Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings
Hon. Brad R. Hill, Cochair
Hon. Stacy Boulware Eurie, Cochair

Agenda Item Type
Action Required

Effective Date
January 1, 2022

Date of Report
October 1, 2021

Contact
Michael Etchepare, Managing Attorney
michael.etchepare@jud.ca.gov

Executive Summary

To support the integrity and impartiality of the judicial system and to promote a court environment free of bias and the appearance of bias, the Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings recommends amendments to California Standards of Judicial Administration, standard 10.20 (Court's duty to prohibit bias). The work group was appointed by Chief Justice Tani G. Cantil-Sakauye to identify improvements and propose amendments to standard 10.20. The work group was charged with ensuring that the standard reflects current law and current understandings regarding the elimination of bias.

Recommendation

The Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings recommends that the Judicial Council approve amendments to California Standards of Judicial Administration, standard 10.20 (Court's duty to prohibit bias) to ensure the standard reflects current law and understandings regarding the elimination of bias and provides a framework for courts to work with local communities to address this important issue. These include amendments to:

- Emphasize the goal for courts to prevent bias, rather than simply prohibit bias;
- More broadly define the scope of the standard and its applicability to all court interactions;
- Update the list of protected classifications enumerated in the standard;
- Define the optimal roles for local or regional bias committees, and outline contemporary considerations for the composition of those committees; and
- Ensure that court users can access information regarding how they can submit complaints about court employees and judicial officers concerning bias in court interactions.

These amendments are consistent with the work group's goal to create a framework and expectations for the elimination of bias, while also recognizing the diversity of size, demographics, needs, and viewpoints of the various legal communities in the state, and the need to allow them to develop customized approaches that will best result in the elimination of bias in court interactions.

The text of the proposed amended standard is attached at pages 15–20.

Relevant Previous Council Action

The Judicial Council first adopted a standard addressing bias in court proceedings in 1987. At that time, the council adopted a general statement on a judge's responsibility to prohibit bias as California Standards of Judicial Administration, section 1. In 1993, the council amended the standard to add a recommendation for courts to create local bias committees and adopt informal complaint resolution procedures. In 1997, the council amended the standard to specify that bias was prohibited on the basis of "disability, gender, race, religion, ethnicity, and sexual orientation."

The standard was renumbered in 2007, but has not been substantively amended since 1997. In its current form, standard 10.20 recommends that judges and courts take steps to prohibit bias on these protected classifications, and includes provisions for the creation of local committees to sponsor and support educational programs and develop and maintain an informal procedure for receiving complaints about courtroom bias.

In November 2020, the Chief Justice appointed the Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings (work group) to identify improvements and propose amendments to standard 10.20. The work group was charged with ensuring that the standard reflects current law and current understandings regarding the elimination of bias, and provided a framework for courts to work with local bar communities to address these issues. The work group was asked to report back to the Chief Justice and Judicial Council in fall 2021.

The charge asked the work group to specifically consider updates to the list of protected classifications enumerated in the standard, and to evaluate the optimal role and composition of local bias committees, considering confidentiality issues with receiving and handling complaints, existing complaint avenues, and the responsibilities for those who receive complaints. The charge recognized that while bias is separate and distinct from intentional discrimination and harassment, there is often significant overlap in the learned associations, attitudes, stereotypes,

and behaviors underlying bias, discrimination, and harassment. Accordingly, the work group was asked to consider, among other things, the recommendations of the Work Group for the Prevention of Discrimination and Harassment, appointed by the Chief Justice in October 2018, and the Rules Committee proposal to adopt rule 10.351 (Judicial branch policies on workplace conduct) of the California Rules of Court, which the Judicial Council adopted in January 2020.

The work group is cochaired by Administrative Presiding Justice Brad R. Hill, Court of Appeal, Fifth Appellate District and Judge Stacy Boulware Eurie, Superior Court of Sacramento County.[1] Many members of the work group also served on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop rule 10.351.

Analysis/Rationale

The work group proposes amendments to each subdivision of standard 10.20.

Duty to prevent bias

As an overarching premise, the proposed amendment changes the title of standard 10.20 from "Court's duty to prohibit bias" to "Court's duty to prevent bias" and replaces all uses of "prohibit" with "prevent," such that the standard now states that courts, judicial officers, and court employees should take actions to prevent bias, rather than simply prohibit bias. This proposed change reflects the work group's charge to modernize the standard to better reflect current understandings regarding the elimination of bias and, as discussed below, reflects a more comprehensive approach to the elimination of bias in court interactions.

As discussed in the Advisory Committee Comments, the work group was concerned that, as used, "prohibit" is a narrow term, focused only on forbidding a certain behavior without any corresponding discussion, education, or opportunity to learn and improve. When conduct is prohibited or forbidden, people might understand that they are not allowed to engage in that conduct, but might not otherwise understand why the conduct is problematic, why the conduct occurs, or how it can still impact people and situations even though it is explicitly forbidden. Simply prohibiting conduct, without taking the steps to educate and prevent the conduct from occurring, is insufficient to achieve the goal of fully understanding and eliminating both unconscious and explicit biases.

Prevention of bias still allows a court to prohibit or forbid bias as part of its plan to prevent bias in court interactions. But a plan to prevent bias necessarily includes a wider array of actions, including:

- Encouraging judicial officers, employees, and court users to report bias;

[1] The work group includes Justice Carin T. Fujisaki, Court of Appeal, First Appellate District, Division Three; Presiding Judge Joyce D. Hinrichs, Superior Court of Humboldt County; Judge Kevin C. Brazile, Superior Court of Los Angeles County; Court Executive Officer Nancy CS Eberhardt, Superior Court of San Bernardino County; and attorneys Rachel W. Hill and Gretchen Nelson.

- Being open to discussing and learning from real misunderstandings and instances of unconscious bias; and
- Facilitating robust education regarding how unconscious and explicit biases develop, how to recognize unconscious and explicit biases, and how to address and eliminate the expression of unconscious and explicit biases.

In short, the change from "prohibit" to "prevent" represents a fundamental change in how courts are asked to combat bias, with a focus on understanding the many forms, causes, and impacts of bias so as to prevent it, rather than simply forbidding it.

Statement of purpose

The proposed amendment to standard 10.20(a) adds a statement of purpose, which reinforces the judicial branch's commitment to ensuring the integrity and impartiality of the judicial system and to court interactions free of bias and the appearance of bias. Subdivision (a) also states that courts should work within their local communities to improve dialogue and engagement with members of various cultures, backgrounds, and groups to learn, understand, and appreciate the unique qualities and needs of each group.

Ensuring the integrity and impartiality of the judicial system

To achieve these goals, subdivision (b) states that judicial officers and court employees should refrain from and take action to prevent biased conduct in all court interactions, and recommends additional responsibilities for judicial officers to ensure unbiased decisions, fairness, and impartiality in courtroom interactions. In outlining these responsibilities, the proposal clarifies or expands on existing standard 10.20 in several key areas.

First, in subdivision (b)(1), the proposal expands the responsibility to both refrain from engaging in conduct and to prevent others from engaging in conduct that exhibits bias beyond "courtroom proceedings" to all "court interactions." As discussed in the Advisory Committee Comments, this change encompasses interactions beyond the courtroom itself—including interactions in clerk's offices, at public counters, and in other places where court users may interact with judicial officers and court staff.

Second, also in subdivision (b)(1), the proposal greatly expands the list of protected classifications to now encompass bias based on age, ancestry, color, ethnicity, gender, gender expression, gender identity, genetic information, marital status, medical condition, military or veteran status, national origin, physical or mental disability, political affiliation, race, religion, sex, sexual orientation, socioeconomic status, and any other classification protected by federal or state law, including Government Code section 12940(a) and canon 3(B)(5) of the Code of Judicial Ethics, whether that bias is directed toward counsel, court staff, witnesses, parties, jurors, or any other person. The proposal adds language to clarify that courts, judicial officers, and court employees may consider such classifications only if necessary or relevant to the proper exercise of their adjudicatory or administrative functions, such as considering military and veteran status in criminal sentencing, or age in juvenile proceedings. This change is intended to

reflect current law and significantly broadens the understanding of what type of conduct constitutes impermissible bias in court interactions.

Third, in subdivisions (b)(1), (b)(2), and (b)(3), in stating the responsibility to ensure fairness in courtroom interactions and unbiased decisions, the proposal clarifies that it applies to all judicial officers. An advisory committee comment clarifies that "judicial officers" includes justices, judges, subordinate judicial officers, and temporary judges. This clarification broadens the coverage of standard 10.20 and encompasses all courtroom proceedings at both the trial and appellate court levels.

Composition and role of local or regional bias committees

In addition to these expansions and clarifications, the proposal also builds on the recommendation in existing standard 10.20 that courts create local bias committees. Specifically, in subdivision (c), the proposal states that courts should collaborate with local bar associations to establish local or regional committees, joint trial and appellate court committees, or separate or joint appellate court committees. This change allows more flexibility for courts and local bar associations. For instance, smaller courts may collaborate with local bar associations and decide to partner with other similarly situated courts to form regional committees that are better able to combine and marshal resources. Likewise, appellate courts may partner with other appellate courts or with trial courts within their region, to enable these courts to have the option to work with other similarly situated courts to create stronger committees.[2]

Further, in subdivision (c)(1), the proposal recommends that each local or regional bias committee be composed of representative members of the local legal community, including judicial officers, lawyers, court administrators, and individuals who interact with the court and reflect and represent the diverse and various needs and viewpoints of court users. This is a change from the existing standard, which delineates specific groups that should be represented in local committees.

While the work group promotes diverse membership in local committees, it also recognizes that identifying certain groups for inclusion can have the opposite effect—leading to exclusion of some groups and viewpoints, and creating a false sense of diversity that is antithetical to the elimination of bias. Instead, the proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique. The proposal allows courts to recognize and build on the unique aspects of their communities, and create committees within the broad framework and guidelines of standard 10.20 that address those unique viewpoints and needs.

Subdivisions (c)(2) and (c)(3) recommend that local or regional committees sponsor and support educational programs designed to eliminate unconscious and explicit biases within the court, and

[2] As used in this report and its accompanying comment chart, the phrase "local bias committee" is intended to refer to any such committee created at a local, regional, or appellate level, and includes single court committees, regional committees, trial/appellate court committees, and joint appellate committees.

also engage in regular outreach with their local communities. In making these recommendations, the work group chose not to set baseline requirements on the number and type of education programs or community outreach activities, but rather to leave those details to be evaluated by each individual committee within the framework created by the standard.

For subdivision (c)(2), the proposal broadly recommends education programs on how such biases develop, how to recognize them, and how to address them, as well as other topics on bias relevant to the local community that the committee may learn of through its community outreach efforts. The work group considers these topics to be of particular importance because education is critical to developing an awareness of the origins of bias, and an awareness of the impact of bias on individuals and access to impartial justice. For subdivision (c)(3), the work group recommends community outreach efforts to include learning about issues of importance to court users and fostering ongoing dialogue regarding concerns related to bias in court interactions. It is important that court users have an avenue to discuss issues of bias in court interactions.

By creating a framework, the work group recognizes that there is not just one correct approach to eliminating bias. Each court and local bias committee must engage their local community to learn what issues concern *their* court users, how bias is manifesting itself in *that* court, and what steps might work to combat *those* particular concerns. For meaningful change to occur, and for local communities to trust the work of the court and local bias committee, the court and committee must be flexible, insightful, and responsive to the particular concerns of their community.

Complaint resolution

Although existing standard 10.20 recommends that local bias committees create their own informal complaint resolution procedures, the current proposal eliminates that recommendation. Instead, courts should ensure that the public can easily access existing information about how to make a complaint against an individual judicial officer or court employee in court interactions regarding bias based on a protected classification. This recommendation was made in large part because of the many existing and effective avenues for making complaints regarding bias in court interactions against judicial officers and court employees, and to avoid creating duplicative and conflicting procedures.

As explained in the Advisory Committee Comment to subsection (d), authority, responsibility, and procedures for addressing complaints concerning judges and subordinate judicial officers are generally outlined in California Rules of Court, rules 10.603 and 10.703, and the California Code of Judicial Ethics, canon 3(D). In practice, courts have developed robust procedures for addressing such complaints against judges and subordinate judicial officers, which are typically made to a court's presiding judge or justice or to a supervising judge.[3] In addition, the Commission on Judicial Performance (CJP)—the independent state agency responsible for

[3] For simplicity, the term "presiding judge" is used in this report and corresponding comment chart to refer to presiding judges, administrative presiding justices, or other supervising judges or justices to whom complaints of bias may be made pursuant to local court policy.

investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges, under article VI, section 18 of the California Constitution—provides detailed information on its website at *cjp.ca.gov* about how to file confidential complaints against judicial officers and the procedures it employs for addressing such complaints.

Similarly, California Rules of Court, rules 10.351 and 10.610, as well as Government Code section 71650 et seq., include authority and processes for addressing complaints against court employees. In practice, courts have developed procedures for addressing complaints against employees, including those raised by court users, and have a legal responsibility to take immediate corrective action on certain types of complaints against court employees. Generally, those complaints can be made to the employee's supervisor or court management and are ultimately the responsibility of the court executive officer.

In addition to the concerns about creating duplicative and conflicting complaint procedures, the complaint resolution guidelines outlined in the existing standard were often unworkable for courts and committees. While several commenters have opposed the proposal on the grounds that it eliminates the recommendation to create a viable, confidential complaint procedure that provides an additional safe space for complainants, the work group concluded that these informal complaint resolution procedures raise various concerns.

For example, the work group was concerned that having local or regional bias committees resolve complaints may actually exacerbate a complainant's confidentiality concerns. Any inquiry by such a committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of local individuals who were aware of the existence or details of the complaint.

Conversely, a CJP complaint is processed and investigated by an experienced CJP investigator outside of the local court system, with established investigation procedures and confidentiality provisions, and the ability to subpoena witnesses. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. Likewise, complaints about judicial officers may also be made directly to a court's presiding judge or justice. In addition to CJP procedures, most courts also have formal, internal procedures for how complaints to the presiding judge or justice are processed, and they have the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. These processes lead to direct resolution of complaints and better protect the confidentiality of the complainant.

In addition, there was concern that referring complaints against judicial officers and court employees to local or regional bias committees might trigger various due process concerns, especially given that these committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may be needed in response to a bias complaint against a judicial officer or court employee. Likewise, referring complaints about court

employees to local or regional bias committees may create personnel and labor relations concerns, which could create conflict with existing court personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to these committees deprives the court of the ability to address the complaint internally and comply with any legal obligations the court may have arising from the complaint, including the need to take immediate corrective action in certain circumstances.

Finally, recommending that local or regional bias committees resolve complaints of bias against judicial officers may result in conflicts with certain ethical obligations for judicial officers who are members of these committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); see also, CJEO Formal Opinion 2020-15). Presiding judges and justices and judges with supervisory authority have additional judicial oversight and reporting responsibilities. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) & 10.703; CJA Jud. Ethics Committee Op. No. 64.) A system in which those complaints are handled informally, at a local level, could undercut those obligations.

Likewise, the distinction that local bias committees should only address complaints that are appropriate for less formal resolution or education as compared to discipline is similarly unworkable given that it is often difficult to determine at the outset if the complaint warrants discipline or would be appropriate for less formal resolution. Judicial officers on the committee making that determination could face their own discipline for not reporting a required complaint to CJP if they made the wrong determination as to whether the complaint was appropriate for informal resolution or merited discipline.

As a result of these concerns, rather than recommending that courts and bias committees create new procedures to resolve bias complaints against judicial officers and court employees, the proposal recommends that each court effectively communicate information to its court users regarding existing procedures to submit complaints of bias in court interactions. While many courts already provide this information on their websites, in their local rules, or displayed in courthouses, the revised standard recommends that all courts take similar steps to ensure that they are providing complaint procedures to court users in a meaningful and accessible manner.

Importantly, the work group proposal does not prohibit courts from having local or regional bias committees resolve bias complaints. Courts and committees with existing informal complaint resolution processes for complaints against judicial officers may continue using those processes, and other courts and committees may choose to create their own processes, if they conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider the concerns discussed above. Because of the specific labor and employment laws governing courts and court employees, including the direction provided in rule 10.351 of the California Rules of Court, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended.

Application of local rules and implementation
Subdivision (e) recommends that courts memorialize in local rules the existence of a local or regional bias committee.

Subdivision (f) encourages courts to implement the revised standard as soon as possible, emphasizing the importance of addressing bias in court interactions. The revised standard better reflects current law and understandings on the elimination of bias and provides a modern framework to address these important issues.

Policy implications

In drafting the proposed amendment, the work group considered two competing objectives: (1) whether to mandate certain statewide procedures and standards that would apply uniformly regardless of each local community's unique circumstances; or (2) whether to provide courts and local or regional bias committees with a broader framework, recommendations, and guidelines that could be used to guide discussions and decisions at the local court and committee level.

As discussed in the Analysis/Rationale section above, and further discussed in the Alternatives Considered section below, the work group has emphasized the second option. The work group wants to empower courts and local or regional bias committees with the discretion to create meaningful programs and procedures that will positively impact court users. The work group understands that there is not just one correct approach to eliminating bias in court interactions, and desires to give courts and committees the flexibility to engage, partner, and problem solve with their local communities, within the framework established by this proposal.

Comments

This proposal was circulated for public comment from May 14 to June 25, 2021,[4] and generated 76 comments signed by 105 commenters.[5] The majority of comments focused on the decision to

[4] Prior to public comment, the work group provided an early opportunity to provide input via email from January 19 through February 12, 2021. Information regarding this opportunity was included in the California Courts website, posted in *Court News Update*, reported in the *Daily Journal,* and distributed to court leadership and others who reached out to the work group to express interest, including the Judicial Council's Tribal Court–State Court Forum, the California Lawyers Association, the California Employment Lawyers Association, and California Attorneys for Criminal Justice. The work group received a number of informative comments as part of this process.

In addition, the work group obtained information from several courts that have already created local bias committees, education programs, and community outreach activities to address bias in court interactions. Some members of the work group met with committees early in the review process, and two committees were invited to speak to the entire work group at its meeting on May 4, 2021. In addition, the work group received a briefing from the director of the CJP regarding how complaints against judicial officers are processed and investigated, and specifically how the CJP resolves bias complaints. These meetings provided valuable information, and the work group used that information to discuss ways to accentuate the positive work of local bias committees and address the challenges they reported. This information, and the information received during the early input period, provided a wide array of ideas, perspectives, and educational material, and was used to shape this proposal.

[5] Of the comments, 41 were unique comments in support or opposition to the proposal, signed by individuals or third-party groups. An additional comment, comment 1 on the attached comment chart, was cosigned by 30 different attorney and third-party groups, all in opposition. An additional 34 commenters submitted a substantially similar comment as the comment cosigned by the 30 groups, and those comments are also included in comment 1.

eliminate the recommendation that local bias committees create informal complaint resolution procedures. Comments on this topic were mixed. Some commenters, including a comment submitted by the Superior Court of San Diego County, supported the removal of the informal complaint resolution procedure, and emphasized concerns with tasking local bias committees with resolving informal complaints of bias:

> Including a complaint resolution procedure and an investigatory role by a local committee raises a number of significant legal, ethical and liability issues for a court and the committee members, because it: (1) would overlap and conflict with CJP procedures and also court employee disciplinary procedures that are governed by statute, case law and collective bargaining agreements which provide employees with due process rights…[6]

Likewise, the Superior Court of Orange County supported the removal of the recommendation that local bias committees create an informal complaint resolution process, noting that "[t]he current standard in some ways duplicates, and in other ways, conflicts with existing systems to address complaints of bias and discrimination," while outlining specific available procedures for resolution of complaints against judicial officers and court employees.[7]

Other commenters, including some attorneys and attorney groups, disagreed. One group of 64 attorneys and attorney groups submitted a joint letter in opposition of the work group's proposal. A full list of the attorneys and attorney groups who signed the opposition or submitted substantially similar comments, and the issues that they raised, is found in comment 1 of the comment chart, pages 21–29. The primary concern of these commenters is the work group's proposal to no longer recommend that local bias committees create informal complaint resolution procedures. This group is concerned that the CJP and existing court procedures to resolve bias complaints are ineffective:

> Accordingly, it is well understood that a complaint to the Commission [on Judicial Performance] is utterly futile. Further, a complaint to the Presiding Judge (PJ) in no manner protects the complaining party from retaliation, repeat offenses or from the PJ themselves if they are the alleged bad actor. Due to social and economic pressures, it is extremely difficult for an attorney to make a complaint of bias against a judge. Providing a safe space to do so, is of utmost importance to the proper administration of justice and to access to justice for all. Intentionally eliminating such a space is unconscionable.[8]

---

[6] Comments submitted on behalf of the Superior Court of San Diego County, by Presiding Judge Lorna A. Alksne and Court Executive Officer Mike Roddy, are referenced in the comment chart as comments 36 and 37.

[7] Comment submitted on behalf of the Superior Court of Orange County, Presiding Judge Erick Larsh, referenced in comment chart as comment 33.

[8] Comment submitted by and/or signed by a group of 64 attorneys and attorney groups, referenced in comment chart as comment 1.

Still others, including the Contra Costa Superior Court Bias Committee, expressed concern that the proposal would eliminate existing local committee informal complaint resolution procedures, noting that it had created its own effective procedure:

> Our Committee seeks clarification as to whether the proposed revisions would eliminate the complaint procedure that our county has worked so hard to develop and of which it is so justifiably proud. We believe the complaint process is a necessary avenue for ensuring the prevention and elimination of bias in our court. We feel the complete elimination of an informal complaint process would set back years of work and progress, in our court and in others, towards the goal of prevention of bias in the judicial system statewide.[9]

The work group considered these various viewpoints and ultimately decided to remove the recommendation that local bias committees create informal complaint resolution procedures, concluding that the existing procedures provide the most appropriate and confidential forums for people to raise specific complaints alleging bias by a judicial officer or court employee, and for those complaints to be investigated and resolved. As noted in the Advisory Committee Comments, and further discussed in the Analysis/Rationale section above, the work group was concerned that a separate informal complaint procedure raised privacy concerns, duplicated existing complaint mechanisms, and created potential conflicts with local court procedures and legal responsibilities for addressing complaints against employees and judicial officers. Yet importantly, the work group's proposal does not prohibit courts and local or regional bias committees, such as the Contra Costa Superior Court Bias Committee, from creating their own informal complaint procedures to resolve complaints of bias against judicial officers. The work group determined that there is no one correct way to eliminate bias; the best method should be determined by each local court and bias committee, working together in partnership with their local community.

Other than comments addressing the informal complaint resolution procedure, the majority of comments from courts, judges, court executive officers, attorneys, and various attorney groups were supportive of the work group's proposal. The California Lawyer's Association noted that it "strongly supports the overarching goal of this proposal," and offered some specific suggestions that are addressed in the comment chart at pages 31–36.[10] The Superior Court of Los Angeles County, through its presiding judge and court executive officer, stated that "the framework anticipated and promoted by a newly amended Standard 10.20 is a useful support for these and other such efforts [achievement of public trust and confidence in the judiciary]."[11] More

---

[9] Comment submitted on behalf of Judge Joni T. Hiramoto, chair of the Contra Costa Superior Court Bias Committee, referenced in comment chart as comment 7.

[10] Comment submitted on behalf of the California Lawyers Association by CEO and Executive Director Ona Alston Dosunmu and President Emilio Varanini, referenced in comment chart as comment 4.

[11] Comment submitted on behalf of the Superior Court of Los Angeles County by Presiding Judge Eric C. Taylor and Executive Officer/Clerk of Court Sherry R. Carter, referenced in comment chart as comment 31.

specifically, the Legal Aid Association of California noted its support to broaden the scope of the standard so that it would encompass more potential court interactions:

> Although we support all of the recommendations made by the work group, we especially approve of the proposal to expand the responsibility to ensure integrity and impartiality beyond "courtroom proceedings" to all "court interactions" including interactions in the clerk's offices, at public counters, and in other places where court users may interact with judicial officers and court staff. This is particularly important because the legal system is not only made up of attorneys and judges; bias can be found preliminarily in one's legal journey and every step of the process should be free of any biased decisions.[12]

However, some commenters raised concerns that the proposal recommended, but did not require, that courts create local bias committees. The Women Lawyers of Alameda County opined that "bias committees are necessary to field bias complaints and to further educate the judiciary on diversity," and expressed disappointment that they were not made mandatory in the standard.[13] Others appreciated the flexibility, including Judge Robin L. Wolfe of the Superior Court of Tulare County who supported the proposal to allow courts and local committees the autonomy and discretion to take actions specifically tailored to local communities:

> We also appreciate the consideration and flexibility the amendments allow to smaller courts to take into consideration their unique circumstances and demographics in forming their committees as well as the ability to join other small courts to allow for more diversity, shared resources, and resolve potential conflicts of interest.[14]

As discussed in greater detail in the Analysis/Rationale section above, the work group considered these viewpoints and continued to recommend creation of local bias committees. As outlined in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines is also consistent with the work group's overall premise of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. While the proposal makes recommendations, the work group also recognizes that there is not just one correct approach, and that courts need the latitude to

---

[12] Comment submitted on behalf of the Legal Aid Association of California by Executive Director Selena Copeland, referenced in comment chart as comment 23.

[13] Comment submitted on behalf of The Women Lawyers of Alameda County, by Board Member Amy Blair, referenced in comment chart as comment 41.

[14] Comment submitted by Judge Robin L. Wolfe, Superior Court of Tulare County, referenced in comment chart as comment 21.

create customized processes and to partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves.

A full listing and response to comments is found in the comment chart at pages 21–183.

Alternatives Considered

Based on the public comments, as well as comments, discussions, feedback, and information provided by various groups and interested parties throughout the process, the work group considered alternative proposals in two primary areas: (1) requiring specific composition and tasks for local bias committees, and (2) recommending that local bias committees develop informal complaint resolution procedures.

Composition and tasks for local or regional bias committees

The work group received several comments regarding whether to mandate certain baseline requirements for all courts and local or regional bias committees. For example, some commenters suggested that the work group prescribe the composition of these committees and specifically recommend that committees contain members of certain demographic groups. Other commenters suggested that the work group mandate certain required minimum activities for bias committees, including required minimum number of education sessions and community outreach activities, mandatory reporting requirements, and mandatory complaint resolution procedures.

As discussed in greater detail in the Analysis/Rationale section above, the work group was concerned that naming certain demographic groups for inclusion in these committee, or setting quotas for membership, would necessarily lead to the exclusion of other groups or viewpoints. Likewise, for education programs, community outreach, and reporting requirements, the work group proposal gives each court and local bias committee the discretion, flexibility, and autonomy to fulfill those recommendations as they deem best. The work group understands that there is not just one correct approach to eliminating bias in court interactions, and the proposed amendments allow each court and local bias committee to create procedures and programs that are specifically tailored to the unique needs, viewpoints, and demographics of that community, and that will address the specific bias issues present for their court users.

Recommending that local or regional bias committees develop informal complaint resolution procedures

Another alternative that the work group considered was to recommend that all local or regional bias committees create informal complaint resolution processes for complaints of bias against judicial officers and court employees. While the work group considered various statewide processes and requirements, it ultimately removed the recommendation that local bias committees create informal complaint resolution procedures for complaints against individual judicial officers or employees.

As explained in the proposed Advisory Committee Comment, and as more fully detailed in the Analysis/Rationale section above, this decision was made in large part because of the many existing and updated avenues for making complaints regarding bias in court interactions,

including at both the local court level and through the CJP. This decision was made (1) to avoid conflicts between those procedures; (2) to avoid concerns that committees overseeing confidential complaints against judicial officers and court employees may trigger privacy, due process, judicial ethics, and labor-relations issues; and (3) due to concerns that some local bias committees may not have sufficient resources or expertise to handle such complaints.

Instead, the work group recommends that each court communicate how court users can use the existing procedures to make complaints about bias in court interactions based on a protected classification. In addition, and as discussed in greater detail in the Analysis/Rationale section above, courts and local bias committees that have existing informal complaint resolution processes may also opt to continue using those processes, and other courts and committees may choose to create their own processes. If so, the work group recommends that they fully consider the concerns discussed above.

Fiscal and Operational Impacts

The work group does not anticipate any significant one-time or sustained annual costs associated with the amendment of standard 10.20. It does anticipate some minor operational impacts on courts and some judicial officers. Specifically, the work group anticipates that some courts may need to examine existing complaint procedures to ensure that avenues for complaints about bias based on a protected classification are easily accessible to the public. In addition, some members of court leadership, some judicial officers, and some court employees may be tasked with working with local bar communities to create local or regional bias committees or update processes and procedures for existing committees. This could result in increased workload for those individuals as more courts attempt to launch their own local or regional bias committees.

Attachments and Links

1. Standards of Judicial Administration, standard 10.20, at pages 15-20
2. Chart of comments, at pages 21-183

Standard 10.20 of the California Standards of Judicial Administration is amended, effective January 1, 2022, to read:

Standard 10.20. Court's duty to ~~prohibit~~ prevent bias

(a) ~~General~~ Statement of purpose

The California judicial branch is committed to ensuring the integrity and impartiality of the judicial system and to court interactions free of bias and the appearance of bias. Consistent with this commitment, each court should work within its community to improve dialogue and engagement with members of various cultures, backgrounds, and groups to learn, understand, and appreciate the unique qualities and needs of each group.

(b) Duty to ensure integrity and impartiality of the judicial system

Each court, its judicial officers, and its employees have the duty to ~~preserve~~ ensure the integrity and impartiality of the judicial system~~, each judge should:~~.

~~(1) *Ensure fairness*~~

~~Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants.~~

~~(2)~~(1) *Refrain from and ~~prohibit~~ prevent biased conduct*

In all ~~courtroom proceedings~~ court interactions, each court, its judicial officers, and its employees should refrain from engaging in conduct and ~~prohibit~~ should take action to prevent others from engaging in conduct that exhibits bias, including but not limited to bias based on age, ancestry, color, ethnicity, ~~disability,~~ gender, gender expression, gender identity, genetic information, marital status, medical condition, military or veteran status, national origin, physical or mental disability, political affiliation, race, religion, sex, ~~ethnicity, and~~ sexual orientation, socioeconomic status, and any other classification protected by federal or state law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), whether that bias is directed toward counsel, court ~~personnel~~ staff, witnesses, parties, jurors, or any other ~~participants~~ person. The court, judicial officers, and court employees may consider such classifications only if necessary or relevant to the proper exercise of their adjudicatory or administrative functions.

(2) *Ensure fairness*

Each judicial officer should ensure that courtroom interactions are conducted in a manner that is fair and impartial to all persons.

(3) *Ensure unbiased decisions*

Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases.

~~(b)~~(c) Creation of local or regional committees on bias

~~Each court should establish a local committee with local bar associations to assist in maintaining a courtroom environment free of bias or the appearance of bias. Courts within one or more counties may choose to form a single committee.~~ To assist in providing court interactions free of bias and the appearance of bias, courts should collaborate with local bar associations to establish a local or regional committee. Trial courts may choose to form a regional committee. Appellate courts may choose to form separate or joint appellate court committees or join a trial court committee or regional committee formed by or composed of trial courts within the appellate courts' districts. ~~The local~~ Each committee should:

(1) Be composed of representative members of the court community, including but not limited to ~~judges~~ judicial officers, lawyers, court administrators, ~~and representative~~ and individuals who interact with the court and reflect and represent the diverse and various needs and viewpoints of court users ~~from minority, women's, and gay and lesbian bar associations and from organizations that represent persons with disabilities~~;

(2) Sponsor or support educational programs designed to eliminate unconscious and explicit biases within the court and legal communities~~, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation; and~~. Education is critical to developing an awareness of the origins of bias and the impact of bias on individuals, culture, and society. Education should include:

(A) Information as to bias based on the protected classifications listed in (b)(1);

(B) Information regarding how unconscious and explicit biases based on these classifications develop, how to recognize unconscious and explicit biases, and how to address and eliminate unconscious and explicit biases; and

(C) Other topics on bias relevant to the local community informed by the committee's independent assessment of the unique educational needs in that community.

(3) ~~Develop and maintain an informal procedure for receiving complaints relating to bias in the courtroom, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation.~~ Engage in regular outreach to the local community to learn about issues of importance to court users. Specifically, committee members should be encouraged to:

(A) Inform local community groups regarding the committee's activities; and

(B) Seek information from the local community regarding concerns as to bias in court interactions and how the court can address those concerns.

~~(c)~~(d)~~Minimum components of a complaint procedure~~ Providing information regarding complaint procedures

~~An informal complaint procedure developed and maintained by a local committee on bias should:~~

~~(1) Contain a provision specifying that the intent of the procedure is to educate with the purpose of ameliorating the problem rather than disciplining the person who is the subject of the complaint;~~

~~(2) Accommodate local needs and allow for local flexibility;~~

~~(3) Apply to all participants in courtroom proceedings;~~

~~(4) Apply only to complaints as to which the identity of the complainant is known;~~

~~(5) To the extent possible and unless disclosure is required by law, protect the confidentiality of the complainant, the person who is the subject of the complaint, and other interested persons;~~

~~(6) Relate to incidents of behavior or conduct occurring in courtroom proceedings;~~

~~(7) Apply to incidents of bias whether they relate to race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status;~~

~~(8) Contain a provision that exempts activities constituting legitimate advocacy when matters of race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status are relevant to issues in the courtroom proceeding;~~

~~(9) Focus on incidents that do not warrant discipline but that should be corrected;~~

~~(10) With respect to those incidents that if substantiated would warrant discipline, advise the complaining party of the appropriate disciplinary authority;~~

~~(11) Contain a provision specifying that nothing in the procedure in any way limits the ability of any person to submit a complaint of misconduct to the appropriate disciplinary body; and~~

~~(12) To the extent possible and unless disclosure is required by law, prohibit retention of written records of complaints received but permit collection of data on types of complaints or underlying anecdotes that might be useful in educational programs.~~

Each court should effectively communicate to its court users regarding existing procedures to submit complaints of bias in court interactions based on protected classifications, as listed in (b)(1). This should include information regarding how to submit complaints about court employees directly to the court and how to submit complaints about judicial officers either directly to the court or to the Commission on Judicial Performance. Possible methods of communication include providing this information on the court website, including the information in the court's local rules, displaying the information in courthouses, or any other similar method to ensure that courts are providing complaint procedure information to court users in a meaningful and accessible manner.

~~(d)~~(e) Application of local rules

The existence of the local committee~~,~~ and its purpose~~, and the features of the informal complaint procedure~~ should be memorialized in the applicable local rules of court.

(f) Implementation

All courts should implement the recommendations of this standard as soon as possible.

Advisory Committee Comment

Subdivision (b). An earlier version of this standard referred to the "court's duty to prohibit bias." The word "prohibit" has been replaced with "prevent" in the title of the standard and in subdivision (b), such that the standard now asks courts, judicial officers, and court employees to take actions to prevent bias rather than prohibit bias. This change reflects a more comprehensive approach in how courts are to combat bias, focusing on understanding the many forms, causes, and impacts of bias rather than simply forbidding it. Preventing bias may include, for example, prohibiting bias; encouraging judicial officers, employees, and court users to report bias; being open to discussing and learning from real misunderstandings and instances of unconscious bias; and focusing on robust education regarding how unconscious and explicit biases develop, how to recognize them, and how to address and eliminate bias.

The judicial officer duties stated in this subdivision are consistent with the California Code of Judicial Ethics, which addresses judicial officer responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)).

An earlier version of this standard applied solely to judges and referred to "courtroom proceedings." "Judge" has been expanded to "judicial officers," which includes all judges as defined by California Rules of Court, rule 1.6, and all appellate and Supreme Court justices. The expanded phrase broadly covers any judge, justice, subordinate judicial officer, or temporary judge who might conduct a courtroom proceeding. Additionally, in subdivision (b)(1), "courtroom proceedings" has been changed to "court interactions" to expand the scope of proceedings and actions covered by this standard to include not only proceedings occurring in courtrooms but also interactions in other areas of the court, including in the clerk's office and at public counters.

Subdivision (d). An earlier version of this standard encouraged local bias committees to create informal complaint procedures for court users and members of the public to submit complaints regarding bias in court proceedings. The recommendation that local bias committees create informal complaint procedures has been eliminated in large part because of the many existing and updated avenues for making complaints regarding bias in court interactions, and to avoid creating conflicts between those procedures. For example, the authority and procedures for addressing complaints concerning judicial officers and subordinate judicial officers are outlined in rules 10.603 and 10.703 of the California Rules of Court and canon 3(D) of the California Code of Judicial Ethics. Similarly, rules 10.351 and 10.610 of the California Rules of Court, as well as Government Code section 71650 et seq., include authority and complaint resolution processes for addressing complaints against court employees. In practice, courts have developed robust procedures for addressing such complaints against judicial officers, subordinate judicial officers, and court employees, and the Commission on Judicial Performance provides detailed information

on its website at *cjp.ca.gov* about how to file complaints and the procedures it employs for addressing such complaints.

In addition to the concerns regarding duplicative and conflicting complaint procedures, the recommendation that local bias committees adopt informal complaint procedures created additional concerns. For example, the earlier version of the standard envisioned using informal complaint procedures to resolve incidents that do not warrant formal discipline; however, it is often difficult to determine at the outset if a complaint is disciplinary in nature or can be ameliorated by education. Other due process concerns were raised that local committees were not necessarily resourced to make these determinations, and may not have had the expertise to investigate and resolve these complaints. Additional concerns were raised that having local committees oversee complaints against judicial officers and court employees created privacy and confidentiality concerns for both complainants and respondents because any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint, thereby significantly expanding the number of local individuals who were aware of the existence or details of the complaint. Ethical concerns were also raised for judicial officers who were members of the local bias committees because judicial officers who become aware of complaints against other judicial officers may have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice or the Commission on Judicial Performance. Finally, there were concerns that local bias committee complaint procedures would conflict with existing personnel policies and labor relations agreements if the local committee attempted to resolve complaints against court employees outside of the procedures outlined in these policy documents.

This standard does not prevent courts and local or regional bias committees from choosing to create informal complaint resolution procedures. Some local bias committees have established effective informal complaint resolution procedures for resolving complaints against judicial officers, and each local court and local or regional bias committee should work to find solutions that work best for that local community. If so, they should fully consider how best to address the above concerns. Because of the specific labor and employment laws governing courts and court employees, including the direction provided in rule 10.351 of the California Rules of Court, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local or regional bias committees resolve complaints against court employees is not recommended.

SP21-03

Judicial Administration: Court's Duty to Prevent Bias (Amend Cal. Standards of Judicial Administration, standard 10.20)

All comments are verbatim unless indicated in brackets, with omissions indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	A substantively similar version of this comment was submitted by the following commenters. The bottom of the comment displays additional information submitted by commenters, indicated with asterisks: ▪ ACLU California Action NI ▪ Alameda Contra Costa County Trial Lawyers Association NI ▪ Alameda County Bar Association NI ▪ Asian American Bar Association of Greater Bay Area NI ▪ George Azadian, Attorney, Azadian Law Group, PC, La Canada N ▪ Bay Area Lawyers for Individual Freedom NI ▪ Bet Tzedek Legal Services NI ▪ Bohbot & Riles by Elizabeth Riles, Oakland N ▪ Cecilia Brennan, Managing Partner, HKM Employment Attorneys LLP, San Diego N ▪ Darci Burrell, Levy Vinick Burrell Hyams LLP, Oakland N ▪ California Employment Lawyers Association NI		[We] strongly contest the proposed changes submitted to the Rules Committee by the Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings to California Rules of Court, Rule 10.20, Court's duty to prohibit bias. The court's duty to support the integrity and impartiality of the judicial system and to promote a courtroom environment free of bias or the appearance of bias is of utmost importance. Every effort should be taken to support these efforts. Found within 10.20 is the duty to establish a local bias committee staffed by diverse members of the local bar community which accepts complaints of bias. Said structure was born from the initial efforts of a 1987 Judicial Council Advisory Committee on Gender Bias in the Courts established by former Chief Justice Rose Elizabeth Bird, and grew thereafter, ultimately codified in the CRC. It was discovered in spring 2020, that nearly all of the Superior Courts in California were out of compliance with CRC 10.20(c)(d). Instead of coming into compliance, instead of taking steps to positively and proactively address bias in the courts, the Work Group shockingly eliminated the complaint procedure. This is unacceptable.	The work group appreciates the commenters' submission and notes the concerns regarding the elimination of the recommendation that local bias committees create informal complaint resolution procedures, and concerns regarding the Commission on Judicial Performance (CJP)'s ability to handle informal bias complaints. As discussed in both the accompanying report and the Advisory Committee Comments, the proposal eliminates the recommendation that local bias committees adopt an informal complaint process, in part because there are many existing, effective, and updated avenues for making complaints regarding bias in court interactions, including avenues through the CJP and to the presiding judge or justice of each court[1], and due to potential conflict between the multiple avenues for raising complaints. While the work group understands the commenters' concerns regarding retaliation, confidentiality, and creating safe places for complainants, the work group concluded that the existing procedures for resolving complaints against judges appropriately address those concerns. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the

[1] For simplicity, the term "presiding judge" is used in this comment chart and corresponding comment chart to refer to presiding judges, administrative presiding justices, or other supervising judges or justices to whom complaints of bias may be made pursuant to local court policy.

	Commenter	Position	Comment	Committee Response
	▪ California Rural Legal Assistance Foundation) NI ▪ California Women's Law Center NI ▪ Grainne Callan, Esq. Sunnyvale N ▪ Centro Legal de la Raza NI ▪ Church State Council NI ▪ Devin Coyle, Coyle Brown Law, Oakland N ▪ Steven R. Diaz, Esq., Attorney Burbank N ▪ Disability Rights Advocates NI ▪ Barbara DuVan-Clarke, Attorney, Los Angeles (see comment 1.1 for additional comment) N ▪ East Bay La Raza Lawyers Association NI ▪ Equal Justice Society NI ▪ Equal Rights Advocates NI ▪ Matt Flynn, Attorney, Flynn Law Office, Oakland N ▪ Joan Herrington, Bay Area Employment Law Office NI ▪ Rutger Heymann, Attorney, Law Offices of Rutger Heymann, San Jose N ▪ Ryan Hicks, Attorney, Hoyer & Hicks, San Francisco N		The Work Group made this change supposedly because a local bias complaint structure is not necessary because other complaint avenues exist, including the ability to complain to the Presiding Judge and the Commission on Judicial Performance. This is in error, as the evidence shows otherwise. A complaint to the Commission on Judicial Performance is nearly always likely to be dismissed without investigation, or the very small chance (nearly less than 1% chance it is investigated), it will be dismissed shortly thereafter. Statistics confirmed in recent reports including the Commission on Judicial Performance 2020 Case Statistics and Commission on Judicial Performance, "Weaknesses in Its Oversight Have Created Opportunities for Judicial Misconduct to Persist", Auditor of the State of California, April 2019, Report 2016-137. Accordingly, it is well understood that a complaint to the Commission is utterly futile. Further, a complaint to the Presiding Judge (PJ) in no manner protects the complaining party from retaliation, repeat offenses or from the PJ themselves if they are the alleged bad actor. Due to social and economic pressures, it is extremely difficult for an attorney to make a complaint of bias against a judge. Providing a safe space to do so, is of utmost importance to the proper administration of justice and to access to justice for all. Intentionally	ability to subpoena witnesses—tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; California Judges Association Judicial Ethics Committee Op. No. 64.) Most courts have formal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints. In addition, having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has

	Commenter	Position	Comment	Committee Response
	▪ Ji-In Houck, Managing Partner, Stalwart Law Group, Los Angeles ▪ Impact Fund ▪ EmilyRose Johns, Senior Associate, Siegel, Yee, Brunner & Mehta, Oakland ▪ Sharan Kangavari, Attorney, Los Angeles ▪ Benjamin K. Karpilow, Meechan, Rosenthal & Karpilow, PC, Santa Rosa ▪ Erin Kelly, Attorney, Law Offices of Scott R. Ames, P.C., Los Angeles ▪ Tuvia Korobkin, El Segundo ▪ Richard Koss, Owner, Law Offices of Richard N. Koss, Redwood City ▪ Debra Lauzon, Owner, Lauzon Law, El Segundo ▪ Law Offices of Moira C. McQuaid, San Mateo by Moira McQuaid, Owner (see comment 1.2 for additional comment) ▪ Law Office of Twila White, Hermosa Beach by Twila S. White, Principal Attorney ▪ Lebe Law, Los Angeles by Jonathan Lebe, Managing Attorney	N NI N N N N N N N N N N	eliminating such a space is unconscionable. I strongly oppose the edits which eliminate the committee.	concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. The work group is also concerned that referring complaints against judicial officers and court employees to local bias committees might trigger various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer or court employee. Likewise, referring complaints about court employees to local bias committees may create personnel and labor relations concerns, given that courts have existing personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to local bias

	Commenter	Position	Comment	Committee Response
	▪ Legal Aid At Work ▪ Legal Aid of Marin ▪ Los Angeles LGBTQ Center ▪ Marin Trial Lawyers Association ▪ Sonya Mehta, Esq., Siegel, Yee, Brunner & Mehta, Oakland ▪ Eduard Meleshinsky, El Cerrito ▪ Mexican American Bar Association ▪ Beth Mora, Mora Employment Law, San Ramon ▪ Mia Munro, Attorney, Los Angeles ▪ National Employment Law Project ▪ Jason Oliver, Law Offices of Jason L. Oliver, Pasadena ▪ Open Door Legal ▪ Public Counsel ▪ Queen's Bench Bar Association ▪ Brent Robinson, Associate Attorney, Aiman-Smith & Marcy, PC, Oakland (see comment 1.3 for additional comment) ▪ Monique Rodriquez, Attorney, Lemon Grove	NI NI NI NI N N NI N N NI N NI NI NI N N		committees deprives courts of the ability to address the complaint internally and comply with any legal obligations the courts may have arising from the complaints, including the need to take immediate corrective action in certain circumstances. In addition, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice, or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, Committee for Judicial Ethics Opinions Formal Opinion 2020-15). A system where those complaints are handled informally, at a local level, could undercut those obligations. The commenters raised concerns that the CJP dismisses many complaints without investigation. The CJP is the independent state agency, established by the California Constitution, which is responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. As stated on its website at *cjp.ca.gov*, "[t]he commission's mandate is to protect the public, enforce rigorous standards of

	Commenter	Position	Comment	Committee Response
	▪ San Francisco La Raza Lawyers Association ▪ San Francisco Trial Lawyers Association ▪ Olivia Sanders, Attorney, Law Office of Olivia Sanders ▪ Leonard H. Sansanowicz, Attorney, Sansanowicz Law Group, P.C., Los Angeles ▪ Sarah Schlehr, Schlehr Law Firm, Burbank ▪ Glicel Sumagaysay, Law Office of Glicel Sumagaysay, Walnut Creek ▪ Susan Swan, Owner and Attorney, Swan Employment Law, San Diego ▪ Wage Justice Center ▪ Women's Section of the Contra Costa County Bar Association	NI NI N N N N N NI NI		judicial conduct and maintain public confidence in the integrity and independence of the judicial system" and the CJP investigates "conduct in conflict with the standards set forth in the Code of Judicial Ethics." This includes responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)). As discussed by the Director-Chief Counsel of the CJP at his presentation to the work group at its public meeting in May 2021, many of the complaints that do not result in CJP investigation are from litigants about the outcome of individual cases. These complaints do not relate to conduct set forth in the Canons of Judicial Ethics, and therefore are not appropriate for resolution by the CJP. There is no indication that the CJP is dismissing any significant number of bias or conduct complaints without inquiry or investigation. The work group recognizes that some local bias committees have established effective informal

	Commenter	Position	Comment	Committee Response
				complaint resolution procedures to resolve complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the concerns raised above. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended. Finally, the work group clarifies the commenters' statement that "[i]t was discovered in spring 2020, that nearly all of the Superior Courts in California were out of compliance with CRC 10.20(c)(d)." Standard 10.20 is a Standard of Judicial Administration, not a rule of court, and is non-binding in nature. As stated in rule 1.5(c), the Standards of Judicial Administration within the

	Commenter	Position	Comment	Committee Response
				rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. As a result, courts without local bias committees and informal complaint resolution processes were not in violation of a mandatory rule of court, but rather, had not adopted a non-binding recommendation.
			Moreover, I request a re-write of CRC 10.20 be conducted with a meaningful Work Group which includes employment attorneys, civil rights attorneys and members of diversity bar associations. This should be done with care and respect, with all appropriate voices included. Thank you for your time and attention to this matter.	Amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs. Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to eliminate bias in all court interactions, Chief Justice Tani G. Cantil-Sakauye appointed a small work group comprised entirely of Judicial Council members, and gave it a limited charge, which enabled the work group to swiftly and efficiently propose amendments to update the standard. The work group includes judicial officers, attorneys,

	Commenter	Position	Comment	Committee Response
				and a court executive officer. Several members of the work group have experience in these and related issues from serving on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, met with various local bias committees, and met with interested groups throughout the process who wanted to share thoughts and ideas for amending the standard.
			1.1 This is unacceptable for many reasons, but will certainly have the greatest impact on those who need the complaint procedure the most, including but not limited to BIPOC.	1.1 The work group appreciates this additional perspective of one commenter, and incorporates the response above regarding the reasons for the elimination of the recommendation that local bias committees adopt informal complaint procedures.
			1.2 You might think that the issue of bias in the courtroom is no longer an issue! But let me assure you that bias in the courtroom is still a problem. I myself have experienced such bias firsthand as recently as last year, 2020. My own recent experience has motivated me to speak out now while the comment period is still open to make sure that this deadline does not pass "quietly" without me formally making a plea that the local bias committee system be	1.2 The work group appreciates this additional perspective from one commenter.

	Commenter	Position	Comment	Committee Response
			maintained so there is a forum for lawyers to register their concerns. 1.3 [the ability to complain to the Presiding Judge and the Commission on Judicial Performance] forums are ineffective at resolving claims of bias, and are insufficient to maintain the appearance of impartiality by curbing conduct that members of the bar are willing to go on the record as saying undermines the Canons of Judicial Ethics.	1.3 The work group notes the commenter's concerns related to submitting complaints to the CJP or a presiding judge, and incorporates the response above regarding the effectiveness of the existing CJP and presiding judge complaint procedures.
2.	Alameda County Superior Court Outreach and Elimination of Bias Judicial Committee by Hon. Clifford Blakely and Hon. Eumi Lee, committee co-chairs	A	On behalf of the Alameda County Superior Court Outreach and Elimination of Bias Judicial Committee, we applaud the recent efforts of the Working Group and concur with the proposed amendments to California Standards of Judicial Administration, standard 10.20. The proposed amendments recognize the need to expand both the scope and reach of standard 10.20. It recognizes the urgent call by Chief Justice Tani Cantil-Sakauye after events last year as well as our nation's history for the courts to address conscious and unconscious bias and to strive for justice for all. The recent proposal is a step towards this. Of note is the substitution of "prevent" with "prohibit" and the replacement of "courtroom proceedings" with all "court interactions." Proposed Standard 10.20(b)(1). Also, equally important is the update and expansion of	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			protected classifications to reflect the true diversity of our society and the struggles faced by many. We also recognize and agree with the need for flexibility in the membership of local committees on bias to reflect the diverse nature of the counties within our State. We see the same flexibility being afforded by the changes concerning the complaint procedure. As Alameda County Superior Court, Local Rule 2.0 (Policy Against Bias) demonstrates, our court is strongly committed to ensuring an environment that strives to be free of all types of bias or prejudice. However, as the proposed amendments recognize, courts have an affirmative obligation to communicate information about the policies and procedures to the public. The proposed standard requires the courts to do so and builds upon the existing reporting structures such as each court's Executive Office and the Commission on Judicial Performance. The proposal establishes a baseline for all of our State's courts. In sum, we see the proposed amendments as an important step forward and encourages the Judicial Council to move forward with the Working Group's proposal.	
3.	Morgan Baxter Self-Help Managing Attorney Superior Court of San Bernardino County	A	I think these proposed amendments are a step in the right direction. I believe ongoing education is essential and should be treated as such, especially for judicial officers, who bear the	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			burden of representing justice. Unconscious bias is difficult to address without ongoing opportunities to learn and confront our own bias. Of course, a more diverse bench that better reflects the community would also be very helpful. I hope this is just one step in a larger framework of eliminating bias.	
4.	California Lawyers Association by Ona Alston Dosunmu, CEO/Executive Director and Emilio Varanini, President, Sacramento	A	We write on behalf of the California Lawyers Association (CLA) in response to the Invitation to Comment – Court's Duty to Prevent Bias. CLA's mission is promoting excellence, diversity and inclusion in the legal profession and fairness in the administration of justice and the rule of law. Our work in the area of diversity, equity, and inclusion is facilitated by our Diversity Outreach Committee and Racial Justice Committee. These two Committees formed a joint working group that took a primary role in reviewing the Invitation to Comment. CLA strongly supports the overarching goal of this proposal and submits the following specific comments. 1. <u>Standard 10-20(c) - Creation of local committees on bias</u> • We support the change to allow more flexibility to allow for local culture. • We support the collaboration of the court with local bar associations to reinforce the role that bar associations	The work group notes the commenter's support for the proposed amendments and appreciates this input. The work group addresses the specific suggestions raised by the commenter below. The work group appreciates the support for the specific proposals discussed by the commenter, and notes the commenter's suggestions that judges be encouraged to attend local bias trainings, and that local bias committees include participation from local agencies like the district attorney and public defender. The work group agrees that these

	Commenter	Position	Comment	Committee Response
			and local bars play; they are the conduit to share information and perceptions from lawyers to the court. • We support the Bias Committees providing education, and also believe the local bench should encourage judges to attend. Training on implicit bias that is limited to lawyers only will not fully address bias in the courts. Any Bias Committee created by a county should allow for and favor participation by other local agencies, e.g., public defender and district attorney.	are helpful suggestions, and that these suggestions may benefit particular communities. While the work group did consider setting baseline recommendations on the number and type of education programs, community outreach activities, and composition of the local bias committees, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in community outreach and educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposal allows local committees on bias the flexibility to adopt any number of the proposals suggested by the commenter, subject to the needs and input of the local community, including that judges be encouraged to attend local bias trainings and that local bias committees

	Commenter	Position	Comment	Committee Response
				include participation from local agencies like the district attorney and public defender.
			2. Standard 10-20(d) - Providing information regarding complaint procedures. • The protections have been removed from the existing Standard that contains minimum components of a complaint procedure. For lawyers to file a complaint against a judicial officer or court staff, certain confidentiality protections need to be in place just as they are with formal complaints brought to the Commission on Judicial Performance or feedback provided to judicial evaluation instruments used to evaluate judges in retention elections. Without the protection of confidentiality, especially in smaller courts, or if a complaint is made about a judicial officer or court staff assigned to a specialty court, a lawyer may not feel safe to make constructive comment for fear of consequences or that it could impact bench-bar relations in general.	The work group notes the concern regarding the importance of ensuring that complaints are handled confidentially, and that the identity of the complainants will not be disclosed to the subject of the complaint. The need to promote privacy and confidentiality is one of the main reasons why the work group advocates using the existing complaint processes, rather than having local bias committees process complaints. Having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to

	Commenter	Position	Comment	Committee Response
				the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. Overall, the work group concludes that the CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal internal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Similarly, courts have specific procedures for addressing complaints about court employees, and those procedures provide confidentiality to the extent allowed by due process and the

	Commenter	Position	Comment	Committee Response
				investigatory process, as provided in court personnel policies and memorandums of understanding. Referring complaints about court employees to local bias committees may create personnel and labor relations concerns, which could create conflict with existing court personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to local bias committees deprives courts of the ability to address the complaint internally and comply with any legal obligations the courts may have arising from the complaints, including the need to take immediate corrective action in certain circumstances.
			• There is a need to clarify how complaints against bailiff's are processed as they are not court staff.	The work group also notes the commenter's request for clarification as to the procedure to submit complaints against bailiffs who are not court employees. Procedures for submitting complaints against bailiffs who are not court employees is beyond the scope of this proposal, and will likely vary depending on the particular county that employs the bailiffs. Complainants should inquire with the court regarding the procedure for making complaints against bailiffs or other non-employee justice partners at the court.
			• Beyond the formal complaint process we suggest there be an opportunity for	The work group notes the commenter's suggestion that there be opportunities for annual input from

	Commenter	Position	Comment	Committee Response
			broad based legal community input annually, to help CJER and local courts with more pointed educational efforts. 3. Request for Specific Comments How well would this proposal work in courts of different sizes? • Same as above: Without the protection of confidentiality, especially in smaller courts, or if a complaint is made about a judicial officer or court staff assigned to a specialty court, a lawyer may not feel safe to make constructive comment. We appreciate your consideration of our comments.	the legal community, especially on education efforts. The work group agrees that this type of community outreach, and providing a direct forum for community input is a helpful suggestion that may benefit particular communities. As discussed above, while the work group did consider outlining baseline education, outreach, and input recommendations, it ultimately left those details to be evaluated by each individual local court and bias committee, with consideration of the specific needs of that community, and within the framework created by the standard. The work group appreciates this additional feedback, and adopts its response made above regarding the need to promote confidentiality and privacy in the complaint process.
5.	California Women Lawyers by Naomi Dewey, President, Sacramento	N	California Women Lawyers (CWL) respectfully submits these comments in response to Invitation to Comment ITC SP21-03,	The work group appreciates this submission, and notes the commenter's concerns regarding the elimination of the recommendation that local bias

	Commenter	Position	Comment	Committee Response
			concerning amendments proposed by the Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings to California Rules of Court, Rule 10.20. CWL supports and applauds most of the amendments proposed by the Committee. CWL must, however, respectfully oppose the Committee's proposal to eliminate the provision of Rule 10.20 providing that local bias committees should "[d]evelop and maintain an informal procedure for receiving complaints relating to bias in the courtroom" in favor of encouraging access to information regarding other means of submitting complaints. The court's duty to support the integrity and impartiality of the judicial system and to promote a courtroom environment free of bias or the appearance of bias is of upmost importance. Every effort should be taken in support of these goals. It is not clear that the Committee had sufficient information to conduct an informed balancing of the potential costs and benefits of this proposed amendment. The cost is that redirecting complainants away from local bias committees undermines fundamental goals of Rule 10.20, such as facilitating discussion about, and learning from, unconscious bias that manifests within a particular courtroom. Hearing directly, and confidentially, from court users who experience bias is important to a local committee's ability to recognize (and help	committees adopt informal complaint resolution procedures, and the concerns regarding the CJP's ability to handle informal bias complaints. As discussed in both the accompanying report and the Advisory Committee Comments, the proposal eliminates the recommendation that local bias committees adopt an informal complaint process, in part because there are many existing, effective, and updated avenues for making complaints regarding bias in court interactions, including avenues through the CJP and to the presiding judges or justices of the local courts, and due to potential conflict between the multiple avenues for raising complaints. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Most courts have internal formal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or

	Commenter	Position	Comment	Committee Response
			alleged offenders recognize) specific instances of unconscious and explicit biases when they occur. The informal complaint procedures provide an important and perhaps irreplaceable means for victims of bias to be heard, confidentially, about instances of bias that are harmful and worthy of the committee's attention, but which the complainant may not feel prepared to escalate through other processes. The costs of eliminating these complaint procedures are severe. The benefits of the proposed amendment, by contrast, are unproven and uncertain. One rationale for the proposed amendment provided in the ITC is that other avenues for complaints are adequate. But simply informing the public about other complaint processes is not likely to fulfill—and may undermine—efforts to identify and address bias in a particular courtroom. For example, a complaint to the Commission on Judicial Performance is nearly always likely to be dismissed without investigation. Over the past 10 years, less than 15% of all complaints filed resulted in a preliminary investigation or even a staff inquiry, and less than 1% resulted in any formal proceeding. These statistics are confirmed in recent reports including the Commission on Judicial Performance 2020 Case Statistics and the Commission on Judicial Performance, "Weaknesses in Its Oversight	justices, which may lead to inconsistent and less optimal handling of these complaints. The commenter also raises concerns that the CJP dismisses many complaints without investigation. The CJP is the independent state agency established by the California Constitution, which is responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. As stated on its website at *cjp.ca.gov*, "[t]he commission's mandate is to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system" and the CJP investigates "conduct in conflict with the standards set forth in the Code of Judicial Ethics." This includes responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)). As discussed by the Director-Chief Counsel of the CJP at his presentation to the work group at its

	Commenter	Position	Comment	Committee Response
			Have Created Opportunities for Judicial Misconduct to Persist," Auditor of the State of California, April 2019, Report 2016-137.	public meeting in May 2021, many of the complaints that do not result in CJP investigation are from litigants about the outcome of individual cases. These complaints do not relate to conduct set forth in the Canons of Judicial Ethics, and therefore are not appropriate for resolution by the CJP. There is no indication that the CJP is dismissing any significant number of bias or conduct complaints without inquiry or investigation.
			A second rationale provided is that it is often difficult to determine at the outset if the complaint warrants discipline or would be appropriate for less formal resolution. However, this proposed amendment does not address that issue, instead it shifts the burden of making that difficult determination away from the local bias committee with its expertise in current law and current understandings of bias, entirely to the victim. The foreseeable result is that many victims will take no action at all, especially in cases where bias is evident, but formal discipline is not clearly required.	The work group also notes the potential ethical conflicts for judicial officers who are members of local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice, or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). Presiding judges, presiding justices, and judges with supervisory authority have additional judicial oversight and reporting responsibilities. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64). Judicial officers on the local committee making the determination as to whether a complaint is disciplinary or education in nature could face their own discipline for not

	Commenter	Position	Comment	Committee Response
				reporting a required complaint to CJP if they made the wrong determination as to whether the complaint was appropriate for informal resolution or merited discipline. Having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. The work group is also concerned that referring complaints against judicial officers and court employees to local bias committees might trigger
			The third rationale provided in the ITC for the proposed amendment is that there are resource, capacity, privacy, and labor relations concerns associated with the informal complaint process. However, it is not clear that these concerns would materialize in practice or could not otherwise be addressed.	

	Commenter	Position	Comment	Committee Response
				various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer or court employee. Likewise, referring complaints about court employees to local bias committees may create personnel and labor relations concerns, given that courts have existing personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to local bias committees deprives courts of the ability to address the complaint internally and comply with any legal obligations the courts may have arising from the complaints, including the need to take immediate corrective action in certain circumstances.
			Due to social and economic pressures, it is extremely difficult for an attorney to make a complaint of bias against a judge. Providing a safe space to do so is of utmost importance to the proper administration of justice for all. Proposing to eliminate such a space is a move in the wrong direction and is likely to undermine the effectiveness of the local committees.	The work group appreciates the commenter's statement regarding the need for safe spaces for court users to make complaints about bias. The work group recognizes that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers, and that there is no one correct way to eliminate bias in court interactions. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures

	Commenter	Position	Comment	Committee Response
			For these reasons CWL must oppose the proposed edits which eliminate the informal complaint process to local bias committees. Thank you for your time and attention to this matter.	for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider the above discussed concerns before deciding to create or continue an informal complaint resolution procedure. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended. Finally, the work group notes the concern that it may be more difficult to facilitate discussions concerning bias if the local bias committee does not resolve informal complaints of bias. The proposed amendments task local bias committees with building partnerships between courts, local bias committees, and their communities to raise awareness regarding unconscious and explicit biases and to find ways to address and eliminate bias. While there would be no recommendation that local bias committees resolve informal complaints against specifically named judicial officer and employees, they would still play an important role in fostering discussions about bias, identifying and resolving systemic concerns, promoting community engagement, delivering formal and informal education about bias, and

	Commenter	Position	Comment	Committee Response
				discussing formal complaint mechanisms through the CJP or the presiding judge.
6.	Amitabho Chattopadhyay San Francisco	AM	While I support the expansion of the protected classes, and the usage of the general 'protected by federal or state law' qualifier, the scope of protected classes should explicitly incorporate not only enumerated classes, but also the unenumerated classes protected by the Unruh Act (Civ. Code section 51 et. seq.), such as political affiliation, personal appearance (except to the extent circumscribed by court rules and decorum), etc. This could perhaps be accomplished by adding 'including all classes protected by the Unruh Act (Civil Code section 51 et. seq.) '.	The work group appreciates this feedback. The proposal amends the list of protected classifications acknowledged in standard 10.20 by adopting the protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law.
7.	Contra Costa Superior Court Bias Committee by Hon. Joni T. Hiramoto, Committee Chair, Superior Court of Contra Costa County	N	[1] The Contra Costa County Superior Court Bias Committee submits the following comments on proposed changes to Standards of Judicial Administration, standard 10.20 (ITC SP21-03). The Contra Costa County Superior Court's Bias Committee is one of the first 10 established in the State of California, and has been in existence since 1992 – almost 30 years. Retired	The work group appreciates the information provided by the commenter and applauds the work the commenter has done on the elimination of bias.

	Commenter	Position	Comment	Committee Response
			Judge Barbara Zuniga was the first judge on this Committee, which was chaired by attorney Linda Debene. The MOU establishing this committee is attached. Two of the Committee's current members, Diana Becton (District Attorney of Contra Costa County, the first African American and first woman to hold this position) and Robin Pearson (partner at Ropers Majeski and recipient of the Contra Costa Bar Association's Outstanding Woman Lawyer of the Year award in 2019) were founding members of this Committee. The membership of our current committee also includes Judge Terri Mockler, who is currently on the CJA Ethics Committee and a past chair of that committee. Thus, this Court and this Committee have a particular interest in revisions to Standard 10.20 and, in particular, to the complaint process. [2] We oppose the proposal to eliminate the procedure for informal complaints of bias from Standard 10.20 for several reasons. [a] One concern expressed by the workgroup was the difficulty encountered by courts in creating a procedure or reviews of bias complaints. In our opinion, while creating a procedure unique to the needs of a particular county court certainly requires effort, the challenge is far from insurmountable. Our Committee has an	The work group appreciates the work that has been done by this commenter to create a functional complaint resolution procedure for complaints against judicial officers, as envisioned by the current version of standard 10.20. The work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. Nothing in the proposed amendments to the standard prevents courts and local bias committees that have existing informal

	Commenter	Position	Comment	Committee Response
			established procedure for handling such complaints and has recently revised our Local Rule 2.150 to update that procedure. Additionally, our Committee has recently handled a complaint against a bench officer according to the guidelines set out in Standard 10.20. [b]Another concern expressed by the workgroup is the nebulousness surrounding the standard of complaints "not warranting discipline." We believe the "not warranting discipline" standard could use some clarification but is not an entirely unworkable starting point. Bias Committee members are lawyers and judges who are used to working with difficult concepts. [c] Lastly, the workgroup was concerned that the bias process could cause conflict with labor laws, inasmuch as it might apply to complaints against employees. We agree with this concern, but do not agree that it is a basis for eliminating the complaint procedure entirely. For example, our complaint procedure applies only to bench officers and not to other court employees and thereby avoids the potential labor relations and human resources conflicts. A revised Standard 10.20 complaint process could be restricted so that it did not apply to employees.	complaint resolution processes for complaints against judicial officers, including the commenter, from continuing to use those processes, and other courts and committees may choose to create their own processes if those courts and committees conclude that is the best way to address bias complaints against judicial officers in their communities. If so, the work group recommends that they fully consider how best to address the concerns expressed below, and also outlined in the report and the Advisory Committee Comments. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended. Yet despite the success of the commenter in creating an informal complaint resolution procedure, the work group is aware that many other courts and local bias committees have encountered struggles to do the same. For example, having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would often be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. While this has not

	Commenter	Position	Comment	Committee Response
			[3] Our Committee seeks clarification as to whether the proposed revisions would eliminate the complaint procedure that our county has worked so hard to develop and of which it is so justifiably proud. We believe the complaint process is a necessary avenue for ensuring the prevention and elimination of bias in our court. We feel the complete elimination of an informal complaint process would set back years of work and progress, in our court and in others, towards the goal of prevention of bias in the judicial system statewide. [4] Our Committee believes that the elimination of this informal complaint procedure would leave certain court users with no avenue other than filing a complaint with CJP, which would lead to underreporting of incidents of bias. We believe there are events which would not "warrant discipline" from CJP but would warrant corrective action on a more informal level. We also believe that leaving incidents in this category solely to the responsibility of the Presiding Judge of the County to take "corrective action" has disadvantages in that: [a] the public may have more confidence in the process of a committee that includes lawyers and non-judges than in the decision-making process of a single individual who is a colleague of the subject of the complaint;	impacted the commenter, the work group has concerns that such an approach, if adopted statewide, would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. While the commenter agrees that the existing complaint resolution recommendations are unworkable for employees, similar concerns also exist for judicial officers. The work group is concerned that referring complaints against judicial officers to local bias committees might trigger various due process concerns, especially given that some local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer. In addition, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). A system where those complaints are handled informally, at a local level, could undercut those obligations.

	Commenter	Position	Comment	Committee Response
			[b] a committee is better situated to be consistent in the actions taken, in contrast to a Presiding Judge whose tenure changes every two years; and [c] the conduct might have been committed by the Presiding Judge. In our Local Rules, we have adopted a policy that a judge who is a member of the Court's Bias Committee shall not take part in any discussion, investigation or vote on a complaint directed at that judge. [5] We attach a copy of our Local Rule, 2.150 which sets out the purview of the court's complaint procedure. (This is in the most recent revision of the Local Rules, to become effective July 1, 2021.) Thank you for your work and consideration.	The commenter suggests that the elimination of informal complaint procedures could leave court users with no forum within which to file a complaint. The work group disagrees. The work group concludes that the existing procedures for resolving complaints against judges appropriately address those concerns. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, the ability to subpoena witnesses, confidentiality for complainants, and existing procedural safeguards to protect complainants from retaliation–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal internal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP

	Commenter	Position	Comment	Committee Response
				and the presiding judges, which may lead to inconsistent and less optimal handling of these complaints.
8.	Disability Rights California by Aisha C. Novasky, Attorney and Tiffany Nocon, Attorney, Los Angeles	A	Disability Rights California, the protection and advocacy system for the State of California, submits this letter in response to the Judicial Council's invitation to comment on the proposed amendments to Standard 10.20 of California's Standards of Judicial Administration, Court's Duty to Prevent Bias. DRC is in support of the proposed amendments that will support the integrity and impartiality of the judicial system and promote a courtroom environment free of bias or the appearance of bias. Disability Rights California (DRC) is the largest disability rights legal advocacy organization in the nation, and we work to ensure a barrier-free, inclusive, and diverse California that values each individual, their voice, and their right to equal opportunity. From 2018 to 2020, DRC advocated on behalf of 84 litigants with disabilities who were unable to access the courts because their reasonable accommodation requests were mishandled. Accordingly, DRC is encouraged by your efforts to amend Standard 10.20, as these amendments will improve reasonable accommodation processing for many of our clients and the communities we serve.	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			DRC is heartened that the proposed amended standard specifically includes litigants with disabilities, and we encourage courts to continue working with the disability community to appreciate their unique qualities and needs to access to the judicial system. The most common requested accommodations for people with disabilities are: • Extensions of time to submit documents • Telephonic or virtual appearances • American Sign Language interpretation • Transcripts and audio recordings of hearings • In-person mediation to be conduct via video • Permission to sit instead of standing in court • Permission to bring a service or support animal into a courthouse • Assistance with completing paperwork for reasonable accommodation requests The proposed changes to Standard 10.20(b) will ensure many of aforementioned accommodations are met, and will enable litigants with disabilities fair access to the courts, which is especially important for litigants without attorneys. Thank you for your consideration of our comments. DRC incorporates by reference written comments submitted by the Legal Aid	

	Commenter	Position	Comment	Committee Response
			Association of California. Please do not hesitate to contact me at (213) 213-8092 or Aisha.Novasky@disabilityrightsca.org should you have any questions regarding these comments.	
9.	The Elimination of Bias Committee for the San Bernardino Superior Court by Hon. Khymberli Apaloo, Co-chair and Hon. John Pacheco, Co-chair	AM	Thank you for your leadership on this statewide court initiative and thank you for the opportunity to provide comment on the proposed revisions to California Standards of Judicial Administration, standard 10.20. The Elimination of Bias Committee (EOBC) for the San Bernardino Superior Court supports the proposed revisions, and we agree that the proposed revisions to the Standard better align with current laws, data, literature, and best practices regarding bias. The EOBC has critically reviewed the proposed revised Standard and we offer the following comments: • The EOBC recommends that the first sentence in the Statement of Purpose be revised as follows: The California judicial branch is committed to ensuring, not only the integrity and impartiality of the judicial system, but also to ensure that the court interactions are free of bias as well as the appearance of bias. The EOBC believes that this revision more clearly articulates the Statement of Purpose. The EOBC does not recommend any	The work group notes the commenter's support for the proposed amendments and appreciates this input. The work group appreciates the commenter's suggested revisions to the Statement of Purpose. The work group concludes that the proposed amendment to the Statement of Purpose of standard 10.20 more accurately states the work group's intended purpose of standard 10.20, to ensure integrity and impartiality in the judicial system, and to commit that courtroom interactions, conducted at the local court level, should be free of bias and the appearance of bias.

	Commenter	Position	Comment	Committee Response
			revisions to the remaining text in the Statement of Purpose. • The EOBC agrees with the revisions to 10.20(c) for the reasons stated in the Work Group's request for comment. However, the elimination of bias is a lofty vision. To determine whether a court is attaining its vision, the court should identify measurable indicators of progress. Such indicators can inform the court of progress towards achieving its vision, and they can define areas where more targeted training is needed, whether to the group as a whole, or as recommendation regarding a particular judge. Therefore, some type of data collection requirement should remain in the Standard. That process could be as simple as tracking the types of complaints received by the court. The Presiding Judge could share the nature of bias-related complaints with the elimination of bias committees, and if appropriate, the committees could use the underlying anecdotes for training purposes. (No personally identifying information from the complaints would be shared with the elimination of bias committees.) Individual courts could collaborate with the Presiding Judge to determine the appropriate reporting	The work group appreciates the recommendation that local bias committees be required to track data on the types of complaints received by the presiding judge, and for local bias committees to establish methods of compiling data to enable them to measure progress in addressing bias. While this approach might be helpful for certain courts and local bias committees, the work group refrains from making specific data collection either a requirement or statewide recommendation. While the work group did consider setting baseline recommendations on reporting requirements and data collection, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in community outreach and

	Commenter	Position	Comment	Committee Response
			structure for the court, but the Standard should include a general requirement for courts to permit data collection regarding the types of complaints or underlying anecdotes that might be useful in educational programs. • Requiring courts to maintain and report complaint-related data to the elimination of bias committees also helps those committees maintain longitudinal data that reveals trends in the types of complaints made to the courts. Having this data will not only memorialize the committees' institutional knowledge as the constituency of the committees may change over the years, but it will also help the elimination of bias committees provide training that is targeted to rectify specific bias-related complaints that have been made to a particular court. • The Standard encourages courts to create local committees on bias, but given the courts' duty to prevent bias, the Standard should require courts to create elimination of bias committees, rather than making this crucial tool for eliminating bias elective.	educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments allow local bias committees to establish their own methods of compiling data that enable the local committees to measure progress in addressing bias and assess issues in a way that is tailored to the communities served by the courts. The work group appreciates this suggestion to make creation of local bias committees mandatory, and the work group strongly recommends that local courts create local bias committees. However, as stated in Cal. Rules of Court, rule 1.5(c), the Standards of Judicial Administration

	Commenter	Position	Comment	Committee Response
				within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and require direct dialogue between the local bias committee and the community. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves.

	Commenter	Position	Comment	Committee Response
			• As addressed above, the EOBC strongly believes that courts should identify accountability metrics that can guide the courts in their duty to prevent bias. To help accomplish this purpose, the EOBC recommends that revised sections (c)(2) and (c)(3) include a minimum requirement that courts must sponsor or support at least one educational program and at least one community engagement event annually. Merely recommending and not requiring courts to implement the training and community engagement that are critical to eliminating bias in the courts is inconsistent with the Standard's statement of purpose as well as the courts' duty to ensure integrity and impartiality of the judicial system.	The work group appreciates the suggestion that local bias committees be required to sponsor or support at least one educational and one community engagement event each year. The work group adopts the response given to this comment above. Specifically, while the work group did consider setting baseline minimum requirements on education, outreach, and data collection, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard, for the reasons outlined above. The proposed amendments allow local bias committees to establish their own type and number of education and outreach programs that are tailored to the needs and unique circumstances of the communities served by that court.
			The EOBC also offers the following responses to the specific questions posed in the invitation to comment: • Does the amended standard appropriately address the stated goal of amending Standard 10.20 to reflect current law and current understandings regarding the elimination of bias and provide a framework for courts to work with their local bar communities to address courtroom bias? Yes	The work group appreciates the feedback provided by the commenter on the specific questions asked by the work group in its Invitation to Comment.

	Commenter	Position	Comment	Committee Response
			• Does the proposal create any additional workload not considered by this Invitation to Comment? The invitation to comment adequately identifies fiscal and operational impacts. However, based on the Court's experience in creating and maintaining its EOBC, the Court suggests that a high-functioning elimination of bias committee may require more administrative support than is anticipated in the invitation to comment. • How well would this proposal work in courts of different sizes? The proposed revisions to the Standard maintain an appropriate balance of carrying out the Standard's purpose of eliminating bias in the courts with allowing individual courts enough flexibility to implement the Standard.	
10.	Equal Rights Advocates by Brenda Star Adams, Senior Counsel, Education Equity and Litigation, San Francisco	N	Madame Chief Justice and Members of the Judicial Council, Equal Rights Advocates respectfully submits this comment in opposition to proposed changes to the California Rules of Court, Rule 10.20 currently under consideration. **Background** Responding to findings by the 1987 Advisory Committee on Gender Bias, the California Supreme Court issued guidance requiring courts to establish local bias committees (LBCs) to	The work group appreciates this submission and agrees that there is a need to protect court users from bias, and acknowledges that the efforts to amend standard 10.20 originated from this need. The work group concludes that amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with legal

	Commenter	Position	Comment	Committee Response
			serve as engines of community education and to help review and resolve complaints of bias regarding members of the judiciary. The Judicial Council codified this requirement in CRC 10.20 in 1996, mandating that these committees and their functions be "memorialized in local rules of court." As of April 2020, after 25 years, thirty-one out of fifty-eight superior courts still had no reference to bias in their local rules of court at all, and only a handful were in full compliance with CRC 10.20. When advocates brought attention to this lack of compliance, several courts quickly announced newly-established LBCs. In November 2020, Chief Justice Cantil-Saukaye convened a Work Group to update the protected classifications listed in CRC 10.20, consider the optimal role and composition of the LBCs, and recommend other changes to better assist courts in maintaining a courtroom environment free of bias and the appearance of bias. The need for robust protections against bias—and accessible avenues for attorneys and litigants to seek recourse against it—remains significant in California's courts. The following table, displaying data from the Judicial Council of California and the California Bar Association reveals the extent to which the demographics of the bench do not match the California legal community or the California population as a	communities and engage in the process of conceptualizing outreach and educational programs. While the work group acknowledges the data regarding the demographics of judicial officers, addressing that disparity is beyond the scope of this work group. However, the work group notes the commenter's concern that those demographic disparities potentially increase incidents of bias concerning certain attorneys and court users from historically marginalized communities, and has been mindful of that disparity in making its proposal and in responding to the further concerns raised by this commenter. The work group appreciates the commenter's concern that the proposed amendment to replace a specific list of recommended members for makeup of local bias committees might lead to underrepresentation of certain groups. The work group considered making recommendations that certain demographic groups be included in local bias committees. While the work group promotes diverse membership in local committees, it also recognizes that identifying certain groups for inclusion can have the opposite effect—leading to exclusion of some groups and viewpoints, and creating a false sense of diversity that is antithetical to the elimination of bias.

	Commenter	Position	Comment	Committee Response
			whole. As is evidenced by the below chart, Latinx individuals, AAPI individuals, and women are underrepresented in both the California judiciary and the bar.[2] Representation matters when it comes to receiving fair treatment in court. This chart makes clear that attorneys and court users from historically marginalized communities have good reason for concern about bias from a judiciary that continues to disproportionately exclude them. "[A]lthough judges may pledge to be free from any bias or other improper influence when deciding cases, this pledge may be undermined when a judiciary is racially unrepresentative. Overt or subconscious bias in favor of one's own racial group often constitutes insensitivity to the plight of other racial groups that are not represented in the judiciary." A. Leon Higginbotham, Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge, 42 Dula 14 1028, 1059 (1993). The same logic applies to gender. While we applaud the Work Group's effort to ensure "court users feel that they have an avenue to discuss issues of bias in court interactions and inform the court," several	Instead, the proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique. The proposal allows courts to recognize and build on the unique aspects of their communities and gives those courts the flexibility to create committees within the broad framework and guidelines of standard 10.20 that address those unique viewpoints and needs.

2

	White	Black	Latinx	Asian/Pacific Islander	Native	Women	LGB	Trans
Judges	64%	8%	1%	8.5%	0.4%	38%	4%	0.1%
Attorneys	68%	4%	7%	13%	0.4%	42%	7%	Bar did not split LGB from T
Public	40%	6%	36%	16%	0.4%	50%	5%	0.4%

	Commenter	Position	Comment	Committee Response
			recommended changes fall short of advancing this goal, or actually work against this objective. ERA supports creating a broader and more inclusive duty on the part of court officers to prevent bias, but, as discussed in further detail below, we oppose diluting obligations to ensure representation of historically-marginalized groups on LBCs and the elimination of these committees' role in receiving and reviewing complaints of bias. **Diverse Representation on LBCs is Crucial to Eliminating Bias in the Judiciary** The addition in subsection (b)(1) of gender expression and gender identity as protected classifications is a laudable change to more comprehensively protect California's court users from bias. Similarly, the shift from "prohibiting" to "preventing" bias in "all court interactions" not just "court proceedings" places appropriate burdens on court officers to proactively eliminate bias wherever they have purview to do so. However, the amendments in subsection (c)(1) undercut this commitment by eliminating directives to ensure representation on LBCs by women, members of minority and immigrant communities, LGBTQI+ individuals, and individuals with disabilities. The proposed amendment replaces an express list of historically marginalized communities that LBCs must work to include with a general call for "individuals who interact with the court and	

	Commenter	Position	Comment	Committee Response
			reflect and represent the diverse and various needs and viewpoints of court users." This new, vague standard removes key guidance to maintain diverse, representative LBCs, and denies community members a clear standard for holding courts accountable to this goal. **LBCs are Crucial to Ensure Complaint Procedures are Accessible and Equitable** Equal Rights Advocates also opposes the Work Group's proposal to abandon CRC 10.20's required LBC bias complaint procedures in favor of "ensur[ing] that court users can access existing complaint resolution procedures." This would leave those who have experienced bias only two options: (1) complain directly to the presiding judge of the relevant court, or (2) complain to the Commission on Judicial Performance (CJP). The Work Group's concerns about redundancy or creating a conflict with the existing CJP procedures fail to address a troubling reality: each year since 2011, nearly 1,200 complaints have been brought to the CJP, accounting for about half of all California judges. Approximately 90% of these complaints are closed without investigation, and fewer than 5% result in discipline. State of California Commission on Judicial Performance 2020 Annual Report, pp. 18-20.	The work group notes the commenter's concerns regarding the elimination of the recommendation that local bias committees adopt informal complaint resolution procedures, and concerns regarding the CJP's ability to handle informal bias complaints. As discussed in both the accompanying report and the Advisory Committee Comments, the proposal eliminates the recommendation that local bias committees adopt an informal complaint process, in part because there are many existing, effective, and updated avenues for making complaints regarding bias in court interactions, including avenues through the CJP and to the presiding judge or justice of the local courts, and due to potential conflict between the multiple avenues for raising complaints. The commenter has raised specific concerns that the CJP dismisses many complaints without investigation. The CJP is the independent state agency established by the California Constitution, which is responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. As stated on its website at *cjp.ca.gov*, "[t]he commission's mandate is to

	Commenter	Position	Comment	Committee Response
			The CJP, which is disproportionately white (64%) and male (64%), explained that "a substantial percentage [of complaints] alleged legal error not involving misconduct or expressed dissatisfaction with a judge's decision." While this justification sounds reasonable, its explanation for the cases where no discipline was given is less compelling. In those cases, the CJP claimed that the allegations were unfounded or unprovable, or the judge in question gave an "adequate" explanation of the situation. Id. at 16. However, a 2019 report by the Auditor of the State of California found that the CJP does not consistently take all reasonable steps when it investigates alleged misconduct, its structure and disciplinary processes do not align with best practices, and it has not worked sufficiently to increase transparency and accessibility. Commission on Judicial Performance, Report 2016-137, pp. 2-3 (emphasis added). The report further found that the CJP failed to detect warning signs and patterns of ongoing misconduct, and their pattern of investigating a very small percentage of reports hindered their ability to identify trends and root out bias. Id. at 23. These low rates of investigation or sanction have an unclear impact on individuals' willingness to report, but over a decade, this dynamic has likely discouraged reporting and limited the judiciary's overall understanding of the prevalence of bias. Given that the CJP has not	protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system" and the CJP investigates "conduct in conflict with the standards set forth in the Code of Judicial Ethics." This includes responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)). As discussed by the Director-Chief Counsel of the CJP at his presentation to the work group at its public meeting in May 2021, many of the complaints that do not result in CJP investigation are from litigants about the outcome of individual cases. These complaints do not relate to conduct set forth in the Canons of Judicial Ethics, and therefore are not appropriate for resolution by the CJP. There is no indication that the CJP is dismissing any significant number of bias or conduct complaints without inquiry or investigation.

	Commenter	Position	Comment	Committee Response
			implemented any suggested improvements from this 2019 report, routing complaints through robust local procedures managed by diverse and independent LBCs could allow for more thorough investigation of a greater proportion of complaints. In light of the CJP's shortcomings, providing multiple avenues for complaint is not redundant; the best employers make various methods available for reporting sexual harassment and other discrimination because they want to reduce barriers to reporting and end such discrimination. If the judiciary shares these same goals, it should maintain alternative reporting processes like LBC-managed complaint procedures. **The Work Group's Concerns about Privacy Do Not Outweigh the Need for Diverse LBCs** The Work Group further cites privacy, personnel, or labor relations concerns with having local bar members and community representatives review complaints of judicial bias. First, reporting to the Presiding Judge—which the Work Group endorses as one of the "existing procedures" about which courts should better educate their users—raises even greater concerns. The risks to privacy or sensitive working relationships are potentially even greater when reporting to the Presiding Judge, especially where they or their colleague are the subject of the complaint. Moreover, discrimination is already so severely	The commenter also suggests that "routing complaints through robust local procedures managed by diverse and independent LBCs could allow for more thorough investigation" than what is provided by CJP. The work group acknowledges that may be the case for some of the largest, most experienced, and best resourced local bias committees, but has significant concerns whether this would be the result in all communities throughout the state. The work group is concerned that referring complaints against judicial officers to local bias committees might trigger various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer or court employee. The work group concludes that the existing procedures for resolving complaints against judges appropriately address those concerns. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges

	Commenter	Position	Comment	Committee Response
			underreported, it is unreasonable to presume that the average litigant would feel comfortable making an accusation of judicial bias directly to the Presiding Judge of the court in which the bias took place. Even if they were comfortable making such a complaint, because of the Presiding Judge's position as a member of the judiciary and likely colleague of the subject of the complaint, litigants may lack faith that anything will come of their complaint and may choose not to report for that reason. The same logic applies to the CJP, especially given its dismally low numbers of complaints investigated, let alone resulting in discipline. With these as the only two options available to litigants experiencing judicial bias, complaints of judicial bias will continue to be chilled and go unremedied. As with sexual harassment, providing additional options could help counter substantial under-reporting of the discriminatory conduct the rules aim to prevent. For example, the EEOC found that approximately 70% of people who experience sexual harassment never report to any authority figure who can help, and that 75% of those who did report faced retaliation. They further found that "organizational indifference or trivialization of the harassment complaint" was a common response and discouraged reporting overall. Chai R. Feldblum & Victoria A. Lipnic, June 2016 Report of the Co-Chairs of the Select Task	with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal internal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints. In addition, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice, or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). A system where those complaints are handled informally, at a local level, could undercut those obligations.

	Commenter	Position	Comment	Committee Response
			Force on the Study of Harassment in the Workplace, EEOC 2016. Thus, providing a safe, inclusive, and representative option for reporting judicial bias will likely result in an increase in reports made and adequately processed. Any concerns the Work Group has regarding confidentiality and privacy can be addressed with policies and procedures limiting the disclosure of sensitive information, and do not warrant completely abandoning the complaint management role of the LBCs.	While the commenter suggests that privacy and confidentiality concerns will be heightened if local bias committees no longer resolve informal bias complaints, the work group concludes the opposite is true. Having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Unlike entities such as the CJP, members of local bias committees may not necessarily be bound by ethical or statutory obligations to maintain the confidentiality of complainants. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant.

	Commenter	Position	Comment	Committee Response
				Yet for those local bias committees that do have the resources, experience, and ability to create informal complaint resolution procedures, creating an informal complaint resolution process to resolve bias complaints against judicial officers is still an option. The work group recognizes that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers, if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the concerns raised above. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended.

	Commenter	Position	Comment	Committee Response
			The Work Group convened in response to widespread non-compliance with CRC 10.20 and a failure by courts throughout the state to establish LBC-led bias complaint procedures. Their recommendation that Californians jettison a complaint procedure that was never properly implemented and instead rely on two processes that are demonstrably flawed will not meet the judiciary's purported goals of preventing bias and remedying it when it occurs. Therefore, Equal Rights Advocates must respectfully oppose rule changes which eliminate the complaint procedures administered by LBCs and dilute requirements that LBCs be representative of historically marginalized communities. We request a re-write of CRC 10.20 to be conducted with a more diverse Work Group which includes employment attorneys, civil rights attorneys, and members of diversity bar associations, reflecting the laudable aims and broadening of anti-bias protections articulated elsewhere in these proposed changes.	Amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs. Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to eliminate bias in all court interactions, Chief Justice Tani G. Cantil-Sakauye appointed a small work group comprised entirely of Judicial Council members, and gave it a limited charge, which enabled the work group to swiftly and efficiently propose amendments to update the standard. The work group includes judicial officers, attorneys, and a court executive officer. Several members of the work group have experience in these and related issues from serving on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, met with various local bias committees, and met with interested groups

	Commenter	Position	Comment	Committee Response
				throughout the process who wanted to share thoughts and ideas for amending the standard.
11.	Fabrice Dejean, Wilmington	AM	The court's MISSION is to prevent bias, the court's DUTY is to REPORT bias. To reach this goal, the Court must implement new RULES OF COURT that DEFINE bias and PROHIBIT the behavior. PUNISHING violators will WARN attempters, and PREVENT future bias to the best of OUR abilities.	The work group appreciates this submission and notes the commenter's suggestion that the work group create a mandatory rule of court with applicable punishments for bias. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and require direct dialogue between the local bias committee and the community. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and partner with their local communities to find solutions that meet the unique and specific needs

	Commenter	Position	Comment	Committee Response
				of each court and the local community that it serves.
12.	Family Violence Appellate Project by Cory Hernandez, Staff Attorney, San Francisco	AM	The following comments are submitted by Family Violence Appellate Project (FVAP) regarding the Judicial Council's (Council) Invitation to Comment proposal number SPR21-03, concerning proposed changes to standard 10.20 of the California Standards of Judicial Administration. FVAP is a California and Washington state nonprofit legal organization whose mission is to ensure the safety and well-being of survivors of domestic violence and other forms of intimate partner, family, and gender-based abuse by helping them obtain effective appellate representation. FVAP provides legal assistance to survivors of abuse at the appellate level through direct representation, collaborating with pro bono attorneys, advocating for survivors on important legal issues, and offering training and legal support for legal services providers and domestic violence, sexual assault, and human trafficking counselors. FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of abuse and their children to obtain relief from abuse through the courts. Because of FVAP's connections to survivors of abuse who have engaged with the courts, it is uniquely positioned to assess the impact of the Council's	The work group appreciates the commenter's feedback that it supports much of the proposal, and addresses the commenter's concerns below.

	Commenter	Position	Comment	Committee Response
			proposed changes to the judicial standards regarding preventing bias in court interactions. Notwithstanding concerns and suggested amendments discussed below, FVAP supports much of this proposal. For instance, shifting the focus from prohibition to prevention of bias will, as the proposal notes on page 3, require courts to move beyond "simply forbidding" bias and more comprehensively taking actions "to combat" it. And shifting the focus from solely courtroom proceedings to all interactions with court employees will ensure coverage of more instances of potential bias, especially since most litigants interact more with court employees other than their assigned judicial officer. **Still, there is room and need for improvement on the proposal, as detailed below in five points.** **First,** removing the requirement for committees to implement a local informal complaint procedure without requiring an alternative seems ill-advised. Although the local committees under the current standard 10.20 may not be the best option to handle such complaints, given the reasons outlined in the proposal at page 7, at least the court itself should be required to institute and maintain such a complaint procedure by litigants against court employees (and others who work at and for the court, as explained further below). True, complaints against judges are resolved by the	The work group notes the commenter's concern that the elimination of the recommendation that local bias committees adopt informal complaint procedures without requiring an alternative will leave court users without options to raise concerns, but also notes that each court may implement alternative options appropriate to the conditions in their local community. The work group concludes that the existing procedures for resolving complaints against judges appropriately address those concerns. As noted on its website, *cjp.ca.gov*, the CJP has

	Commenter	Position	Comment	Committee Response
			Commission on Judicial Performance, but that does not allow for any informal resolution and the Commission's procedures themselves are opaque and difficult for many to understand. Plus, complaints about other judicial officers are handled differently, if at all. For instance, the Commission has no jurisdiction over temporary or private judges, nor, it seems, does the court because neither is considered a court employee—although, as discussed below, there may be other ways for courts to in some ways control or influence non-court employees. And of course the Commission has nothing to do with non-judicial officer court employees. Moreover, there is no requirement in the proposal for the courts (or anyone) to address complaints by litigants against court employees. On page 12 of the proposal, the proposed advisory committee comments to standard 10.20 read in pertinent part, "Similarly, rules 10.351 and 10.610 of the California Rules of Court, as well as Government Code section 71650 et seq., create authority and complaint resolution processes for addressing complaints against court employees." However, the cited authority do not in fact create or require any process for litigant complaints against court employees and other workers. Rule 10.351 of the California Rules of Court, for instance, does not apply to litigant complaints as it only applies to	authority over all superior court judges, all justices of the Courts of Appeal and Supreme Court, and has joint authority with the local court over referees, commissioners, and other subordinate judicial officers. The CJP is well equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation. In addition, complaints against both judicial officers and court employees may be made at the local court level. Complaints about judicial officers, including subordinate judicial officers and temporary judges assigned to the court, may be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal internal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address

	Commenter	Position	Comment	Committee Response
			employee complaints of workplace conduct. And rule 10.610 merely provides general duties of the court executive officer, including the duty to create and follow a personnel plan as per rule 10.670. Yet the requirements of the personnel plan in rule 10.670 do not include a complaint procedure for litigants against court employees; again, the only complaint procedure mentioned is for the "treatment of employees," i.e., for court employees to complain of workplace conduct. Finally, Government Code section 71650 et seq. does not require creation of a complaint procedure for litigants against court employees. Rather, that article merely provides for an "employment protection system" by establishing minimum procedural requirements for employee discipline. (Gov. Code, § 71650, subd. (a).) Separately and additionally, that article does not apply to subordinate judicial officers or certain employees not within the court's employment protection system. (Id., § 71650, subds. (d)(1)-(2).) This proposal should require courts to have a procedure for resolving complaints by litigants against court employees, and not rely on good faith of courts to institute one on their own.	issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints. Likewise, local courts have robust procedures for dealing with complaints against court employees, including those raised by court users. While the commenter notes that not every statutory authority cited by the work group in its Invitation to Comment actually contains a complaint resolution process, these statutes and rules provide the authority for courts to address employee conduct and create complaint resolution procedures. These procedures are often codified in personnel policies, memorandums of understanding, or other similar documents that govern the terms and conditions of employment. Courts have a legal responsibility to take immediate corrective action on certain types of complaints against court employees. Generally, those complaints can be made to the employee's supervisor or court management and are ultimately the responsibility of the court executive officer. Finally, the work group recognizes that some local bias committees have established effective informal complaint resolution procedures to address complaints against judicial officers. As

	Commenter	Position	Comment	Committee Response
				discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures to address complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the concerns regarding local complaint resolution procedures outlined in the report. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended. Given the wide array of avenues for court users to file complaints against judicial officers and court employees, the work group recognizes that educating the public about those methods is critical. As a result, the work group opted to recommend that each court effectively communicate information to its court users regarding existing procedures to submit

	Commenter	Position	Comment	Committee Response
				complaints regarding bias in court interactions. While many courts already provide this information on their court websites, in their local rules, or displayed in courthouses, the revised standard recommends that all courts take similar steps to ensure that they are providing complaint procedure information to court users in a meaningful and accessible manner.
			Second, the list of protected classifications in the proposed standard should be expanded to include the status of being a victim of abuse, including domestic or sexual violence. Domestic and sexual violence are grievous problems in our state that cut across all genders, sexual orientations, races, ethnicities, ability levels, socioeconomic levels, and professions.	The work group notes the suggestion to include victims of abuse as a protected classification under the standard. The proposal, however, amends the list of protected classifications acknowledged in standard 10.20 by specifically adopting the protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law.

	Commenter	Position	Comment	Committee Response
			Third, the last sentence of revised standard 10.20(b)(1), at page 8 of the proposal, seems to set an overly broad standard for an exception that seems to swallow the rule: "The court, judicial offices, and court employees may consider such classifications only if necessary or relevant to the proper exercise of their adjudicatory or administrative functions." We would strongly suggest removing the phrase "or relevant." If the consideration is necessary, it must be relevant. But if the consideration is only relevant, it may not be necessary. Leaving the decision of what is relevant for consideration up to the individual employee seems problematic as it could in some circumstances effectively nullify the prohibition of bias that was established in the first place. For example, if a transwoman presents a court clerk with a petition for a domestic violence restraining order and selects "F" for female on her request form (DV-100), but the clerk accepting the petition does not believe she presents as female for some reason, the clerk may feel it "relevant" to ask, "You checked the F here for gender, but are you really a woman?" This question is not necessary: the clerk does not need to ask it to properly file the request. The question is also plainly transphobic and harmful. Such interactions could be avoided by disallowing circumvention of the prohibition on considering those protected characteristics,	The work group notes the commenter's suggestion to remove the phrase "or relevant" from standard 10.20(b)(1). The terms "necessary" and "relevant" are not redundant. "Necessary" and "relevant" are different standards with different definitions, and the work group notes that there could be circumstances where it may not be "necessary" (e.g. required) to consider a classification, but that the classification could still be relevant to the proceeding.

	Commenter	Position	Comment	Committee Response
			unless necessary to the proper exercise of power.	
			Fourth, while covering all court employees in this standard is a good and necessary step forward, that does not necessarily include everyone who may work in and for the court and interact with a litigant. For instance, employees of a local government or agency may work at and for the court, such as security guards or child custody evaluators or mediators, who would not otherwise be characterized as court employees. And the court may hire independent contractors or temporary workers who may not otherwise be classified as employees. As such, these other workers do not appear to be covered by this proposal but everyone should be held to the same standards of preventing bias. While courts may not be able to directly influence individuals who are not their employees, at the least the Council's rules and standards of court should require courts to take certain actions before deciding whether to hire a non-employee, such as providing training for them and engaging in a memorandum of understanding to ensure all those working within the courts are held to the same standards.	The work group agrees with this comment, but notes that no further amendment is necessary. The proposal is very broadly worded to apply to "each court, its judicial officers, and its employees." The inclusion of "each court," listed separately from its judicial officers and employees, is meant to emphasize that the court itself has an obligation to refrain from bias and prevent biased behaviors. The "court" may include people beyond its judicial officers and employees, and the court should take steps to make sure that all people who work at or conduct business at the court, including contractors, judicial partners, government agency employees, and volunteers, act in an appropriate manner while engaging in court interactions. The work group leaves decisions regarding policy creation, notice, and enforcement to the local courts, consistent with the unique circumstances of that court.
			Fifth, requiring courts to implement these changes "as soon as possible," as per proposed standard 10.20(f), is not strong enough. What	The work group notes the commenter's concern regarding the absence of a specific timeline to implement standard 10.20. The proposal

	Commenter	Position	Comment	Committee Response
			constitutes "as soon as possible" and who decides? When directing the Council, the Legislature often sets deadlines in its legislation; the Council should do the same here for courts, to ensure the changes take effect in a reasonable timeframe. In short, FVAP supports the spirit and many provisions of this proposal, but as outlined above, more and revised provisions are needed to improve litigants' fair access to the court.	encourages courts to implement the revised standard "as soon as possible." This acknowledges the importance of addressing bias in court interactions. If the Judicial Council adopts the proposed amendments to standard 10.20, the amended standard will go into effect on January 1, 2022, and courts may begin immediate implementation. The work group has not identified a specific implementation date because it recognizes that each court will follow a unique process in forming a local or regional committee on bias and that, as a result, the timeframes for forming local or regional committees in each community may vary.
13.	Filipino Bar Association of Northern California by Jennifer Sta.Ana, President, San Francisco	N	The Filipino Bar Association of Northern California (FBANC) opposes the Work Group's proposed changes to California Rules of Court, Rule 10.20, Court's duty to prohibit bias. In November 2020, the Chief Justice of California appointed the Work Group to identify improvements and proposed amendments to Rule 10.20. The result: one central proposal is the elimination of the local bias committees in favor of obligating courts to direct complainants to existing complaint resolution processes. FBANC opposes these proposals for the following reasons. Rule 10.20 imposes a duty on California courts to establish a local bias committee staffed by diverse members of the local bar community.	The work group appreciates this submission and notes the commenter's concerns regarding the elimination of the recommendation that local bias committees adopt informal complaint resolution procedures, and concerns regarding the CJP's ability to handle informal bias complaints. As discussed in both the accompanying report and the Advisory Committee Comments, the proposal eliminates the recommendation that local bias committees adopt an informal complaint process, in part because there are many existing, effective, and updated avenues for making complaints regarding bias in court interactions, including avenues through the CJP and to the presiding judge or justice of the local courts, and due to potential conflict between the multiple avenues for raising complaints.

	Commenter	Position	Comment	Committee Response
			One of the critical functions of the local bias committees is to accept and resolve complaints of bias in courts. Rule 10.20(c)(d), for instance, requires that courts have "[m]inimum components of a complaint procedure." Although it came to light in spring 2020 that nearly all of the Superior Courts in California were out of compliance with California Rule of Court 10.20(c)(d), the Work Group has proposed to eliminate the complaint procedure. This proposal is inexplicable in light of the fact that such a rule has never been widely adopted and effectively implemented. The Work Group asserts that eliminating the local bias complaint structure is preferable to strengthening Rule 10.20(c)(d). According to the Work Group, other existing complaint resolution processes renders redundant the local bias committee required under 10.20(c)(d). Not so. Even the annual reports by the Commission on Judicial Performance show that a complaint filed with their body is in fact no resolution at all. Rather, a complaint to such a body is almost always likely to be dismissed without an investigation. And even in the rare instance where a complaint is actually investigated, the complaint is shortly dismissed without any meaningful resolution for the complainant or changes to courtroom conduct. See Commission on Judicial Performance 2020 Case Statistics and Commission on Judicial Performance,	The work group concludes that the existing procedures for resolving complaints against judicial officers appropriately address those concerns. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal internal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints.

	Commenter	Position	Comment	Committee Response
			"Weaknesses in Its Oversight Have Created Opportunities for Judicial Misconduct to Persist", Auditor of the State of California, April 2019, Report 2016-137. Another example of this proposal's shortcoming is the elimination of Rule 10.20(e)(7). This provision provides guidance to each local committee on bias because it clearly identifies which groups are protected and what kind of conduct is reportable. As it stands, complaint procedures apply to "incidents of bias whether they relate to race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." Eliminating this clear and specific language in favor of merely ensuring that "court users can access information regarding how they can submit complaints regarding bias" confuses rather than clarifies. Consequently, the Work Group's proposals must be rejected. In light of the lack of viable alternatives, Rule 10.20 should be strengthened, not weakened. Eliminating the minimal procedures and approving what the Work Group proposes, however, weakens Rule 10.20 in its entirety. One example of how Rule 10.20 may be strengthened is by ensuring confidentiality to potential complainants. The Work Group proposes as another alternative to the local bias	Having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. The work group is also concerned that referring complaints against judicial officers and court employees to local bias committees might trigger various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint

	Commenter	Position	Comment	Committee Response
			committee the fact that "courts have developed robust procedures for addressing such complaints." For instance, in many courts, "complaints against judicial officers . . . are made to the court's presiding judge." This is not enough. The purpose of Rule 10.20 is to establish a neutral third-party composed of disinterested attorneys from the community. Complainants must feel confident that even though they may file a complaint of bias about a presiding judge or their staff in connection with a present case, they are not risking their client's interest, nor their own reputation before the judiciary. Aside from failing to shield complainants from potential retaliation and other adverse actions, it is not in the spirit of Rule 10.20 to leave complainants relying on presiding judges to accept complaints and to regulate themselves regarding their own biases.	against a judicial officer or court employee. Likewise, referring complaints about court employees to local bias committees may create personnel and labor relations concerns, given that courts have existing personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to local bias committees deprives courts of the ability to address the complaint internally and comply with any legal obligations the courts may have arising from the complaints, including the need to take immediate corrective action in certain circumstances. In addition, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). A system where those complaints are handled informally, at a local level, could undercut those obligations. The commenter raises concerns that the CJP dismisses many complaints without investigation. The CJP is the independent state agency

	Commenter	Position	Comment	Committee Response
				established by the California Constitution, which is responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. As stated on its website at *cjp.ca.gov*, "[t]he commission's mandate is to protect the public, enforce rigorous standards of judicial conduct and maintain public confidence in the integrity and independence of the judicial system" and the CJP investigates "conduct in conflict with the standards set forth in the Code of Judicial Ethics." This includes responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)). As discussed by the Director-Chief Counsel of the CJP at his presentation to the work group at its public meeting in May 2021, many of the complaints that do not result in CJP investigation are from litigants about the outcome of individual cases. These complaints do not relate to conduct set forth in the Canons of Judicial Ethics, and therefore are not appropriate for resolution by the CJP. There is no indication that the CJP is

	Commenter	Position	Comment	Committee Response
				dismissing any significant number of bias or conduct complaints without inquiry or investigation. The work group recognizes that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the concerns raised above. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended.

	Commenter	Position	Comment	Committee Response
			In short, FBANC proposes that the Rule Committee reject these proposals. Instead, the Rule Committee may consider re-constituting the Work Group. FBANC proposes that amendments to Rule 10.20 be conducted with a Work Group comprised of civil rights attorneys, employment attorneys, and members of diversity bar associations, if possible. FBANC would encourage this reconstituted Work Group to identify proactive measures for eliminating bias in the courts and in court interactions. Court personnel, for instance, should have clearer guidance and authority in prohibiting and preventing bias in courts and in interactions with the court. The importance of eliminating bias in the courts demands that the Rule Committee approach this with care, respect, and inclusion of appropriate voices. Thank you for your consideration of public comment.	Amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs. Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to eliminate bias in all court interactions, Chief Justice Tani G. Cantil-Sakauye appointed a small work group comprised entirely of Judicial Council members, and gave it a limited charge, which enabled the work group to swiftly and efficiently propose amendments to update the standard. The work group includes judicial officers, attorneys, and a court executive officer. Several members of the work group have experience in these and related issues from serving on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, met with various local bias committees, and met with interested groups

	Commenter	Position	Comment	Committee Response
				throughout the process who wanted to share thoughts and ideas for amending the standard.
14.	Tara Repka Flores Yuba City	AM	The term "Bias" is a polite term for a much uglier truth. Blatant racism and mistreatment of people of color in the court system flourishes in the dark and undermines the validity of the entire system, which in turn destabilizes our society. The work you are undertaking here is of the utmost importance. Given the importance of your work, it is vital that you make meaningful changes. Stop making recommendations and start making requirements; every court needs to have a bias committee or you end up in the ridiculous situation of allowing the people responsible for perpetrating the bias be responsible for controlling the elimination of bias and even worse for handling complaints of bias – this will never work.	The work group appreciates the commenter's position and agrees that the efforts to combat bias in court interactions are of the utmost importance. The commenter suggests that the work group mandate certain actions in standard 10.20, rather than making recommendations. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and require direct dialogue between the local bias

	Commenter	Position	Comment	Committee Response
				committee and the community. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves.
			Please take consideration of a more global perspective of how to eliminate bias as well. While training and a complaint process and body are the bare minimum to make an attempt at addressing bias, consider how very ugly forms of bias flourish in the dark and are enabled by secrecy. Our courts are allowed to operate in a state of quasi secrecy. Implement transparency. Eliminate the situation where courts can limit the number of people in a court room, limit access to media both by denying media coverage requests and by rescheduling procedures over and over to discourage media coverage, and have blatant displays of bias	The work group appreciates the suggestions regarding transparency and access. The work group notes that addressing issues such as livestreaming proceedings, access to court records, and press access to court proceedings is beyond the work group's charge to propose amendments to standard 10.20. Public access to court proceedings is addressed in California Rules of Court, rule 1.150, which pertains to photographing, recording and broadcasting court proceedings, the use of personal recording devices, and media coverage of court proceedings. Public access to court records is addressed in California Rules of Court, rules 2.503 – 2.507. The work group also notes the suggestion that it make specific recommendations regarding court

	Commenter	Position	Comment	Committee Response
			observed only by a small number of people which are not recorded in the official record. Have standard requirements for allowing access to court records – allowing extreme limitations on how many people can attend court in person, coupled with the lack of live streaming, and adding a challenging environment for gaining access to court records in a timely manner creates the perfect storm for bias to flourish. Change the foundation of how we are doing things to disallow this environment to exist. Half of our courts in California already live stream proceedings. Bring the rest of the courts out of the dark and require live streaming of all proceedings so that the public can see what is happening. Require audio recordings of all proceedings including chambers proceedings and have the bias committee audit a random sample of those proceedings, rather than waiting for people being mistreated to navigate how to make a complaint. Bring court proceedings out of the dark! Shine light on biased behaviors and make the perpetrators of those behaviors feel the need to hide instead of allowing the behaviors to be blatantly out in the open. Through simple transparency, make those who would lead with bias uncomfortable enough to change. Require your bias committees to obtain and report out relevant data to hold the institution	access and transparency of proceedings. The work group considered setting baseline recommendations for courts and local bias committees on various topics such as education, outreach, and transparency. However, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in community outreach and educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish proposals specific to the local community's needs and to obtain input from the local community. Likewise, the work group has left the decision to collect and report data, and the details of that

	Commenter	Position	Comment	Committee Response
			accountable. Without this information a bias committee is also in the dark, doing things for feel good reasons, without any reality mixed in.	decision, to the local courts and local bias committees. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish proposals specific to the local community's needs and to obtain input from the local community.
			Finally, remember crime victims of color. So much of the focus of bias in the system looks at bias focused on perpetrators, but victims of crime experience bias in the court system in a way that is really disturbing and is often overlooked. You must include victims of color in your attempts at addressing bias.	The work group appreciates the suggestion to increase focus on victims, especially victims of color. The proposal amends the list of protected classifications acknowledged in standard 10.20 by adopting the protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). The decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law. There is no restriction that protected classifications apply only to perpetrators and not victims. It is the work group's intention that a victim of a crime would be included within the protections of the standard so long as the conduct was based on an included protected classification, such as color.

SP21-03

Judicial Administration: Court's Duty to Prevent Bias (Amend Cal. Standards of Judicial Administration, standard 10.20)

All comments are verbatim unless indicated in brackets, with omissions indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
15.	Hogue & Belong by Jeffrey Hogue San Diego	A	This rule change was brought to my attention by a listserv where I am a member. The chair was unhappy with the changes and requested her members to take action. So, I reviewed the memo and the proposed changes to the rule. I am of the opinion that the proposed changes are fine, but I know it is next to impossible for everyone to agree with any proposed change. I particularly liked the fact the commission did away with quotas in establishing diversity, as explained on page 5 of the memo.	The work group notes the commenter's support for the proposed amendments and appreciates this input.
16.	Hon. Colette Humphrey Presiding Judge, Superior Court of Kern County	A	I approve of the recommendations and thank the community for their work on this important issue.	The work group notes the commenter's support for the proposed amendments and appreciates this input.
17.	Hon. Stephanie Jones Judge, Superior Court of Solano County	A	No specific comment.	The work group notes and appreciates the commenter's support for the proposed amendments.
18.	Hon. John Monterosso Presiding Judge, Superior Court of Riverside County	A	The committee did an excellent job updating 10.20 to reflect current circumstances. The current standard creates confusion by creating another process for investigating complaints that overlaps and interferes with existing processes. The committee correctly pointed out the pitfalls of having local committees (consisting partly of lawyers and community members) concurrently investigate judges and other employees of the court when there already exist robust processes to do so. I fully support the proposal to have courts prominently post on their websites how and where to file complaints.	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
19.	Hon. Dylan Sullivan Judge, Superior Court of El Dorado County	AM	"The court ***should*** establish a local committee…" I think the rule should say, "***shall***." This is a strong message to all the local courts. Many small and rural counties (and maybe bigger counties) do not have elimination of bias committees. If we do not mandate, then we will not eradicate bias in our courts. This is the first step.	The work group appreciates this submission and notes the commenter's suggestion that standard 10.20 require local bias committees, rather than recommend them. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and require direct dialogue between the local bias committee and the community. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and

	Commenter	Position	Comment	Committee Response
				partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves. The work group also notes that the current proposal allows courts to create regional committees.
			The counties can create regional committee to leverage the resources and the time. Please consider my suggestion.	
20.	Hon. David Wolf Judge, Superior Court of Kern County	A	I would like to thank the Chief Justice and members of the working group for their hard work and outstanding suggestions for improving the current rule. Elimination of Bias is a very important topic and is critical to our system of justice. I have been working with our local bar association with judges and attorneys from another county trying to work within the former guidelines. The former framework was very difficult to work with and detracted from the time and energy available to work on some training and educational programs. Thank you again for what clearly took a significant amount of time, energy and thought. You should be very proud of your hard work. I am grateful for the outstanding work done improving standard 10.20. These improvements will allow those of us working to achieve the Elimination of Bias from our judicial system to focus our time and	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			energies on training and educational opportunity.	
21.	Hon. Robin L. Wolfe Judge, Superior Court of Tulare County	A	I would like to commend the Chief Justice and work group for their hard work and dedication in tackling the Court's duty to prohibit bias. The proposed amendments to 10:20 are a significant improvement and address all the concerns we have been struggling with to update our local rules of court. We agree the focus of the local committee should be on education, transparency and accessibility rather than creating or overseeing a disciplinary/complaint procedure with limited resources and potential conflicts of interest. We also appreciate the consideration and flexibility the amendments allow to smaller courts to take into consideration their unique circumstances and demographics in forming their committees as well as the ability to join other small courts to allow for more diversity, shared resources, and resolve potential conflicts of interest.	The work group notes the commenter's support for the proposed amendments and appreciates this input.
22.	John Hsu Paralegal Member, California Employment Lawyers Association, Berkeley	AM	Background 1987 – 2021 Alternating between "prevent bias" and "prohibit bias." Bias, intentional discrimination, harassment have origin in learned behaviors, attitudes, & stereotyping. The Proposal • Limiting "bias" to "protected classifications" Is this necessary?	The work group appreciates the comments regarding the proposal, and will address the specific comments it believes are raised by the commenter. The commenter notes the proposed change to "prevent" bias. As discussed in the accompanying report, and as outlined in the Advisory Committee Comments that accompany standard 10.20, this is a significant change. The advisory comment to this revision notes that: "the standard now asks

	Commenter	Position	Comment	Committee Response
			• Addressing all "court interactions" • Local bias committees' optimal role is informal, secondary, supportive, and optional. But, does the collaborative process not induce mutual respect and long-term harmony? • Availability of resources and expertise requires that CJP examine, investigate, and evaluate formal complaints about judicial officers. "Prevent" vs "prohibit" "Prohibit" disallows, forbids, and eliminates bias. "Prevent" permits, allows, tolerates, and shelters bias. Must the Code of Judicial Ethics and Justice be compromised? Statement of purpose Ensure the integrity and impartiality of the judicial system. How an exception may swallow the rule California Code of Judicial Ethics Canon 1. A judge shall uphold the integrity and independence of the judiciary.	courts, judicial officers, and court employees to take actions to prevent bias rather than prohibit bias. This change reflects a more comprehensive approach in how courts are to combat bias, focusing on understanding the many forms, causes, and impacts of bias rather than simply forbidding it. Preventing bias may include, for example, prohibiting bias; encouraging judicial officers, employees, and court users to report bias; being open to discussing and learning from real misunderstandings and instances of unconscious bias; and focusing on robust education regarding how unconscious and explicit biases develop, how to recognize them, and how to address and eliminate bias." This change in focus should provide clear guidance to courts and local bias committees as to the intention of the work group in how courts can best address bias in court interactions. The work group also notes that the commenter has mentioned the proposal to define protected classifications more broadly. The work group is of the view that this too is a positive change. The proposal amends the list of protected classifications acknowledged in standard 10.20 by adopting the protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This

	Commenter	Position	Comment	Committee Response
			An independent, impartial, and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved. The provisions of this code are to be construed and applied to further that objective. A judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this code. ADVISORY COMMITTEE COMMENTARY: Canon 3B(2) Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office. Canon 1 provides that an incorrect legal ruling is not itself a violation of the law. The Commission on Judicial Performance has provided an important Qualifier to this Exception: "A judge's legal error might be a basis for investigation by this commission if there is sufficient evidence of bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law or any purpose	amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law. The work group also notes that the commenter has referred to the intended role of local bias committees as "informal, secondary, supportive, and optional." That is not the intention of the work group. To the contrary, the proposed amendments empower local courts and local bias committees to partner with their communities and adopt meaningful changes that are tailored to the specific needs of the community. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in

	Commenter	Position	Comment	Committee Response
			other than the faithful discharge of judicial duty." The California Supreme Court's Advisory Committee is therefore urged to incorporate this Qualifier into the Committee's ADVISORY COMMITTEE COMMENTARY. Re: SP21-03 California Code of Judicial Ethics Violations of Judicial Canons Rehab judges Judicial Council PJ Institutes Presiding Judges, assisting in rehab Classes Types? How the "vexations litigant statute "can come to judges' rescue? Education, in place of discipline Relaxing the Code of Judicial Ethics? Issues considered: Bias Discrimination Harassment Retaliation Origin of bias Learned behavior Attitudes	community outreach and educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish standards specific to the local community's needs, to obtain input from the local community, and to drive meaningful change. The commenter also appears to make a specific recommendation regarding changes that the California Supreme Court's Advisory Committee can incorporate into the Advisory Committee Comments for the Canons of Judicial Ethics, and for the rehabilitation and discipline of judicial officers. These comments and recommendations are beyond the scope of this work group, and the comment will be forwarded to the California Supreme Court Advisory Committee for their additional consideration. The work group has redacted part of this comment discussing the commenter's own personal complaint of bias due to privacy concerns, and also because the comment is outside the scope of this work group.

	Commenter	Position	Comment	Committee Response
			Stereotyping Behaviors manifested Supremacy Lack of patience Dominance Brutality Criminal offense Lack of respect for others Trickery Substance abuse Beyond hope Treatments needed: Psychological assessment Medication Who is responsible for paying for the prolonged treatments? Judicial Council of California? Taxpayers? The Judges themselves? Discipline CJP Resources Expertise 2019 State Auditor's Report on CJP Big progress is being made at CJP • Filing Complaint online, providing for submission of supporting documents	

	Commenter	Position	Comment	Committee Response
			• Promptly acknowledging receipt of Complaint • Clear Guidance is provided on: o The Types of Conduct that are considered; o The circumstances under which a judge's legal error might become the basis for CJP's investigation. A real-life example of Judicial Misconduct • Has the Work Group anticipated such outrage? • Is the Work Group prepared to deal with it? [* The remainder of the comment has been redacted because it is the commenter's own personal complaint of bias. This raises privacy concerns and the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.]	
23.	Legal Aid Association of California by Selena Copeland, Executive Director, San Francisco	A	I am writing on behalf of the Legal Aid Association of California (LAAC) to express our **support** for SP21-03 (Judicial Administration). We support SP21-03 because it would amend California Standard of Judicial Administration (Standard 10.20) to support the integrity and impartiality of the judicial system by promoting a courtroom environment both free of bias as well as the appearance of bias.	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			LAAC is a statewide membership association of over 100 public interest law nonprofits that provide free civil legal services to low-income people and communities throughout California. LAAC member organizations provide legal assistance on a broad array of substantive issues, ranging from general poverty law to civil rights to immigration, and also serve a wide range of low-income and vulnerable populations. LAAC serves as California's unified voice for legal services and is a zealous advocate advancing the needs of the clients of legal services on a statewide level regarding funding and access to justice. We support the working group's proposal to (1) update the list of protected classifications enumerated in the standard, (2) more broadly define the scope of the standards and its applicability to all court interactions, (3) define the optimal role for local bias committees and outline contemporary considerations for the makeup of those committees, and (4) ensure that court users can access information regarding how they can submit complaints regarding bias about court employees and judicial officers in court interactions. **The elimination of bias at the judicial level is critical and fundamental to access to justice.** The enhancement of Standard 10.20 demonstrates the Council's commitment to the elimination of bias not only in the courtroom	

	Commenter	Position	Comment	Committee Response
			but during all court interactions by regularly reviewing that commitment to ensure it is modernized to accurately reflect current understandings of elimination of bias and that those standards are realistically applicable. Bias contributes to staggering disparities in our justice system and revising the 10.20 standard is one essential step to take when addressing and eliminating bias that exists in all courtrooms around the state. **1. More Broadly Define the Scope of the Standards and its Applicability to All Court Interactions** Although we support all of the recommendations made by the work group, we especially approve of the proposal to expand the responsibility to ensure integrity and impartiality beyond "courtroom proceedings" to all "court interactions" including interactions in the clerk's offices, at public counters, and in other places where court users may interact with judicial officers and court staff. This is particularly important because the legal system is not only made up of attorneys and judges; bias can be found preliminarily in one's legal journey and every step of the process should be free of any biased decisions.	

	Commenter	Position	Comment	Committee Response
			2. Define the Optimal Role for Local Bias Committees and Outline Contemporary Considerations for the Makeup of Those Committees Another essential step in addressing bias is education and training for those who work in the judicial system and those making important decisions. Research shows that trial court judges often rely on intuition, rather than deliberative judging, in deciding matters before the bench, fostering unconscious and explicit bias results. We approve of the recommendations regarding local committees, mandating that they not only engage in regular outreach to their local communities to learn about the issues of importance—including ongoing dialogue regarding concerns related to bias in court interactions—but to also sponsor and support educational programs designed to eliminate unconscious and explicit biases within the court. SP21-03 will hopefully reduce the impact of bias in the courtroom and make the justice system more just. **We support SP21-03.** Thank you again for this opportunity to comment. Please do not hesitate to reach out to me with questions or comments.	
24.	Los Angeles County Bar Association (name not provided)	AM	In 1990, the Judicial Council Advisory Committee on Gender Bias in the Courts published a comprehensive report on bias in the judicial system, and issued 68 recommendations all unanimously adopted by the Judicial	The work group appreciates this submission and notes the commenter's concern that eliminating the recommendation that local bias committees adopt informal complaint resolution procedures is premature, and that there has not been sufficient

	Commenter	Position	Comment	Committee Response
			Council.[3] This led to the creation of local bench/bar committees on bias in the courtroom, and the adoption of Standard of Judicial Administration 10.20 ("Standard 10.20"). The rationale behind the rule was explained as follows: "the Advisory Committee on Gender Bias in the Courts found that attorneys frequently noted incidents of gender bias for which there were no appropriate remedies. These incidents were not severe enough to warrant submission of complaints to the responsible disciplinary bodies but were nevertheless annoying and unwarranted from the complainants' perspectives. The advisory committee therefore recommended that local groups be formed to experiment with informal complaint resolution methods and educational programs designed to address these less egregious incidents of bias."[4] In spring 2020, the California Employment Lawyers Association surveyed the Superior Courts in California and discovered nearly all of them were out of compliance with Standard 10.20. The Daily Journal also conducted a survey finding that "at least 22 of 58 superior	time to determine if these informal complaint processes are helpful. The work group also notes that it spoke to a number of local bias committees and interested groups during its deliberative and drafting process. Members of the work group met with many local bias committees to gather their thoughts on a myriad of topics, including whether local bias committees should handle informal bias complaints. While the work group featured two local bias committees at its public meeting, work group members were provided briefings about the additional meetings with other local bias committees. Similarly, work group members met with a number of interested persons and groups throughout the process, including members of the California Employment Lawyers Association and the California Judges Association, and provided briefing to the full work group on those meetings as well. The work group also had an early comment period, in addition to this public comment period, so that it could gather feedback from further interested parties who had not met personally with the work group. As a result, the work group was adequately informed in making these recommendations.

[3] Advisory Committee to Implement Gender Fairness Proposals Subcommittee on Local Fairness Groups, Workshop for Local Fairness Committees Report and Recommendations (July 12, 1992).
[4] Ibid.

	Commenter	Position	Comment	Committee Response
			courts are not complying with a decade-old California Judicial Council recommendation that they establish committees to address courtroom bias."[5] Throughout the year, courts all across the state started forming committees.[6] The Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings now invites the public to comment on its proposed amendments to Standard 10.20, the majority of which are welcome updates to the rule. We write now only to raise concern about the elimination of the complaint procedure in Standard 10.20. Many counties have just begun to form committees pursuant to Standard 10.20, and there has not yet been a comprehensive study of the success of the disparate counties' efforts to implement this rule. In the fall of last year, the California Judges Association announced that its task force on "allegations of bias and inequality in the justice system" intended to become a resource for county courts to share information about Standard 10.20 committees.[7] Such a task force is well positioned to survey the counties about the effectiveness of the 10.20 complaint procedure, and perhaps identify best	The work group recognizes that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the specific concerns posed by informal complaint procedures that are outlined in the report and mentioned below. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended.

[5] Jessica Mach, Daily Journal, "22 Counties not in compliant with bias committee recommendations" (July 6, 2020).
[6] See, i.e., Jessica Mach, Daily Journal, "3 county courts have plans to launch bias committees" (August 5, 2020).
[7] Jessica Mach, Daily Journal, "New head of Judges Association targets budgets, pensions" (Sept. 29, 2020).

	Commenter	Position	Comment	Committee Response
			practices. While the present work group invited two of these county committees to speak at a meeting, we believe a more comprehensive review is warranted before eliminating the complaint procedure. We conclude by observing that the purpose of Standard 10.20 was to capture information about incidents at bias at the courts, incidents which did not rise to the level of a report to a disciplinary authority. Without further study into whether litigants and lawyers are bringing these incidents to the courts' attention, we believe it is premature to eliminate the "informal procedure" in Standard 10.20. Thank you for your consideration,	The work group, however, is proposing that standard 10.20 no longer recommend that local bias committees create informal complaint resolution procedures to resolve complaints that accuse an individual of bias. The work group makes this proposal because of the many existing and updated avenues for making complaints against individuals regarding bias in court interactions, including avenues at both the local court level and through the CJP. The work group is concerned that recommending another procedure—undertaken by variously sized, experienced, and resourced committees who may be unable to guarantee confidentiality in the complaint process—might create conflicts between procedures, and may trigger privacy, personnel, due process or labor-relations issues. The work group, however, does envision that local bias committees will engage in education, community outreach, and discussion about courtwide and systemic bias issues that do not directly accuse an individual of wrongdoing. Given that some courts and local bias committees have created informal complaint resolution procedures and intend to keep using them for complaints against judicial officers, and that others will likely continue to rely on internal court complaint procedures and CJP procedures for resolution of such complaints, this should allow courts and local bias committees to gather

	Commenter	Position	Comment	Committee Response
				information to compare the merits of different processes.
25.	Shannon McHenry Connorsville, Indiana	N	I would like to see the Commission take a look at Britney Spears. She is being kept as a modern day slave. She has no medical evaluation saying a conservatorship is necessary, and while they say it is "voluntary", she clearly told judge Brenda Penny she wanted the conservatorship dissolved and it was not- in fact it was disregarded and Judge Penny went on to discuss a new "careplan" with a provider! I am in shock this is allowed to continue. Please, just look at the documents, you will be shocked at what she has had to live through.	Evaluating conservatorship proceedings is beyond the scope of the proposal. Information regarding conservatorship proceedings can be found here: https://www.courts.ca.gov/7813.htm
26.	Michael [No last name provided] San Francisco	AM	Annually, convene local court racial bias commissions and committees to discuss progress, share local efforts and discuss plans moving forward.	The work group appreciates the commenter's suggestion that local bias committees meet annually to discuss local efforts. While the work group did consider setting baseline recommendations on the number and types of meetings for local bias committees, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the

	Commenter	Position	Comment	Committee Response
				proposal broadly recommends that local bias committees engage in community outreach and educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish meetings and standards specific to the local community's needs, and to obtain input from the local community.
27.	Marcie Phillips advocate/member One moms battle, Newport Beach	A	Are you agree with the proposed changes and I'm glad this is being addressed in Family Court. [* The remainder of the comment has been redacted because it is the commenter's own personal complaint of bias. This raises privacy concerns and the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.]	The work group notes the commenter's support for the proposed amendments and appreciates this input. The work group has redacted the remainder of this comment discussing the commenter's own personal complaint of bias due to privacy concerns, and also because the comment is outside the scope of this work group.

	Commenter	Position	Comment	Committee Response
28.	Deborah Blair Porter Manhattan Beach	AM	Dear Sir or Madam - Please see my attached comments to the proposal reflected in Invitation to Comment SP21-03 (Work Group to Enhance Administrative Standards Addressing Bias in Court Proceedings). Based on the court's website, I understand these comments are due today (June 25, 2021) and that this comment is timely submitted. (https://www.courts.ca.gov/policyadmin-invitationstocomment.htm) I would appreciate your confirming this comment has been received. Thanks in advance for your assistance. <u>Introduction</u> On June 8, 2020, Chief Justice Tani Cantil-Sakauye, responding to demonstrations in California's streets, issued a statement decrying the deaths of George Floyd and others: "Justice is the first need addressed by the People in the preamble of our nation's Constitution. As public servants, judicial officers swear an oath to protect and defend the Constitution. We must continue to remove barriers to access and fairness, to address conscious and unconscious bias – and yes, racism. All of us, regardless of gender, race, creed, color, sexual orientation or identity, deserve justice. Our	The work group appreciates the commenter's perspectives on the proposal and addresses the specific concerns raised by the commenter below. The work group notes that it has redacted portions of this comment because those portions reflect the commenter's own personal complaint of bias. This raises privacy concerns and the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.

	Commenter	Position	Comment	Committee Response
			civil and constitutional rights are more than a promise, a pledge, or an oath – we must enforce these rights equally. Being heard is only the first step to action as we continue to strive to build a fairer, more equal and accessible justice system for all."[1] [* A portion of the comment has been redacted because it is the commenter's own personal complaint of bias. This raises privacy concerns and the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.] As a result of Chief Justice Cantil-Sakauye's June 8, 2020 statement, I first became aware of Standard 10.20 and the court's duty to prohibit bias, as well as its lack of implementation and enforcement for over two decades. When Chief Justice Cantil-Sakauye appointed the Work Group to "Enhance Administrative Standards Addressing Bias in Court Proceedings," and called for the Standard to be enhanced, updated, and improved, and brought into modern-day usage and alignment with California Rule of Court ["CRC"] 10.351, I committed to following the new Work Group's activities.	The proposal was broadly disseminated for public comment, including posting on the Judicial Council webpage for public comments, a press release notifying the public that an Invitation to Comment on the proposal was posted, reference to the fact that the proposal had been posted for public comment at the May 21, 2021 Judicial Council meeting, and direct communication with many individuals and groups that had requested notification when the proposal was posted for comment.

[1] California Chief Justice Speaks Out on Addressing Racism and Bias," June 8, 2020. https://newsroom.courts.ca.gov/news/california-chief-justice-speaks-out-addressing-racism-and-bias

	Commenter	Position	Comment	Committee Response
			After contacting the court about the status of the Work Group, in late April, I received an email informing me the Work Group would hold a public meeting May 4, 2021. I listened to this meeting and was heartened by the reports from various county courts which had undertaken the process of establishing local bias committees in their communities. While the meeting involved discussion of Standard 10.20, there was no indication when any proposal would be forthcoming and the only information I had received from the court's representative was that another call for comments would occur when the Work Group made its proposal in the next few months. On May 21, 2021, I happened to listen to the Judicial Council's public online meeting. During the report of the Rules Committee, I was surprised to hear mention of the word "bias" and realized Standard 10.20 was being discussed, although I had seen nothing on the agenda about it. I was also surprised to learn a proposal had been issued May 13, 2021, only nine days after the Work Group's public meeting at which no forthcoming proposal was mentioned. While the Judicial Council meeting was ongoing, I checked the Work Group's public webpage,[2] but found nothing regarding an	Further, the work group made substantial efforts to assure that the process for reviewing and proposing amendments to standard 10.20 was an inclusive process. Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to eliminate bias in all court interactions, the Chief Justice created a limited charge and appointed a small work group comprised entirely of Judicial Council members, which enabled the work group to swiftly and efficiently update the standard. Several members of the work group served on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, met with interested groups throughout the process who wanted to share thoughts and ideas for amending the standard, hosted a public meeting to discuss its ideas, and sought input through this public comment process.

[2] https://www.courts.ca.gov/biasworkgroup.htm?fbclid=IwAR223W0axe4GQ8BAcV3yXYkWR1QKDhuKIxwKyA--lwrfdFDc__D9RDZr_n8#panel44784

	Commenter	Position	Comment	Committee Response
			invitation to comment or an opportunity for public input. I actually went back through the Judicial Council website to access the Rules Committee Report[3] to trace back to the May 13, 2021 Invitation to Comment[4] (which at that point only allowed comments through June 11th). As of the date of this submission, more than a month and a half after the Invitation to Comment SP21-03 was issued, it still does not appear on the Work Group's public web page and members of the community who may be interested in the Work Group's efforts have no idea an "Invitation to Comment" was issued or that they have been foreclosed from providing input. This does not reflect an inclusive process. This does not ensure the involvement of interested stakeholders. This is not how a process ostensibly focused on overhauling a standard to eliminate bias should be undertaken. Ironically, at the same May 21st Judicial Council meeting, Chief Justice Cantil-Sakauye touted the *National Center for Access to Justice* ranking California 4th in terms of access to justice (behind Washington DC, Massachusetts and Connecticut). In reality, the *National Center*'s website statistics show that while California may be ranked as the 4th highest state (it is actually in the 5th position considering	

[3] https://jcc.legistar.com/View.ashx?M=F&ID=9414363&GUID=004D74FB-D3FF-4177-8711-377C09559A70
[4] https://www.courts.ca.gov/documents/sp21-03.pdf

	Commenter	Position	Comment	Committee Response
			Washington, DC), its rubric score is only 61 out of 100. Grading on a purely objective scoring system, this means California is barely passing with a low D in terms of access to justice.[5] On closer examination, the *National Center*'s statistics makes it apparent California is doing even worse in terms of disability access. [6] In the May 21, 2021 Judicial Council meeting, the Chief Justice stated that the mantra for California's courts over the past several decades has been "access to justice." Unfortunately, as parents of an adult with disabilities, this has not been our experience in California's courts. In fact, it was because our frontline perspective has been so different from what the Chief Justice described that I decided to follow the activities of this Work Group. Despite listening to the Work Group's May 4th public hearing, it was only by sheer luck and happenstance that I learned of this opportunity for comment. That is extremely unfortunate for those who may have been foreclosed from this opportunity, as well as for the Court. <u>Work Group's Charge</u> Based on court press statements, as well as the Work Group's website, the Work Group's charge was to "enhance Administrative	The proposed standard 10.20(a) sets a high bar for California courts, stating that "The California judicial branch is committed to ensuring the integrity and impartiality of the judicial system and to court interactions free of bias and the

[5] See, https://ncaj.org/state-rankings/2021/justice-index.
[6] https://ncaj.org/state-rankings/2020/disability-access

	Commenter	Position	Comment	Committee Response
			Standards Addressing Bias in Court Proceedings," "identify improvements" and "propose amendments to existing Standards of Judicial Administration, standard 10.20 – Court's duty to prohibit bias", to "ensure that standard 10.20, last substantively amended in 1997, reflects - current law and current understandings regarding the elimination of bias." The Work Group was also to "augment" the Judicial Council's recent actions and recommendations related to the Work Group on Prevention of Discrimination and Harassment, adopted in July 2019, reflected in CRC 10.351, and adopted by the Judicial Council in January 2020. [7] The Work Group was given topics to evaluate, including CRC 10.351, and told to specifically consider "updating the list of protected classifications " in the current standards; "the optimal role and composition of local bias committees" and "other changes to better assist courts in maintaining a courtroom environment free of bias and the appearance of bias."[8] <u>Work Group's Proposal</u> At page 8 of ITC SP21-03, the Work Group's "Request for Specific Comments," queries	appearance of bias." Critical to that commitment is that each court "work within its community to improve dialogue and engagement with members of various cultures, backgrounds, and groups, to learn, understand, and appreciate the unique qualities and needs of each group." In addition, subdivision (b) gives each court, its judicial officers, and court employees the "duty" to "ensure integrity and impartiality" in court interactions. These standards provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs. Amending standard 10.20 is a necessary *first* step in renewing the branchwide commitment to the elimination of bias in all court interactions. It is clear that the emphasis now turns to courts and local bias committees to build on this framework to create their own meaningful processes. While the work group did consider setting firm baseline recommendations or mandates on the role of local bias committees, including the number and type of education programs, specific required community outreach activities, mandatory reporting requirements by local bias committees, and specific complaint resolution processes, it

[7] https://newsroom.courts.ca.gov/news/california-chief-justice-appoints-new-work-group-address-bias-court-proceedings; https://www.courts.ca.gov/biasworkgroup.htm#panel44783.
[8] *Ibid.*

	Commenter	Position	Comment	Committee Response
			"Does the amended standard appropriately address the stated goal of amending Standard 10.20 to reflect current law and current understandings regarding the elimination of bias." This comment responds to that query. After reviewing ITC SP21-03, my answer to this query is a resounding no. While the Work Group's amendment and proposal includes a few good suggestions, it misses the mark in terms of achieving the overarching goal of updating, enhancing and improving Standard 10.20 so as to address and eliminate bias in California's courts. The proposed amendment does nothing to remove barriers to access and fairness, address conscious and unconscious bias, including racism, or take steps to enforce rights equally or equitably. In fact, the proposal the Work Group has presented not only will not ensure progress toward eliminating bias, it proposes changes to the Standard that are not in keeping with the historical trend of the Standard, or other actions toward accountability the Judicial Council has taken, including CRC 10.351, which arose out of the efforts of the Prevention of Discrimination and Harassment Work Group. Instead, the proposed amendments would actually lessen the authority and strength of Standard 10.20.	ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The work group expects courts and local bias committees to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in community outreach and educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish standards specific to the local community's needs and to obtain input from the local community. The work group expects that courts will do just this; otherwise, they may not be able to meet the ambitious statement of purpose and duties outlined in the amended standard 10.20(a) and (b).

	Commenter	Position	Comment	Committee Response
			The proposed amendment does not encourage or require greatly needed bias education by or for the courts, and in fact does not seem to require any action or change on the part of California's judicial officers. It actually eliminates the complaint process in the current standard that has gone unenforced for over two decades and fails to replace it with anything other than cavalier references toward complaint processes it asserts are plentiful, "existing" and "robust," ignoring that such processes are not readily available or accessible to those who do not regularly use the courts or that they may be even more inaccessible to individuals with disabilities, including those with visual, language, cognitive or other disabilities that may preclude them from accessing such "existing" complaint systems. Most troubling is that despite the charge to the Work Group that it look to the efforts undertaken by the Prevention and Elimination of Harassment and Discrimination Work Group, which resulted in the enactment of CRC 10.351, the framework of that Rule, which could serve as a good model and the complaint process it includes, were considered but then ignored. The proposed amendment as it stands does not meet the charge, and actually does not seem to establish any goals that will result in any action or outcome that will eliminate bias.	

	Commenter	Position	Comment	Committee Response
			The proposed amendment will not build the "fairer, more equal and accessible justice system for all," Chief Justice Cantil-Sakauye called for nor does it ensure all citizens, including those in various protected classes, are "heard" in California's courts. While it uses the words "fairness and integrity in California's judicial system," language from the Judicial Canons, this language alone, without goals or action will not lead to improvement or foster confidence in California's court system. If adopted, the bar will be set so low that the net effect of this proposal will be to allow bias to continue unchecked in California's courts, without accountability or redress. This does nothing to ensure the fairness and integrity promised by California's judicial canons and will only lead to greater inequity, denial of access to justice and greater dissatisfaction overall on the part of California's citizens. [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. Based on what has happened [in our experience], we do not believe the Work Group's proposed amendment comes close to being effective in terms of eliminating bias nor will it lead to systemic change in California's courts.	

	Commenter	Position	Comment	Committee Response
			While we recognize that what happened to [us] may be a unique circumstance, and certainly hope that is the case, so long as California's courts fails to count and account for people with disabilities in cases in the courts, problems such as we experienced will persist, despite the status of this group as a "protected class" under California law. For these reasons we do not agree with the approach of the Work Group's proposal. What follows is our input and recommendations regarding what the Work Group and the Judicial Council should do instead and an analysis of the lack of data regarding disability in California's court system. We have also included a document entitled "Judicial Officer Actions Reflecting Bias Based on Disability" which lists the actions by judicial officers in [our case] we believe reflected bias. <u>Input</u> The Work Group needs to examine and utilize "The Evolving Science on Implicit Bias,"[9] discussed in greater detail below. The Work Group should recognize that current Standard 10.20 does not *"recommend"* judicial officers do not engage in bias, it *prohibits bias,* that "prohibit" is a far more preferable and	The work group acknowledges the commenter's concern that changing standard 10.20 from "prohibiting bias" to "preventing bias" may weaken the standard. As discussed in the

[9] https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911

	Commenter	Position	Comment	Committee Response
			powerful word than "prevent" as "prohibit" carries the power and authority of the law and the Judicial Canons of Ethics, which also use that term. CRC 10.351, which the Work Group was to rely on to *augment* Standard 10.20 also uses the term "prohibit." The only issue with the term "prohibit" in the Standard is that it has not been sufficiently implemented or enforced. The rationale and explanations the Work Group uses to justify using "prevent" over "prohibit" do not make sense or measure up.[10] The Work Group needs to adhere to the Standard's historical trend toward greater prohibition, especially as there has been no implementation or compliance that would justify such a rollback. It is fruitless and counterproductive to prevent progress particularly as Chief Justice's June 8, 2020 statement stated the need for change. The Work Group proposal actually uses language that will weaken the standard, do nothing to reduce or eliminate bias, will not lead to systemic improvements or change nor will it lead to greater fairness or integrity and thus will not foster confidence in California's courts.	accompanying report, and as outlined in the Advisory Committee Comments that accompany standard 10.20, the opposite is true. The advisory comment to this revision notes that: "the standard now asks courts, judicial officers, and court employees to take actions to prevent bias rather than prohibit bias. This change reflects a more comprehensive approach in how courts are to combat bias, focusing on understanding the many forms, causes, and impacts of bias rather than simply forbidding it. Preventing bias may include, for example, prohibiting bias; encouraging judicial officers, employees, and court users to report bias; being open to discussing and learning from real misunderstandings and instances of unconscious bias; and focusing on robust education regarding how unconscious and explicit biases develop, how to recognize them, and how to address and eliminate bias." This change in focus should provide clear guidance to courts and local bias committees as to the intention of the work group in how courts can best address bias in court interactions.

[10] The current proposal will do nothing to prevent the sort of bias [we] experienced, as it not only rolls back the standard, but fails to ensure accountability, even eliminating the complaint procedures the current Standard required in collaboration with local bar associations and failing to replace it. As history shows, the local bar association complaint processes never materialized and there has been no accountability whatsoever. The current proposal would, in fact, enable bias to continue without review, as it proposes relaxing the current Standard which was simply not implemented or enforced.

	Commenter	Position	Comment	Committee Response
			The Work Group needs to understand that to eliminate bias, judicial officers should not avoid considering protected classes or classifications (as the Proposal suggests at page 4; in the proposed amendment at 10.20(b)(1) and in the Advisory Comment), ***but instead focus on them, consider them, acknowledge them and learn about them.***[11] The Work Group needs to examine the language of its proposal and the bias and deflection reflected in its use of language, including language which actually seeks to avoid addressing bias, requiring education or any meaningful actions on the part of judicial officers, and instead suggests the law is discretionary or that judges need to be "asked," "encouraged," or otherwise cajoled to do what the law and rules require. The Work Group needs to take a lesson from the processes of the Work Group on Prevention of Discrimination and Harassment which led to the issuing of CRC 10.351 and the CLASP "Strategic Plan for Language Access in the California Courts" and the processes each reflect with regard to redressing complaints through structured and documented complaint processes that have meaning and capacity.	The work group notes the commenter's position that the amended standard 10.20 should mandate requirements. However, as stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and

[11] [*A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above].

	Commenter	Position	Comment	Committee Response
			The Work Group needs to consider a far more comprehensive process overall that will include stakeholders not just from outside the court system but also specifically from protected classes the Work Group presumes to speak for. The Work Group needs to give this effort a far more concerted, thoughtful, organized and inclusive effort than what has occurred and not rush to put something out because of a deadline, but because it has thoroughly vetted and completed the task at hand.[12] Most importantly, the Work Group should be providing notice to interested parties, including those outside the court system, and not pushing out a "proposal" under the radar by using the Rules Committee, as it did with the May 13th proposal, failing to publicly post its proposal on the Work Group website to this day. Standard 10.20 has not been implemented or enforced for over twenty years. This is a problem and a reflection of the underlying reality that there is no real, meaningful complaint system in place in California that allows court users to redress grievances against judicial officers who engage in bias and other misconduct and holds judicial officers truly	require direct dialogue between the local bias committee and the community. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves. The work group notes the commenter's concerns regarding the composition of the work group, the commenter's concern with the openness and thoroughness of the work group's process, and that there is still work to be done on eliminating bias in court proceedings. As discussed in response to the commenter's remarks above, the work group's process was open and inclusive, consistent with legal requirements and Judicial Council policies and procedures. Although its work to amend standard 10.20 has been thorough, the work group also acknowledges that this

[12] Also, what is the basis for the assertion at page 6 of the proposal that "identifying certain groups for inclusion" in local bias committees or any group working to effect change will necessarily create "a false sense of diversity" or will lead to "exclusion of some groups and viewpoints"? Most likely groups were referenced in the Standard because of the recognition at the time of the historical exclusion of these groups from such committees. Not identifying groups, presuming to speak for them and excluding them from processes such as this invitation to comment seems far more contrary to diversity.

	Commenter	Position	Comment	Committee Response
			accountable for their actions on the bench with any consistency, accountability or transparency. The result is that today too many judicial officers seem to believe California laws and rules are discretionary, including laws and rules intended to ensure access to the courts through accommodations for individuals with disabilities. In order to eliminate bias, the Standard needs to address these attitudes, have goals that will lead to action that will require accountability for bias, and require California's judicial officers to meaningfully ensure the rights of protected classes and be held accountable for their failure to do so. The present proposal also changes language that doesn't need changing, inserts superfluous unnecessary language already stated in the Judicial Canons of Ethics, and avoids addressing the meat of the subject - how to prohibit bias, how to educate judicial officers and court employees about it and what complaint procedures are needed for when they don't learn the lessons intended by the Standard. Included below is a list of recommendations regarding the proposal and the process undertaken, as well as for California's court system overall. The Work Group and California's courts as a whole must recognize that individuals with developmental or other cognitive disabilities, as	proposal is just the first step in the process of eliminating and preventing bias in court interactions, and now the focus shifts to courts and local bias committees to take specific actions within the guidelines set by the amended standard. As to concerns regarding the composition of the work group, the work group is a diverse group of judicial officers, attorneys, and a court executive officer. Several members of the work group served on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The fact that the work group was so experienced in these matters allowed it to work quickly and efficiently. The work group members supplemented their own personal experiences and work on prior work groups by implementing an early comment period specifically designed to seek input from interested groups and persons, and also meeting with interested groups who wanted to share thoughts and ideas for amending the standard. The work group was well informed in undertaking its charge.

	Commenter	Position	Comment	Committee Response
			well as language comprehension and processing challenges, need and are entitled to effective communication[13] and that parents and companions assisting such individuals are a necessary part of the access process that judicial officers should not deny, but instead encourage. Effective communication and facilitation not only ensures an individual's access to the court, but leads to greater clarity for the individual with disabilities and the court itself, with everyone on the same page and better understanding all around. The Work Group should also examine its privilege in terms of its familiarity with court processes and procedures and recognize that just saying "there are existing complaint processes" or "see code section or rule x, y and z" does not mean complaint processes are available or accessible, especially for people with language, visual, print or other disabilities who may not have access to such processes. This does not begin to address challenges individuals with developmental disabilities or cognitive impairments face in accessing the courts,[14] as	The work group agrees with the commenter that complaint procedures should be readily available to court users. The work group's proposed amendment states that each court should ensure that court users can access information regarding how to submit complaints regarding bias, including information regarding how to submit complaints about court employees directly to the court and how to submit complaints about judicial officers either directly to the court or to the CJP. The work group also notes in its report that while many courts already provide this information on

[13] *See,* ADA 28 CFR §35.160. https://www.ada.gov/effective-comm.htm
[14] *See* 09/24/19 letter, Spectrum Institute to Judicial Council: "Spectrum Institute believes that the Judicial Council has engaged in unlawful discrimination by indicating that the duty of courts to offer disability accommodations is dependent on a request. Rule 1.100, educational presentations by Judicial Council staff, and materials developed for attorneys, court staff, and the public all convey such an impression. For example, a recently published benchguide is conspicuously silent regarding the duties of judges when a self-represented litigant with obvious disabilities fails to make an ADA accommodation request. ("Handling Cases Involving Self-Represented Litigants," Judicial Council (April 2019) There are no court rules, webpages, or educational materials clarifying that local courts do have sua sponte ADA duties

	Commenter	Position	Comment	Committee Response
			well as how such individuals are precluded from independently presenting complaints regarding the court or judicial officers due to difficulty in accessing such processes, beyond the complex process of redressing grievances regarding denial of accommodations, which in the case of rulings by judicial officers require multiple court proceedings in multiple courts just to "be heard." [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. I appreciate the opportunity to provide this comment, for the Work Group, the Judicial Council and California's courts as a whole need to understand what is happening on the front lines of California's court system at the hands of California's judicial officers. It is our experience that California's courts are NOT ensuring access to individuals in the various protected classes listed in the current Standard 10.20 or the proposed revision and from our perspective this is especially true for individuals with disabilities because, as discussed at the conclusion of this response, *no one is even*	their court websites, in their local rules, or displayed in courthouses, the revised standard recommends that all courts take similar steps to ensure that they are providing complaint procedure information to court users in a meaningful and accessible manner. Included in this recommendation is that the information be provided in an "accessible" manner. The California court system complies with the Americans with Disabilities Act, which requires providing information in a format that is accessible to disabled individuals. Thus, local courts should publish information regarding complaint procedures in a format that is accessible to disabled individuals. The work group agrees with the commenter that there was a significant need to amend standard 10.20, and the work group views this as an opportunity to renew the judicial branch's commitment to ensuring the integrity and impartiality of the judicial system and to court interactions free of bias and the appearance of bias. All proposed amendments to the standard are focused on that goal. The work group also agrees that the absence of any reference to individuals with disabilities in the existing standard is problematic and could leave

even when no request is made. This misleading omission is causing actual and potential harm to disabled litigants. https://tomcoleman.us/publications/2019-ada-compliance.pdf -

	Commenter	Position	Comment	Committee Response
			considering or acknowledging the presence of this demographic or how our court system is or isn't ensuring access for this group. California's courts are NOT living up to the Judicial Canons of Ethics, NOT abiding by the various opinions requiring judicial officers adhere to strict ethical requirements, not exercising oversight and accountability with regard to such judicial officers and NOT ensuring fairness and integrity in California's courts. Chief Justice Tani Cantil-Sakauye has made two separate statements over the past several years that I consider "lodestar" in terms of access and fairness for people with disabilities. They both articulate goals the Work Group needs to aim for. In the CLASP Report which discusses steps intended to ensure Language Access to millions of Californians, the Chief Justice said: "Access to our justice system must be examined through a framework that looks at equal access, physical access, and remote access. We ensure physical access by keeping courthouses and courtrooms open, well-maintained and accessible to persons with disabilities; we ensure remote access by providing online resources and electronic access to our court system; and we ensure equal access by making judicial proceedings and all related court contacts available and	those individuals excluded from the broad protections of the standard. The proposal seeks to rectify that problem by amending the standard to include all protected classifications recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20, and specifically includes individuals with mental and physical disabilities. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law.

	Commenter	Position	Comment	Committee Response
			comprehensible to all. Efforts to enhance language access for LEP court users are a critical component of this Access 3D framework."[15] As laudable as this statement may be, it confirms that in California, people whose disabilities are not physical, i.e., those with visual impairments, hearing impairments, cognitive and developmental disabilities, autism, Asperger's, learning disabilities, language impairment, and what the court's own documents refer to as "hidden disabilities," *are effectively "disappeared" by the current approach of California's courts and these individuals are not enjoying the same access those protected by the LAP enjoy, at the same time they experience similar impacts.* As the parent of an individual with diagnosed language disabilities and autism, I think the reason is apparent in the Court's own records. According to "reports and publications" for the Judicial Council's "Advisory Committee on Providing Access and Fairness," no study of access for individuals with disabilities has been undertaken since 1997.[16] What this means is that none of the research related to autism and brain development from the past few decades has been factored into California's procedures for	

[15] https://www.courts.ca.gov/documents/CLASP_report_060514.pdf
[16] https://www.courts.ca.gov/7769.htm.

	Commenter	Position	Comment	Committee Response
			ensuring access for persons with disabilities.[17] Combined with the failure to implement and enforce Standard 10.20, this has inevitably led to what our son and others like him whose disabilities are not physical in nature are experiencing in California's courts in the form of denial of access. It is the Chief Justice's second statement on June 8, 2020, that is seminal, particularly "Our civil and constitutional rights are more than a promise, a pledge, or an oath – we must enforce these rights equally. Being heard is only the first step to action as we continue to strive to build a fairer, more equal and accessible justice system for all."[18] [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. Therefore I write to the Work Group and the Judicial Council, despite the failure to meaningfully disseminate the invitation to comment [*Redacted]. Please- PLEASE- do the right thing and meaningfully and comprehensively address the bias we've seen	

[17] This despite California judicial officers participating in studies involving individuals with autism. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4392381/ "Purpose The purpose of this paper is to explore how judges perceive High Functioning Autistic Spectrum Disorders (hfASDs) and the disorders' effects on an offender's ability to formulate criminal intent and control behaviour. **Design/methodology/approach.** Semi-structured interviews on topics related to offenders with hfASDs were conducted with 21 California Superior Court Judges."
[18] California Chief Justice Speaks Out on Addressing Racism and Bias," June 8, 2020. https://newsroom.courts.ca.gov/news/california-chief-justice-speaks-out-addressing-racism-and-bias

	Commenter	Position	Comment	Committee Response
			first-hand in California's courts. While we cannot say how extensive bias against individuals with disabilities is, nor does California's court system have any idea given the absence of data, our personal experience confirms it is real and having devasting consequences for California's citizens, including people like [* Redacted] our family. <u>Recommendations for Updating Standard</u> I strongly urge the Judicial Council NOT to adopt the proposed amended Standard 10.20 as submitted by the Working Group, for it will not eliminate bias or achieve the charge to the Work Group. Instead, it lowers the standard and will ensure no change at all. I urge the Judicial Council to urge the Work Group to go back to the original language of the current Standard 10.20 as a starting point to make the straightforward changes the court requested, to enhance, improve and augment the Standard to ensure that bias is acknowledged and addressed, there are complaint processes for redressing grievances with regard to such bias and that there is meaningful accountability with regard to same. In light of the significant overlap between discrimination/harassment and bias (implicit and explicit) the Work Group should revise Standard 10.20 to align with and correspond to the language of CRC 10.351 – particularly to ensure	The work group appreciates the commenter's perspective. The amendments to standard 10.20 ensure the standard reflects current law and understandings regarding the elimination of bias and provides a framework for courts to work with local communities to address this important issue. These include amendments to emphasize the goal for courts to prevent bias, rather than simply prohibit bias; more broadly define the scope of the standard and its applicability to all court interactions; update the list of protected classifications enumerated in the standard; define the optimal roles for local bias committees and outline contemporary considerations for the composition of those committees; and ensure that court users can access information regarding how they can submit complaints regarding bias about court employees and judicial officers in court interactions. While the commenter desires that these amendments result in requirements similar to California Rules of Court, rule 10.351; as described in response to this commenter above, a

	Commenter	Position	Comment	Committee Response
			there are (a) Prohibition policies (*not "prevention" which is a lowering of the standard*); (b) Complaint reporting processes; (c) Court responsibility on receipt of complaint or knowledge of potential misconduct; (d) Implementation *(so that another twenty years does not go by without implementation and enforcement, while bias runs rampant throughout California's courts, both civil, criminal, family law, dependency, probate, etc.)* Aligning Standard 10.20 with CRC 10.351 does more to meet the charge to "augment" the standard. Standard 10.20 does not need to be weakened. It is not working not because it was implemented and enforced and went too far. It has not been implemented and enforced and it needs language to ensure that it is. It also needs language to ensure bias can be and is redressed through meaningful complaint procedures, with robust accountability for those who engage in bias, not just education programs that fall on deaf ears. The "protected classes" should not be in alphabetical order. Placing them in that order eliminates the historical evolution of protected classes, makes no categorical sense or meaning and frankly is disrespectful. The language of the "protected classes" in the current Standard 10.20 can be used as a starting point and	Standard of Judicial Administration is quite different than a rule of court. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. The work group's amendments are consistent with the parameters of a Standard of Judicial Administration and further are consistent with the work group's goal to create a framework and expectations for the elimination of bias, while also recognizing the diversity of size, demographics, needs, and viewpoints of the various legal communities in the state, and the need to allow them to develop customized approaches that will best result in the prevention of bias in court interactions. The work group substantively addresses the specific recommendations outlined by the commenter in the other sections of this comment. The list of protected classifications is organized alphabetically for ease of reference, and no additional significance is given to any protected classification based on where it appears in the list. All listed protected classifications are equally protected regardless of where they are listed in order.

	Commenter	Position	Comment	Committee Response
			supplemented by cross reference to Cal. Civ. Code §51, which in turn cites to GC §12926 (not GC §12940 which is an employment reference and not as applicable).	More importantly, the proposal amends the list of protected classifications by adopting all protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law.
			Do not deconstruct the term "disability," rather supplement it, if that. "Disability" is a comprehensive umbrella description for all the varying types of disabilities, be they mental, physical, medical, or a combination. It is a description that is inclusive in its simplicity and will ensure that people of varying disabilities will see themselves in it and not feel "disappeared" or disregarded as may happen if it is broken into only "physical" or "mental" disabilities. This is particularly true since many people may not see themselves in either category while others find themselves in both.	The work group specifically incorporated the protected classifications used by the Fair Employment and Housing Act (FEHA). "Mental disability" and "physical disability" are separate protected classifications enumerated under the FEHA, listed in Government Code section 12940(a), and the definition section of the statute, Government Code section 12926, separately lists both physical and mental disability.

	Commenter	Position	Comment	Committee Response
			There needs to be significantly more education for judicial officers and court employees with regard to the numerous types and categories of disability, particularly with regard to those that are not as obvious or apparent as physical disabilities, i.e., "hidden disabilities".[19] Judicial officers also need significant and ongoing education and training with regard to individuals, including those with hidden disabilities, who may seek to cover up their disability due to stigma or in order to avoid being identified as disabled as they want to appear to be as typical as the next person. Individuals with diagnoses such as, for example, autism, Asperger's syndrome, learning disabilities, language processing and comprehension deficits, developmental and intellectual disabilities, etc., often present typically, yet can have significant challenges and difficulty accessing and processing courtroom proceedings, interacting with people and understanding such interactions. Some of these individuals often remain quiet to avoid being found out.	The work group agrees that training and education for both judicial officers and court employees are critical for the elimination of bias in court interactions. As outlined in the proposed standard 10.20(c)(2), the work group has specifically recommended that local bias committees engage in education programs designed to eliminate unconscious and explicit biases within the court and legal communities. Education should include information as to bias based on protected classifications and information regarding how unconscious and explicit biases based on these classifications develop, how to recognize unconscious and explicit biases, and how to address and eliminate unconscious and explicit biases. As discussed, while the work group has recommended these education programs, it ultimately left the specific details to be evaluated by each individual committee within the framework created by the standard. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus,

[19] https://www.courts.ca.gov/documents/access-fairness-etiquette-2009.pdf (Persons With Hidden Disabilities - Not all disabilities are apparent. A person may have difficulty following a conversation, may not respond when you call or wave, or may say or do something that seems inappropriate. The person may have a hidden disability such as poor vision, a seizure disorder, a hearing loss, a learning disability, a brain injury, a mental disability, or a health condition. These are just a few of the many different types of hidden disabilities).

	Commenter	Position	Comment	Committee Response
			The Penal Code specifically states that if it is "suspected" an individual has a developmental disability the Court shall appoint Regional Center to examine the individual to determine if they are developmentally disabled and in need of services. (See, PC §1001.22 and PC §1369(a)(3)). Despite these requirements, it has been our experience that judicial officers fail and refuse to make such appointments, for a multitude of reasons, including time constraints, lack of knowledge, etc. As a result, the right of an individual with disabilities not to be adjudged to punishment while incompetent is placed at risk and violations of due process result. Bureau of Justice Statistics ["BJS"] from the U.S. Department of Justice confirms "Cognitive disability was the most commonly reported disability among inmates. About 2 in 10 prisoners and 3 in 10 jail inmates reported a cognitive disability, the most common disability reported by each population."[20] This appears just as true in California's prisons and jails, demonstrating that too many judicial officers are not complying with the statutory requirements of PC §1369 or Rule 4.130 when a concern arises regarding the competency of an individual who has cognitive impairments, so that they fly under the radar due to their cognitive impairments and failure to access the process, and end up in jail and prison, where they don't belong and	while the proposal broadly recommends that local bias committees engage in educational opportunities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish education programs specific to the local community's needs and to obtain input from the local community. The work group notes that the commenter suggests that complaint resolution procedures be posted prominently. The work group incorporates its prior response to this commenter on this issue, included above, and notes that the proposal recommends that courts broadly disseminate complaint procedures for court users.

[20] https://bjs.ojp.gov/content/pub/pdf/dpji1112.pdf -

	Commenter	Position	Comment	Committee Response
			languish for years because they cannot navigate the processes that will get them out. [21] The Work Group should use the language of the complaint procedures set forth in CRC 10.351 along with the CLASP process and complaint requirements, as an existing model of guidance for court users, including individuals with disabilities, on the filing of complaints. This will allow all parties, including court users and court employees to know them and readily use them.[22] Post these procedures conspicuously in clearly marked locations in every single courthouse and judicial building in the state of California so that all court users are aware of them and can access and use such procedures along with guidance on how to use them whenever the need arises. Make such notices available in multiple languages, as well as in accessible formats so that ALL people can access them, including people with disabilities, visual and print impairments, those with intellectual and developmental disabilities or other cognitive issues. Enhance the complaint system by combining and equalizing the systems for Language Access	

[21] https://thearc.org/wp-content/uploads/2021/05/Criminal-Justice-System.pdf
[22] https://www.courts.ca.gov/documents/CLASP_report_060514.pdf "Stakeholders participating throughout the planning process agreed that, in order to ensure the success of a statewide language access plan, it is necessary to create systems for implementing the plan, for compliance and monitoring its effects on language access statewide, and for tracking the need for ongoing adjustments and improvements. Participants in the court system, from legal services providers to interpreters to court users themselves, emphasized the need for quality control measures, including mechanisms for making and resolving complaints about all aspects of the courts' language access services." Page 74; *see also* Pages 75-77, 87, 92, 94.

	Commenter	Position	Comment	Committee Response
			Complaints (https://www.courts.ca.gov/LAPcontact.htm) with bias complaints, as well as for individuals with disabilities so that they are all adequately supported in having access to the judicial system. Make the process for complaints involving a judicial officer's denial of accommodations for people with disabilities as equitable as the Language Access process. As it stands, a person whose "Request for Accommodations" was denied or not ruled on or otherwise granted by a judicial officer, despite the requirements of CRC 1.100, is forced to file a petition for writ to the Court of Appeal to redress what is often a result of ignorance or bias. The notion that redress for the denial of access to one court proceeding is another far more complex court proceeding is not only exceedingly unfair, it makes no sense, particularly in light of the challenges faced by those with more complex or significant disabilities. Also, it is our experience, that Court of Appeal judicial officers find it more preferable to ignore or excuse the improper behavior of a Superior Court judge than chastise them for failing to ensure the rights of the disabled to have access to the courts, ensuring compliance with Rule 1.100 or effective communication under the ADA.[23]	The proposal to amend standard 10.20 specifically addresses eliminating bias in court interactions. The commenter raises additional concerns regarding disability accommodations for court users and access for persons with disabilities. The process for asserting complaints regarding the denial of requests for accommodations under California Rules of Court 1.100 is beyond the scope of this proposal. Information regarding Rule 1.100 may be found here: https://www.courts.ca.gov/documents/access-fairness-QandA-for-persons-with-disabilities.pdf Likewise, addressing access issues for persons with disabilities is beyond the scope of this proposal. Information regarding access to the California court system may be found here: https://www.courts.ca.gov/24647.htm?rdeLocaleAttr=en

[23] https://www.ada.gov/effective-comm.htm

	Commenter	Position	Comment	Committee Response
			It is also inequitable and incomprehensible that California has a Strategic Plan for Language Access in California courts to ensure language access for non-English speakers through the Court's Language Access Plan, but has no corollary plan in place for individuals with disabilities whose disabilities are not physical, rather language or processing challenges and /or cognitive impairments that negatively impact their access, yet they are denied the assistance and benefits routinely granted to those granted language access. An equitable system needs to be implemented for people with disabilities where they have the same right to access, support and assistance as is reflected in Rule 1.300, and through the LAP complaint process.[24] The CLASP "Strategic Plan" at page 21 states: "California's Language Access Plan effort supports Goal I of the Judicial Council's most recent strategic plan—Access, Fairness, and Diversity—which sets forth that: • All persons will have equal access to the courts and court proceedings and programs; • Court procedures will be fair and understandable to court users; and • Members of the judicial branch community will strive to understand and be responsive to the needs of court users from diverse cultural backgrounds.	

[24] https://www.courts.ca.gov/LAPcontact.htm

	Commenter	Position	Comment	Committee Response
			The Language Access Plan also aligns with the most recent operational plan for the judicial branch, which identifies additional objectives in support of Goal I, including: • Increase qualified interpreter services in court-ordered/court-operated proceedings and seek to expand services to additional court venues; and • Increase the availability of language access services to all court users" [25] These goals and objectives are just as applicable to persons with disabilities accessing the court and until California ensures this level of access to individuals with disabilities, California's judicial system is an inequitable system. Include stakeholders from the community in the process of revising Standard 10.20. The failure to include stakeholders from the protected classes and from the organizations interested in advancing civil rights and access to the courts is one reason the Work Group's proposal will not be successful. It has created a proposal which may reflect the Court's perspective on such protected classes, but does not include the community's perspective.[26]	As discussed, amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs.

[25] https://www.courts.ca.gov/documents/CLASP_report_060514.pdf
[26] *See "The Evolving Science on Implicit Bias"* pages 11-12 ("The Multiple Levels of Inequality: Privilege") and Page 13 (Intergroup Contact). https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911.

	Commenter	Position	Comment	Committee Response
			Those involved in this process should also review the archived document "Bias in the Courts! Focusing on the Behavior of Judges, Lawyers, and Court Staff in Court Interactions (Access to Justice for Persons of Color: Selected Guides and Programs for Improving Court Performance Bias in the Court)." [27] While several years old, its materials still appear relevant and are and at least as a starting point would be useful in any training undertaken. And comprehensive training is needed. As part of any process seeking to address and resolve bias, the courts should institute an "ombudsman" program, such as that described in "Bias in the Courts!"[28]	Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to eliminate bias in all court interactions, Chief Justice Tani G. Cantil-Sakauye appointed a small work group comprised entirely of Judicial Council members, and gave it a limited charge, which enabled the work group to swiftly and efficiently propose amendments to update the standard. The work group includes judicial officers, attorneys, and a court executive officer. Several members of the work group have experience in these and related issues from serving on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, which included comments from people in protected classes, met with various local bias committees, and met with interested groups (including groups representing people from various protected classes) throughout the process who wanted to share thoughts and ideas for amending the standard.
			Institute a training program, such as that suggested in this guide. "In response to Recommendation 4-8, the Oregon Judicial	As discussed above, the work group promotes and recommends training programs as an essential part of eliminating bias in court proceedings. The work

[27] https://www.ojp.gov/pdffiles1/Digitization/173729NCJRS.pdf
[28] *Ibid.* Recommendations 3-7 and 3-8, Handout 1-1.

	Commenter	Position	Comment	Committee Response
			Department has developed and provided diversity educational training for all court personnel."[29] The trainings can be self-directed as well as continuing education programs. The lack of minimum complaint procedures in the revised Standard will lead to a lack of information and lack of redress and will ensure that problems with bias will persist. It will also result in second-class status for members of the public, compared to court employees and language access users, who have protections under CRC 10.351, CRC 1.300 and California's Language Access Plan, which provides for local complaints.[30] By not conforming standard 10.20 to processes under Rule 10.351 and the Language Access Plan, the Work Group fails to update the standard to current law and understanding regarding bias, preventing harassment, discrimination, etc. based on protected classes. The current Standard 10.20 shows that a complaint process is the expectation. The Work Group's charge included using Rule 10.351 to "augment" Standard 10.20, not completely eliminate complaint processes altogether.	group has left the specific details regarding the number and type of training programs to be resolved by each local bias committee, based on the unique needs of the community. The work group notes the commenter's concern that eliminating the recommendation that local bias committees adopt informal complaint procedures will diminish the importance of complaints from members of the public. As discussed in both the accompanying report and the Advisory Committee Comments, the proposal eliminates the recommendation that local bias committees adopt an informal complaint process, in part because there are many existing, effective, and updated avenues for making complaints regarding bias in court interactions, including avenues through the CJP and to the presiding judge or justice of the local courts, and due to potential conflict between the multiple avenues for raising complaints. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice.

[29] Ibid. Handout 1-1.
[30] http://www.lacourt.org/generalinfo/courtinterpreter/GI_IN006.aspxhttp://www.lacourt.org/generalinfo/courtinterpreter/GI_IN006.aspx

	Commenter	Position	Comment	Committee Response
				Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints. In addition, having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the

	Commenter	Position	Comment	Committee Response
				local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. The work group is also concerned that referring complaints against judicial officers and court employees to local bias committees might trigger various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer or court employee. Likewise, referring complaints about court employees to local bias committees may create personnel and labor relations concerns, given that courts have existing personnel policies and labor relations agreements regarding resolution of employee complaints. In addition, referring complaints about court employees to local bias committees deprives courts of the ability to address the complaint internally and comply with any legal obligations the courts may have arising from the complaints, including the need to take immediate corrective action in certain circumstances.

	Commenter	Position	Comment	Committee Response
				In addition, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). A system where those complaints are handled informally, at a local level, could undercut those obligations. The work group recognizes that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the

	Commenter	Position	Comment	Committee Response
				concerns raised above. Given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended.
			In order to foster confidence in the judicial system, I would suggest you open up the activities of this Work Group and expand its process to include the public. The Work Group did not hold public meetings, with the exception of the May 4th meeting and in that meeting did not notify those observing the meeting that a proposal was forthcoming. Only nine days later a proposal was issued, without any notice on the Work Group's public page, through a Rules Committee member in a Judicial Council meeting that very few members of the public access. To be sure this was without notice to those interested in the subject matter and activities of the Work Group, for even if they regularly checked the Work Group page they would not be notified of ITC SP21-03, as it is not published or otherwise posted there to this day. Again, this is not an open or inclusive process. If the Court truly wishes to foster confidence in the integrity of the court, it needs openness and transparency, neither of which are a hallmark of California's court system today. Do not	The commenter raised this issue in an earlier portion of the comment, and the work group incorporates its earlier response.

	Commenter	Position	Comment	Committee Response
			continue to hold this information close, but instead disseminate information about the updates to the standard widely so the general public is aware of it and can participate. California's court system is not seen by the general public as fair or impartial nor do I consider it so based on the experiences we have been forced to endure at the hands of biased judicial officers who do not follow the law. We believe in the rule of law. [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. Enforce, enforce, enforce. [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. The most recent Judicial Council "2020 Court Statistics Report Statewide Caseload Trends 2009–10 Through 2018–19" indicates California's court system, which serves a population of more than 39 million people—about 12.1 percent of the total U.S. population—processed about 5.9 million cases in fiscal year (FY) 2018–19.[31] Statewide criminal filings totaled 4,503,153 with 178,244	The work group appreciates the information provided by the commenter. The work group notes the commenter's concern that the proposed amendments to standard 10.20 do not appropriately consider disability status. However, the proposed amendments to standard 10.20 include both physical disability and mental disability as protected classifications. In addition, the decision to tie the protected classifications in standard 10.20 to those in Government Code

[31] https://www.courts.ca.gov/documents/2020-Court-Statistics-Report.pdf at Page 1.

	Commenter	Position	Comment	Committee Response
			of those felonies.[32] Los Angeles County accounted for approximately a quarter of those total and felony filings. Yet, this Court Statistics Report does not account for disability or provide data regarding how many of those files involve individuals with disabilities. How many of California's criminal filings involved an individual with disabilities? Cognitive disabilities? A hidden disability? Statistically, upwards of 20% percent of the U.S. population has a disability. [33] Most recent data from the U.S. Department of Justice Bureau of Justice Statistics indicates numbers of individuals with disabilities are significantly higher among the jail and prison populations, with 30-40% and upwards of 50% of those incarcerated having one or more disabilities. The December 2015 Special Report by the U.S. Department of Justice, Office of Justice Programs, titled "Disabilities Among Prison and Jail Inmates, 2011-2012" indicates "About 2 in 10 prisoners and 3 in 10 jail inmates reported a cognitive disability," as distinguished from mental disorders.[34] Yet, despite the prevalence of disability, courts and judicial officers regularly fail to consider,	section 12940(a) and Code of Judicial Ethics canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized in either the statute or the canon. The commenter also raises concern that the proposed amendments allow judicial officers to consider protected classifications in court interactions "only if necessary or relevant to the proper exercise of their adjudicatory functions, such as considering military and veteran status in criminal sentencing, or age in juvenile proceedings." The commenter then suggests that protected classifications should be considered in more situations, and that disability status should be fully considered by judicial officers in court proceedings. The "only if" language is newly added to standard 10.20 in the proposed amendment. In the existing standard, judicial officers are advised to not consider protected classifications, including disability status, in any context. The proposed amendment seeks to create a workable exception for judicial officers; giving those judicial officers the discretion to consider disability status, or other protected classification status, when necessary or

[32] *Ibid.* Page 123.
[33] http://www.serviceandinclusion.org/index.php?page=basic
[34] *https://www.bjs.gov/content/pub/pdf/dpji1112.pdf.* "Examples of cognitive disabilities include Down syndrome, autism, attention deficit disorder, learning disorders, intellectual disabilities or traumatic brain injuries."

	Commenter	Position	Comment	Committee Response
			acknowledge or address disability in general, including cognitive disabilities and their impact on individuals who appear before them, despite California laws which specifically address developmental disability and require intervention and expertise. The Work Group proposal at page 4, actually seems to believe this is how things should be handled[35] when it is the failure to consider, acknowledge or address disability that has exacerbated the problems my son faced. It is our perspective that this accounts for the fact that so many individuals with disabilities, including developmental disabilities, are incarcerated rather than receiving services in appropriate settings, as both the Penal Code and Welfare and Institutions Code contemplate, i.e., because no one stopped to consider disability or whether the criminal system was the proper place for what may have been caused by or is a function of disability. In its May 21, 2021 meeting, the April 23, 2021 "Report to the Legislature: Disposition of Criminal Cases According to Race and Ethnicity of Defendant." was submitted,[36] reflecting data collected pursuant to Penal Code section 1170.45, on the statewide disposition of	relevant to the adjudication of proceeding. This is a meaningful step to addressing the concern raised by the commenter and will give judicial officers discretion to consider a protected classification if it is necessary or relevant to resolving the matter before the court. The commenter also raises comments about education and police reform that are beyond the scope of this proposal and the work group.

[35] The proposal, amendment and advisory comment includes the language "that a court, judicial officers, and court employees may consider such classifications *only if* necessary or relevant to the proper exercise of their adjudicatory functions, such as considering military and veteran status in criminal sentencing, or age in juvenile proceedings." (Emphasis added)
[36] https://jcc.legistar.com/View.ashx?M=F&ID=9342579&GUID=75503F08-8A46-4067-BB8F-20F76328278C

	Commenter	Position	Comment	Committee Response
			criminal cases according to defendants' race and ethnicity. This Report states that "In addition to looking at the race/ethnicity breakdown of the data, several other legal and demographic features that may relate to outcomes are also described and analyzed, including gender, age, county, prior criminal history, and features of the current offense or offenses." Beyond these additional factors, however, the Report provides NO information or data related to disability nor does it appear to contemplate collecting it, despite over 20% of the population having a disability and one third of all families being affected by disability in their family.[37] Under the ADA, "Nondiscrimination requirements, such as providing reasonable modifications to policies, practices, and procedures and taking appropriate steps to communicate effectively with people with disabilities, also support the goals of ensuring public safety, promoting public welfare, and avoiding unnecessary criminal justice involvement for people with disabilities."[38] In other words, courts and judicial officers must focus their attention on disability as a "protected class," including considering and acknowledging people with disabilities when they come into courthouses, particularly when	

[37] http://www.serviceandinclusion.org/index.php?page=basic "An estimated 20.3 million families, or 29% of all families in the United States, have at least one member with a disability."
[38] "Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act," *https://www.ada.gov/cjta.html*.

	Commenter	Position	Comment	Committee Response
			charged as defendants. Otherwise, too often, their right to modifications of policies and practices, as well as accommodations to ensure their effective communication in proceedings are not recognized, supported, granted or even understood so that they are able to enjoy the same right to access proceedings as those without disabilities routinely enjoy. As a result, as the BJS statistics confirm, far too many people with disabilities are ending up in California's jails and prisons when simple modifications and accommodations will make all the difference in the world in the lives of defendants, and for the courts overall. Collecting such data is a critical first step that must be taken to begin to ameliorate implicit and explicit bias people with disabilities experience in California's courts. This step, on the path to ensuring that individuals with disabilities have the right "to be heard", as Chief Justice Cantil-Sakauye stated and as the Judicial Canons promise, is necessary in order to reduce the present and persistent reality that disability is not being acknowledged or considered and instead is often being criminalized, with California's courtrooms and jail cells unnecessarily far too full because of it. We must also acknowledge that it is not just courts that are responsible for the charging and incarceration of untold numbers of individuals with disabilities. Colleges and education	While the work group did consider setting baseline recommendations on data collection, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. The proposed amendments to standard 10.20 allow courts and local bias committees the flexibility to establish data

	Commenter	Position	Comment	Committee Response
			institutions, as well as police agencies and district attorneys who are undereducated when it comes to disability, are just as culpable. Far too often, rather than acknowledge, address, and accommodate disability or take steps to ensure effective communication for people with disabilities so that they are "heard", these agencies ignore and talk over individuals with disabilities or make assumptions or presumptions based on bias, failing to see that what they see as a function of crime, may instead be a function of disability and that they are, in fact, criminalizing an action or behavior that is often beyond the ken or control of such individuals. While this is certainly not always the case, our eyes have been opened to how readily those in positions of authority do not even take the time to listen to the simplest explanation. [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. Under Section 504 and the ADA, as well as California law, students have rights and unfortunately, education agencies do not follow them, preferring to see courts as the last stop on the "school to prison pipeline, even when Superior Court judges order them not to resort to the courts. Students with disabilities need education, not incarceration. Individuals with disabilities do not deserve to be jailed because	collection specific to the local community's needs and to obtain input from the local community.

	Commenter	Position	Comment	Committee Response
			they are disabled. Acknowledging this is an issue is the first step toward eliminating bias. This is where California's courts are, in part, because of significant bias against people with disabilities in society as a whole. A recent report by the National Center for State Courts, entitled "The Evolving Science of Implicit Bias" addresses the role implicit bias plays in the court system as well as other fields. > Implicit biases can influence a number of judgments and actions in professional settings, where they have significant impacts on people's lives.[fn 38] In the legal domain, for example, researchers have demonstrated correlations between judges' implicit biases and their sentencing decisions, . . ." [fn 39][39] The American Bar Association's "Implicit Bias Guide" (January 2019), cites to multiple studies showing implicit bias is a part of who we are, and despite what we often consider to be our core values, "[i]mplicit biases about persons with disabilities are pervasive."[40]	

[39] https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911 citing fn. 38 Greenwald, A. G., Banaji, M. R., & Nosek, B. A. (2015). Statistically small effects of the Implicit Association Test can have societally large effects. Journal of Personality and Social Psychology, 108(4), 553–561. Fn. 39 Rachlinski, J., Johnson, S., Wistrich, A., & Guthrie, C. (2009). Does Unconscious Racial Bias Affect Trial Judges? Notre Dame Law Review, 84, 1195–1246.

[40] https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/ "A 2007 study found that "[p]reference for people without disability compared to people with disabilities was among the strongest implicit and explicit effects across the social group domains" (e.g., gender, race, religion, sexuality, weight, political orientation, etc.), with only age showing more implicit bias. (3) *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 Eur. Rev. Soc. Psychol. 36, 54 (2007) (the study examined data obtained between July 2000 and May 2006 from more than 2.5 million test takers who completed the Implicit Association Test and self-reports across 17 topics). Significantly, 76 percent of respondents showed an implicit preference for people without disabilities, compared to nine percent for people with disabilities. (Id)

	Commenter	Position	Comment	Committee Response
			Therefore, we need to be counting, and accounting for, disability just as we do race, ethnicity, gender and age, particularly considering that disability is supposed to be a natural part of the human experience[41] and statistically, a part of American life. This point is made clear in "The Evolving Science on Implicit Bias" and its discussion of "Implications for Courts and Their Communities." This is something this Work Group and the Judicial Council as a whole need to address if California intends to undertake an honest effort to address bias and reform California's courts. Beyond leading by example and reaffirming commitments to identifying and addressing systemic injustice, courts must "[e]ducate not just to raise awareness, but to build capacity for change" and, perhaps most importantly, "[g]ather information to understand what is really happening in your court and community."[42] As noted above, what is missing with regard to the various "protected classes," and in my experience what has happened with regard to disability specifically, is that this demographic is wholly ignored, "disappeared" from the landscape, so that for the most part no one knows what is happening with this group and how they are experiencing bias. What we	

[41] 42 USC 15001. SEC. 101. **(***Public Law 106–402, 106th Congress).*
[42] https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911 (Page 21).

	Commenter	Position	Comment	Committee Response
			need with regard to disability is *"data that can shed light on the specific types, direction, and magnitude of disparities – and their root causes – in a particular jurisdiction.*"[43] In other words, we can't know where we're going, if we don't know where we are.[44] Ultimately, the ABA's Report on bias shows the challenges bias presents, yet the promise addressing it can bring. Citing a 13-year study which showed that implicit bias increased over time and with age, meaning they had less favorable feelings toward people with disabilities,[45] "when participants were asked explicitly how much they preferred people with individuals, they shared more positive responses with time and age."[46] It also showed that "people who had contact with disabled individuals had lower prejudice." What does it all mean? "When you interact more with a stigmatized group, you may develop positive associations with them, challenging your biases and, thus, resulting in attitudinal changes."[47] If California's courts are actually, truly focused on	

[43] *Ibid.* page 22, Fn. 141 E.g., see Livingston, R. (2020). How to promote racial equity in the workplace: a five-step plan. Harvard Business Review. Available at https://hbr.org/2020/09/how-to-promote-racialequity-in-the-workplace.
[44] *Ibid.* "Understanding the nature of the problem is crucial for determining which types of interventions are needed and which are likely to be successful. The more the court can use data to inform its strategy, the better positioned it will be to channel resources toward the interventions with the biggest impact".
[45] https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/ Fn. 6 Jenna A. Harder, Victor N. Keller & William J. Chopik, *Demographic, Experiential, and Temporal Variation in Ableism*, 75, No.: 3 J. Soc,. Issues 683-706 (July 12, 2019), https://spssi.onlinelibrary.wiley.com/doi/abs/10.1111/josi.12341)
[46] https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/
[47] This is confirmed by the "The Evolving Science on Implicit Bias" and what it refers to as "Intergroup Contact." https://ncsc.contentdm.oclc.org/digital/collection/accessfair/id/911 (Page 13).

	Commenter	Position	Comment	Committee Response
			addressing bias against protected classes, including based on disability, this approach bodes well for people with disabilities who come into its courts. [* A portion of the comment has been redacted here because it relates to the commenter's own personal complaint of bias, as discussed above]. We appreciate the opportunity to comment and your consideration of these comments. We are happy to answer any questions or provide clarification with regard to the information we have provided and can also provide documentation with regard to any of the events described. Respectfully submitted: June 25, 2021 [* A portion of the comment has been redacted because it relates to the commenter's own personal complaint of bias, as discussed above]. Essentially, an individual with disabilities denied access to the court by a judicial officer can only challenge the bias and ignorance that denial reflects by pursuing another court proceeding in another higher court. On its face this appears to be a form of bias, as it does not consider the challenges this presents to people with disabilities related to access, cost or complexity of such processes. That this is California court's expectation for individuals who may have significant language challenges,	

	Commenter	Position	Comment	Committee Response
			developmental disabilities or cognitive impairment not only adds insult to injury, it reflects a level of disregard and disparate treatment when compared to those who benefit from the court's Language Access Plan, which provides significant resources and supports to ensure access for non-English speakers who experience similar access issues based on language challenges. In addition, we found that Court of Appeal judicial officers engage in "judicial realism," politics and protection for judicial officers, by refusing to address front and center legal issues on appeal related to accommodation, effective communication and access, in order to avoid political or social consequences and to cover for the misconduct and conflict of lower court judges, rather than ensure accountability and extinguish bias [* Redacted].	
29.	Public Law Center by Leigh E Ferrin, Director of Litigation and Pro Bono, Santa Ana	AM	The Public Law Center (PLC) writes in support of SP21-03 (Judicial Administration), which will amend the Cal. Standards of Judicial Administration, standard 10.20 to address bias in court proceedings. PLC staff and clients have both witnessed and experienced bias in the court system, and greatly appreciates the work group's efforts to decrease, and hopefully one day eliminate the existence of bias in the court. PLC is a 501(c)(3) legal services organization that provides free civil legal services to low-income individuals and families in Orange	The work group appreciates the commenter's support for the majority of the proposal and will address the specific suggestions made by the commenter. The commenter suggests that the list of protected classifications in the standard be further expanded to include litigants who cannot speak English fluently and who need interpreters. The work group appreciates this feedback, but is only including protected classifications that are otherwise recognized by law. The proposal amends the list of protected classifications

	Commenter	Position	Comment	Committee Response
			County, California. PLC staff and volunteers provide assistance across a range of substantive areas of law, including consumer, family, immigration, housing, and health law. Additionally, PLC provides legal assistance to low-income small business owners and nonprofits serving clients similar to those of PLC. The services include counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. Overall PLC strongly supports the purpose and recommendations of the work group. Bias in court proceedings, whether actual or believed, is one of the main reasons the public loses faith in the court system. The efforts of the work group to standard 10.20 to better reflect the current reality, including adding in the education needed to fully eliminate bias, are commendable. We have a few specific comments, addressing both the experience of self-represented litigants, but also clients represented by PLC and PLC staff and volunteers: Expansion of scope of standard PLC applauds the expansion of the applicability of the standard to all "court interactions" rather than just "courtroom proceedings" is particularly important. Many litigants will spend as much or more time in the clerk's office, the	acknowledged in standard 10.20 by adopting the protected classifications that are recognized by existing law in similar areas, including Government Code section 12940(a) (for employment and housing discrimination, harassment, and retaliation) and Code of Judicial Ethics canon 3(B)(5) (for judicial bias). This amendment greatly expands and modernizes the list of protected classifications listed in standard 10.20. In addition, the decision to add that the protected classifications in standard 10.20 include any other classifications protected by state and federal law, including Government Code section 12940(a) and Code of Judicial Ethics, canon 3(B)(5), allows the list to stay updated, as the standard will automatically incorporate any new protected classifications that are recognized by state or federal law. The work group acknowledges the commenter's concerns regarding interpreter services in the courts. Addressing interpreter issues is beyond the scope of this proposal; however, information regarding how to submit complaints regarding interpreters can be found here: https://www.courts.ca.gov/42807.htm The work group also acknowledges the commenter's concerns about potential consequences of raising complaints regarding judicial officers, and the need for such complaints to be addressed anonymously. The work group agrees, and the need to promote privacy and

	Commenter	Position	Comment	Committee Response
			records department, or the self-help center than they will actually in front of a judge. Therefore, a litigant's perspective of bias in the court system is rarely limited to interactions in the courtroom. That being said, it is difficult to deny that the interaction that matters the most is the one with the judge and courtroom staff, since those are the parties that will ultimately determine the outcome of the case. Expansion of covered classifications PLC also applauds the inclusion of additional categories of protected classifications. Notably missing from the list is language capacity, and specifically the ability to speak English fluently. PLC's attorneys routinely see litigants who request an interpreter face discriminatory, or biased, conduct by the bench officers and court staff. Often, litigants who need an interpreter are moved to the end of the calendar, forcing those litigants to wait longer in the courtroom, possibly missing more work and losing more income. Bench officers have flat out told PLC attorneys that an interpreter will not be provided. In those cases, the litigant has been represented by a lawyer and we have been able to navigate the situation with the client. But what happens when the litigants are representing themselves?	confidentiality is one of the main reasons why the work group advocates using the existing complaint processes, rather than having local bias committees process complaints. Having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. Overall, the CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators,

	Commenter	Position	Comment	Committee Response
			Self-represented litigants may not be so lucky. The availability and quality of interpretation services has also been a challenge. In order to meaningfully access the court system, litigants in need of an interpreter must have the entire court proceeding interpreted, and must still be able to share their story with the court. PLC clients have recounted instances where the interpreter only interpreted what they said and what the bench officer said, but not what the opposing counsel said. The bench officer in that case made no effort to correct the problem. It is close to impossible to imagine how those litigants did not feel some measure of bias in the legal system when they had no meaningful opportunity to respond to opposing counsel's statements. While PLC appreciates the expansion of protected classifications, as well as the intent that this covers bias not just towards litigants, but also towards counsel, court staff, witnesses, jurors or other persons, the power relationship is still difficult to navigate. PLC has noticed disparate treatment for some of its attorneys of color, compared to its white attorneys, but for counsel to raise such an issue is a risky undertaking. Reputations are easily made, but not easily rehabilitated. For better or for worse, the legal community often downplays claims of discrimination, particularly in court proceedings because of the high esteem in which it holds judges. The ability to report anonymously is one	established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted.

	Commenter	Position	Comment	Committee Response
			tool, but it is often difficult to provide specific instances of bias without disclosing the complainant's identity. PLC suggests that, if this does not already exist, that complaint systems allow for complaints of witnessed behavior, in addition to experienced behavior. For instance, if an attorney or other user identifies bias in a court hearing, or in a courthouse generally, that witness could report the incident as well.	Standard 10.20, as amended, would permit individuals who witness bias to report those incidents. A proposed amendment to standard 10.20, subdivision (b) changes the court's duty to prohibit bias to the court's duty to prevent bias. The advisory comment to this revision notes that: "the standard now asks courts, judicial officers, and court employees to take actions to prevent bias rather than prohibit bias. This change reflects a more comprehensive approach in how courts are to combat bias, focusing on understanding the many forms, causes, and impacts of bias rather than simply forbidding it. Preventing bias may include, for example, prohibiting bias; encouraging judicial officers, employees, and court users to report bias; being open to discussing and learning from real misunderstandings and instances of unconscious bias; and focusing on robust education regarding how unconscious and explicit biases develop, how to recognize them, and how to address and eliminate bias."
			Expansion of Judicial Officer Responsibility PLC appreciates the clarification that standard 10.20 applies not just to judges, but to all judicial officers, even temporary judges. While most temporary judges mean well, they inevitably have less experience and training in	As stated in the advisory committee comments: "Judge" has been expanded to "judicial officers," which includes all judges as defined by California Rules of Court, rule 1.6, and all appellate and Supreme Court justices. The expanded phrase broadly covers any judge, justice, subordinate

	Commenter	Position	Comment	Committee Response
			ruling from the bench that justices, judges, or commissioners. All levels of judicial officers will benefit from the education, as well as the obligation to prevent bias, since that will ultimately create more confidence in the system as a whole. Creation of Local Bias Committees The work group's recommendations that courts create bias committees is well-taken. While we appreciate the reasons that the work group did not provide specific requirements for the creation of the bias committees, we also believe it is important that courts be held accountable if the committees are not created – or if they are not effective. PLC has seen entities (not just courts) create a committee or work group with good intentions, but with limited or no effectiveness if it has no funding or no power to create change.	judicial officer, or temporary judge who might conduct a courtroom proceeding. Accordingly, the standard as amended will apply to temporary judges. The work group notes the commenter's suggestion that courts that do not create local bias committees be held accountable in some manner. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create

	Commenter	Position	Comment	Committee Response
				customized processes, and partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves.
			PLC also suggests that the work group propose a preferred (or model) makeup of the bias committee, consisting of local bar association leaders, legal services providers, members of the public, and attorneys. The variety of perspectives will allow for creative solutions and discovery of unique issues that may not otherwise come to light.	The work group considered making specific recommendations that certain demographic groups be included in local bias committees, and also considered specifying a model committee membership. While the work group promotes diverse membership in local committees, it also recognizes that identifying certain groups for inclusion can have the opposite effect—leading to exclusion of some groups and viewpoints, and creating a false sense of diversity that is antithetical to the elimination of bias. Instead, the proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique. The proposal allows courts to recognize and build on the unique aspects of their communities and gives those courts the flexibility to create committees within the broad framework and guidelines of standard 10.20 that address those unique viewpoints and needs.
			PLC agrees with the work group that utilizing existing complaint procedures, and ensuring the processes are available to the public is best practices. For instance, it was only this year that PLC staff became aware that there was a	The work group agrees with the commenter that information regarding complaint procedures should be readily available to court users. The proposal provides that each court should ensure that court users can access information regarding

	Commenter	Position	Comment	Committee Response
			complaint process for issues with interpretation within the Orange County Superior Court. In the past, PLC attorneys would navigate the interpretation issues on their own, attempting to use legal arguments to address systemic issues. This can be effective for the individual clients, but does not result in progress towards systemic change. The complaint processes should be publicized, and not just to the attorneys who practice in the court, but also to the public generally. As courts reopen to in-person visits, signage in the clerk's office, in self-help centers, and in or near courtrooms would be appropriate. Flyers could also be available at the self-help centers, and there should be easily accessible information on the court's website directing court users to the complaint system(s). PLC recommends that the courts also publicize the complaint process, so that users know where their complaints are going, and when and/or whether they can expect to receive a response. Court users will have substantially more confidence in the system and the court process if they are clear on how their complaints will be handled.	how to submit complaints regarding bias, including information regarding how to submit complaints about court employees directly to the court and how to submit complaints about judicial officers either directly to the court or to the CJP. While many courts already provide this information on their court websites, in their local rules, or displayed in courthouses, the revised standard recommends that all courts take similar steps to ensure that they are providing complaint procedure information to court users in a meaningful and accessible manner. In doing so, courts may include additional information regarding complaint processes, including timelines, if any.
			While any litigant may experience bias, the experience of self-represented litigants in the system is substantially different than those who are represented. PLC believes strongly that the perspective of legal services providers and the general public who access the court system is	The work group notes the commenter's concern regarding self-represented litigants. The proposed amendments to standard 10.20 protect self-represented litigants. Standard 10.20(b)(2) states: "Each judicial officer should ensure that courtroom interactions are conducted in a manner

	Commenter	Position	Comment	Committee Response
			particularly important. While there is an imbalance of power with attorneys and judicial officers already, the imbalance with self-represented litigants is substantially more pronounced. PLC again thanks the work group for their thoughtful approach to the revisions, and believes that the proposals can effect meaningful change in the California courts, with just a few adjustments. Should additional information be needed, please feel free to contact me.	that is fair and impartial to all persons." Standard 10.20(b)(3) states: "Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases." Information regarding resources available to self-represented litigants can be found here: https://www.courts.ca.gov/7648.htm.
30.	Superior Court of El Dorado County by Hon. Dylan Sullivan, Judge	AM	We formed an Elimination of Bias Committee in El Dorado County in July 2021. We have been working diligently to make our courts fair. This is from our Committee. The Judicial Council proposal states in part: "[T]he work group recommends that each court communicate to its users how they can use the existing procedures to make complaints about bias in court interactions based on a protected classification. While many courts already provide this information on their court websites, in their local rules, or in courthouses, the revised standard recommends that all courts take similar steps to ensure that they are providing complaint procedure information to court users in a meaningful and accessible manner."	The work group appreciates the commenter's suggestion to shift the emphasis from "complaints" to "reporting," and agrees with the commenter's stated goals of gathering information to guide education and outreach, and to recognize various systemic issues in the court. The commenter's proposal harmonizes with the work group's goal of facilitating partnerships between courts and their communities through local bias committees, and focusing those local bias committees on education, outreach, and discussing issues, rather than tasking local bias committees with disciplinary and investigatory goals. Local bias committees will play an important role in fostering discussions about bias, identifying and resolving systemic concerns, promoting community engagement, and delivering formal and informal education about bias.

	Commenter	Position	Comment	Committee Response
			It occurred to us in our discussion that our Committee as a whole, and the Complaint Subcommittee in particular, should consider whether reimagining and renaming our process of gathering information about specific bias incidents or recurring systemic biases from a "complaint" process to a "reporting" process. Our concern is that by calling it a "complaint" process we are creating an expectation of corrective action that is beyond the authority granted to the committee by the Rule of Court. In contrast, by calling it a "reporting" process we are expressing that we are primarily gathering information for purposes of providing education. Our intention is to use reporting information to: 1) Guide our education and outreach efforts with respect to the individuals, groups, or agencies involved in individual incidents (as opposed to taking corrective action); 2) To inform the court of specific issues to enable it to correct itself systemically; and 3) To enable the Committee to direct a reporting party to the appropriate existing "complaint" procedure administered by a body other than the Committee. We know that many bias issues (particularly implicit biases) are rooted in a lack of information or awareness. The "reporting"	

	Commenter	Position	Comment	Committee Response
			process will address that foundational cause and direct the Committee's attention to targeted solutions that are separate from and in addition to any corrective actions that may result from existing "complaint" processes. This reporting process will assist the committee by providing further information for those situations where a "complaint" process does not already exist and give guidance to the committee of areas where education and outreach efforts are needed but might not otherwise be known without a means of reporting instances of bias. We will of course refer reporting parties to specific existing "complaint" processes as the Judicial Council has suggested. However, we must have reports to work with to target those referrals. Thank your for our consideration.	
31.	Superior Court of Los Angeles County by Hon. Eric C. Taylor, Presiding Judge and Sherri R. Carter, Executive Officer/Clerk of Court	A	We write in support of Invitation to Comment SP21-03, Judicial Administration: Court's Duty to Prevent Bias. Recognizing the need for public trust and confidence in the judiciary, the Superior Court of Los Angeles County has long sponsored programs that seek to achieve these goals through, among other means, the recruitment and preparation of a more diverse population of attorneys and judicial officers. The framework anticipated and promoted by a newly amended Standard 10.20 is a useful support for these and other such efforts. We see no additional	The work group notes the commenters' support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			workload not considered by the *Invitation to Comment*.	
32.	Superior Court of Mendocino County by Kim Turner, Court Executive Officer	AM	Generally, I agree with the proposed changes. The goal of preventing bias is laudable and the expansion of the SJA to cover all court staff and judicial officers is a positive change. Regarding the creation of local bias committees, I am concerned that many courts will not have time or resources to prioritize creation of these committees, especially small and rural courts. Rather than having a number of local efforts that may not be equipped to really address these issues, I would like to suggest that the appellate districts take the lead on setting up bias committees for each district and all courts that file in that district. The appellate district could then request representatives from courts and bar associations and other legal services providers to join these more centralized committees. This would provide more structure to the work, would offer a wider range of differing perspectives from stakeholders and would also create better opportunities for the education activities to be sponsored, procured and supported. Thank you for the opportunity to comment.	The work group appreciates the commenter's concern that small and rural courts may not have the resources to devote to forming and supporting local bias committees. Under the revised standard, trial courts may form regional committees if they so choose. Appellate courts may form separate or joint appellate court committees or may join a trial court committee or regional committee formed by or composed of trial courts within the appellate courts' districts. The work group, however, does not require or recommend any particular structure for these committees. Some courts have already created local bias committees and may not wish to change their committees to include other courts, and some courts may wish to have the flexibility to continue with their own unique committees. The work group's overall goal is to create a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the

	Commenter	Position	Comment	Committee Response
				proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create local bias committees as they see fit, consistent with the unique needs of their community.
33.	Superior Court of Orange County by Hon. Erick Larsh, Presiding Judge	A	Does the amended standard appropriately address the stated goal of amending Standard 10.20 to reflect current law and current understandings regarding the elimination of bias and provide a framework for courts to work with their local bar communities to address courtroom bias? We believe that the amended standard appropriately addresses the stated goal of amending Standard 10.20 to reflect current law and current understandings regarding the elimination of bias and provides a framework for courts to work with their local bar communities to address courtroom bias. We interpret the proposal as a reaffirmation of the principle that the judicial branch is not an advocacy body, but rather a neutral adjudicative body. The amended standard demonstrates that the court as a whole is committed to providing an environment that ensures the integrity and impartiality of the judicial system and promotes interactions free from bias, discrimination, harassment, the appearance of bias, and other inappropriate conduct based on a protected classification.	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			We support eliminating the outdated complaint resolution procedure outlined in current Standard 10.20. Local bias committees might not have sufficient resources or expertise to investigate and resolve complaints. A complaint procedure run by a local bias committee while a case is ongoing could also raise disqualification, ex parte communication, and comment on pending matters ethics issues for judicial officers. In addition, since the standard was last amended over two decades ago, significant changes in laws, rules, and procedures provide mechanisms to address complaints of bias based on protected classifications during court interactions. The current standard in some ways duplicates, and in other ways, conflicts with existing systems to address complaints of bias and discrimination. Although existing Standard 10.20 requires a complaint to be kept confidential, a complaint cannot be kept confidential when judges, attorneys, and court administrators have legal or regulatory obligations to report bias and harassment to the appropriate authority. For example, the Code of Judicial Ethics defines the "appropriate authority" to mean "the authority with responsibility for initiation of the disciplinary process with respect to a violation to be reported." (Code of Judicial Ethics, Advisory Comm. Commentary to canons 3D(1) & 3D(2).) Disclosure of the complaints could be compelled by subpoenas or legal processes	

	Commenter	Position	Comment	Committee Response
			issued by courts, the Commission on Judicial Performance, the State Bar Court, or regulatory agencies. The investigative materials may also be subject to requests for access under the California Public Records Act, California Rules of Court, rule 10.500, or requests by executive agencies. Existing systems provide adequate and comprehensive methods to address complaints of bias, prejudice and harassment in court interactions. Numerous authorities prohibit judges, attorneys, court staff and others from engaging in speech, gestures, or other conduct that would reasonably be perceived as sexual harassment or bias, prejudice, or harassment based upon race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. (See Code of Judicial Ethics, canons 3B(5), 3B(6), 3C(1), 3C(3), 6D(1), 6D(3); Cal. Rules of Court, rules 10.351 & 10.670; Rules of Prof. Conduct, rule 8.4.1.) Differing systems address complaint reporting and resolution procedures for violations of the authorities prohibiting discrimination, bias, and harassment. The Commission on Judicial Performance is responsible for investigating complaints of judicial misconduct and judicial incapacity and for disciplining judges. (Cal. Const., art. 1, § 18.) The State Bar of California	

	Commenter	Position	Comment	Committee Response
			is responsible for prosecuting complaints of lawyer misconduct, including bias. (See Bus. & Prof. Code § 6077 et seq.) A comprehensive personnel system addresses complaints of bias and misconduct by court employees. (Gov. Code, § 71651 et seq.; Cal. Rules of Court, rules 10.351, 10.610(c)(1), & 10.670.) In addition, the reporting systems and complaint resolution procedures vary by roles. A judge who has reliable information that another judge has violated any provision of the Code of Judicial Ethics must take appropriate corrective action, which may include reporting the violation to the appropriate authority, which may include the Commission on Judicial Performance. (Code of Judicial Ethics, canon 3D(1).) Presiding judges and judges with supervisory authority have additional judicial oversight and reporting responsibilities. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) & 10.703; CJA Jud. Ethics Committee Op. No. 64.) Court employees are subject to a court personnel plan and progressive discipline procedures. (Gov. Code, § 71651; Cal. Rules of Court, rule 10.610(c)(1).) "Each court must adopt a process for employees to report complaints of harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification." (Cal. Rules of Court, rule 10.351(b).) "Each court must	

	Commenter	Position	Comment	Committee Response
			develop processes to intake, investigate, and respond to complaints or known instances of harassment, discrimination, retaliation, or inappropriate workplace conduct based on a protected classification." (Cal. Rules of Court, rule 10.351(c).) In addition, each court must have a grievance or complaint procedures covering, among other things, sexual harassment and discrimination. (Cal. Rules of Court, rule 10.670(c)(5).) Finally, court administrators who have knowledge of harassment, discrimination or inappropriate workplace conduct based on a protected classification have a duty to report this information to the presiding judge, court executive officer, human resources, or other appropriate judicial officer. (Cal. Rules of Court, rule 10.351(b)(5).) Court employees have constitutionally-protected privacy rights in their employment records. (See Cal. Const., art. 1, § 1; Braun v. City of Taft (1984) 154 Cal.App.3d 332, 347; BRV, Inc. v. Superior Court (2006) 143 Cal.App.4th 742, 757.) In some cases, they also have rights to evidentiary due process hearings to review disciplinary decisions and review procedures. (Gov. Code, §§ 71653 to 71655.) Law firms and lawyers with supervisory authority over another lawyer are required to make reasonable efforts to ensure that the other lawyer complies with the Rules of Professional Conduct and the State Bar Act. (Rules Prof.	

	Commenter	Position	Comment	Committee Response
			Conduct, rules 5.1(b), 5.1(c).) A judge who has personal knowledge of an attorney's violation of the Rules of Professional Conduct must take appropriate corrective action, which may include reporting the violation to the appropriate authority. (Code of Jud. Ethics, canon 3D(2).) Given all these existing comprehensive processes, we believe the amended standard appropriately eliminates the suggestion that local bias committees create their own complaint resolution procedures, and instead recommends that courts ensure that the public can easily access existing information about how to make a complaint regarding bias in court interactions based on a protected classification. Does the proposal create any additional workload not considered by this Invitation to Comment? Implementation of Standard 10.20 will require significant investment of time and resources, to update our website, to post information throughout our courthouses, and to educate the bench, court staff, and court users about the amended standard.	
34.	Superior Court of Sacramento County by Hon. Russell L. Hom, Presiding Judge	A	I appreciate the opportunity to submit comments regarding proposed revisions to Rule 10.20 of the Standards for Judicial Administration. I strongly support the goal of enhancing efforts on the part of the judicial branch to prohibit and	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			eliminate bias in our court system. The proposed rule changes accomplish that purpose. Although existing Rule 10.20 has been in place for a number of years, the inclusion of the informal complaint process encompassed in the current rule (Standard 10.20 sections (b)(3) and (c)(1)-(12)) proves to be an impediment to acceptance on the part of judicial officers. I have been involved in diversity and inclusion efforts much of my legal career both as a bench officer and as a private citizen. The elimination of bias requires educating and often times changing the mindset of individuals. The inclusion of the informal complaint process in the current rule not only serves as an obstacle to that educational process but adopts a potentially punitive approach towards eliminating bias. Although the formation of standing committees to address bias and protocols for shareholders, employees and members of the public who access the court to identify incidents of bias in our legal system are arguable equally important tools, combining both into one rule fosters neither. The inclusion of the informal complaint process becomes the proverbial "poison pill." Although in some form, this Standard has been in place for more than two decades, widespread implementation of the Standard has not taken place. It is my belief that the informal complaint process is unnecessary. The ability to identify	

	Commenter	Position	Comment	Committee Response
			incidents of bias is accomplished by existing protocols in place at most courts. Some local bar associations have committees addressing bar/court relations where complaints about judicial officers and staff are brought to the attention of court leadership. In many counties, the public is able to anonymously raise concerns regarding treatment in our court system by directing complaints through a court website, electronic form or correspondence. Those complaints are brought to the attention of either the Court Executive Officer or the Presiding Judge. All Courts should have policies and protocols in place to address employee related complaints. Lastly, complaints involving a possible violation by a judicial officer of their ethical responsibilities, including Canon 3B(5) are properly directed to the Commission on Judicial Performance. The continued inclusion of the informal complaint process is duplicative of vehicles already in place by most courts to identify, report and resolve incidents of bias. The complaint process itself proves to be a barrier to widespread acceptance by judicial officers. Although I have no doubt that Standard 10.20 was well intended, its efficacy as a vehicle to promote fairness and impartiality in the courtroom is hindered by the continuing inclusion of sections (b)(3) and (c)(1)-(12).	

	Commenter	Position	Comment	Committee Response
			I urge the Working Group to recommend the adoption of the proposed rule change to Standard 10.20.	
35.	Superior Court of San Bernardino County by Hon. Michael Sachs, Presiding Judge	A	Thank you for the opportunity to provide comment to the proposed revisions of Standard 10.20 by identifying improvements, updating the standard to reflect current law and understanding of modern information on the elimination of bias. The Superior Court of California, County of San Bernardino, supports the proposed revisions and applauds the efforts of the workgroup to modernize Standard 10.20. California Code of Judicial Ethics, canon 38 well documents judicial officers are bound to perform their duties without bias or prejudice and to ensure decorum in the courtroom. Pre-existing policies and procedure provide a pathway to remedial action in the event a judicial officer runs afoul of this canon. Any member of the public may submit a judicial complaint to the office of the Presiding Judge. The Presiding Judge is charged with the obligation to investigate that complaint. If the complaint is substantiated, the Presiding Judge must impose appropriate discipline. Additionally, the Presiding Judge may refer the complaint to the Commission on Judicial Performance for their investigation and possible imposition of discipline. As currently written, Standard 10.20 is vague, at best, and potentially would contradict long standing Rules of Court.	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			Changes in the Rules of Court and the Commission on Judicial Performance, along with companion requirements for court employees, have formalized complaint procedures in a way that is effective and transparent. Your proposed standard to provide information regarding complaint procedures provides improvement in transparency and ease of access. The modern Elimination of Bias Committee's charge best serves the court and community by identifying and providing outreach and communication opportunities in a way that educates, supports and prevents bias in a positive and forward focused manner. In regards to general comments and responsive to your request for specific comments: *Does the standard appropriately address the state goal of amending Standard 10.20 to reflect current Jaw and current understanding regarding the elimination of bias and provide a framework for courts to work with their local bar communities to address courtroom bias?* Yes *Does the proposal create additional workload not considered in this Invitation to Comment?* Impacts are generally defined in the invitation to comment. Specifically, we anticipate some courts may experience a workload/staffing/reallocation of resources impact in setting up a local committee, staffing	

	Commenter	Position	Comment	Committee Response
			the committee and providing ongoing clerical and administrative cost. Cost for technology, office supplies and space is a factor. Website updates must be considered as well as other communications to provide access to complaint procedures and forms. Training in the new standards can be expected. *How well would this proposal work in courts of different sizes?* The flexibility for joint and regional committees provides the needed flexibility to accommodate both small and large courts and provides the diversity needed for a robust team. Please do not hesitate to contact me if you have any questions.	
36.	Superior Court of San Diego County by Hon. Lorna Alksne, Presiding Judge	A	I agree that local bias committees should not create their own complaint resolution procedures. As noted in the Invitation to Comment, in addition to the CJP's existing comprehensive procedures for handling complaints against judicial officers, courts also have processes and procedures in place to receive, investigate and respond to complaints against judicial officers and court staff. Including a complaint resolution procedure and an investigatory role by a local committee raises a number of significant legal, ethical and liability issues for a court and the committee members, because it: (1) would overlap and conflict with CJP procedures and also court employee disciplinary procedures that are	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			governed by statute, case law and collective bargaining agreements which provide employees with due process rights; (2) may allow litigants to circumvent or undermine the CCP § 170.1 process; (3) may result in unintended ex parte communications between a litigant and a judicial officer who is a member of the committee; (4) create confidentiality issues for the complainant and others involved in the process; (5) would give rise to potential liability and litigation for a court, committee and its members; and (6) opens the door for committee members to be called as witnesses at depositions, disciplinary proceedings and trials.	
37.	Superior Court of San Diego County by Mike Roddy, Court Executive Officer	A	• Does the amended standard appropriately address the stated goal of amending Standard 10.20 to reflect current law and current understandings regarding the elimination of bias and provide a framework for courts to work with their local bar communities to address courtroom bias? Yes. (See General Comments below) • Does the proposal create any additional workload not considered by this Invitation to Comment? No • How well would this proposal work in courts of different sizes?	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			Unknown <u>General Comments</u> The San Diego Superior Court agrees with the current proposal, which eliminates the prior suggestion that the local bias committee create its own complaint resolution procedure. As noted in the Invitation to Comment, in addition to the CJP's existing comprehensive procedures for handling complaints against judicial officers, courts also have processes and procedures in place to receive, investigate and respond to complaints against judicial officers and court staff. Including a complaint resolution procedure and an investigatory role by a local committee raises a number of significant legal, ethical and liability issues for a court and the committee members, because it: (1) would overlap and conflict with CJP procedures and also court employee disciplinary procedures that are governed by statute, case law and collective bargaining agreements which provide employees with due process rights; (2) may allow litigants to circumvent or undermine the CCP § 170.1 process; (3) may result in unintended ex parte communications between a litigant and a judicial officer who is a member of the committee; (4) create confidentiality issues for the complainant and others involved in the process; (5) would give rise to potential liability and litigation for a court, committee and its members; and (6) opens the door for	

	Commenter	Position	Comment	Committee Response
			committee members to be called as witnesses at depositions, disciplinary proceedings and trials. No additional Comments.	
38.	Superior Court of Santa Clara County by Rebecca Fleming, Court Executive Officer	A	Santa Clara Superior Court very much supports the efforts of this committee in updating and making current the application and role intended of Standard of Administration 10.20. We respectfully submit the following comments: 1) SCSC agrees with extending the responsibility broadly to all court transactions. We feel this will create consistency for the court user. 2) There may be an initial void in court staffing for the support of the educational events and training. We are hopeful that partnerships locally and with CJER will be able to provide that expertise for local committees. 3) We believe that there is continued room to work on a consistent complaint processing approach while recognizing court individuality. Santa Clara consistently hears from users about the inconsistencies with neighboring courts. To the extent possible, alignment of initial steps in the process is preferable.	The work group notes the commenter's support for the proposed amendments and appreciates this input. The work group agrees that courts and local bias committees should work together, and also use available resources to provide education and training. The work group also agrees that all courts and local bias committees should be continually reevaluating their processes and complaint resolution procedures to avoid inconsistencies.
39.	Lisa J. Wilbur Mountain View	N	More needs to be done based upon experiences of people subjected to bias in the courts since the early 1990's. Lawyers, Judges, Bailiffs, and	The work group appreciates this submission and notes the commenter's suggestion regarding

	Commenter	Position	Comment	Committee Response
			all Court connected workers or employees need to undergo Critical Race Training so that there are no incidents of bias to be reported. No qualified or absolute immunity for reported bias after said training, not even for judges. [* A portion of the comment has been redacted because it is the commenter's own personal complaint of bias. This raises privacy concerns and the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.] Then formulate your proposals based upon the reality of the dominance of white privilege in and about the CA Courts.	increasing training of court personnel, attorneys, and bailiffs. While the work group did consider setting baseline recommendations on the number and type of education and training programs, it ultimately left those details to be evaluated by each individual committee within the framework created by the standard. The work group recognizes that counties vary greatly in size, demographics, needs, and viewpoints of the local bar community, and each county has unique and specific issues within its legal community. The intent of the proposed amendments is to provide courts and local bias committees with the framework to take the essential steps to engage their local communities in the important discussions that are required to prevent and eliminate bias. Thus, while the proposal broadly recommends that local bias committees engage in educational opportunities, and while the proposal suggests various roles that these local committees might play in their communities, the work group also recognizes that there is not just one correct approach. The proposed amendments to standard 10.20 allow local bias committees the flexibility to sponsor educational presentations directed at members of the local legal community, including attorneys and county employees, such as bailiffs. The work group has redacted a portion of this comment discussing the commenter's own personal complaint of bias due to privacy

	Commenter	Position	Comment	Committee Response
				concerns, and also because the comment is outside the scope of this work group. The work group is unable to resolve individual complaints of bias and the commenter may want to consider pursuing recourse through the avenues available at the local court or through the CJP.
40.	Kailin Wang Spanish Fork, Utah	AM	There is extreme bias, and prejudice against Pro Per's if the other party is represented.	The work group appreciates this submission and notes the commenter's concern regarding self-represented litigants. The proposed amendments to standard 10.20 protect all persons, which includes self-represented litigants. Standard 10.20(b)(2) states: "Each judicial officer should ensure that courtroom interactions are conducted in a manner that is fair and impartial to ***all*** persons." (Emphasis added.) Standard 10.20(b)(3) states: "Each judicial officer should ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases." These protections would include self-represented litigants. Information regarding resources available to self-represented litigants can be found here: https://www.courts.ca.gov/7648.htm.
41.	Women Lawyers of Alameda County by Amy Blair, Board Member, Oakland	N	We write to oppose certain of the proposed changes to Standards of Judicial Administration, standard 10.20. Specifically, we oppose (1) eliminating a complaint resolution process,	The work group appreciates this submission and addresses the commenter's concerns below.

	Commenter	Position	Comment	Committee Response
			(2) characterizing the creation of local bias committees as a recommendation rather than a requirement, and (3) the absence of a timeline by which courts must implement the standard. Courts have failed to form the local bias committees suggested by this Council since 1993. The newly proposed changes to standard 10.20 cause concern that the judicial branch will further avoid its duty to ensure the unbiased administration of justice. Current public sentiment and the fair administration of justice call for a dismantling of the institutional bias which impedes the success of so many participants in the justice system. Therefore, we have chosen to articulate our opposition. We oppose the elimination of the complaint resolution process through bias committees. The Work Group has erroneously concluded that other complaint avenues such as filing a complaint with the Presiding Judge or the Commission on Judicial Performance are adequate measures for addressing bias. Complaints made to the Presiding Judge or Commission on Judicial Performance carry the threat of retribution against the complaining parties or their attorneys. Further, these complaint processes are not specifically designed to address bias as would be a complaint process provided by a committee formed for the sole purpose of addressing bias. Moreover, eliminating the ability for members	The work group notes the commenter's concerns that eliminating the recommendation that local bias committees adopt informal complaint processes could result in retribution toward parties or attorneys who complain to the CJP. The work group is concerned that having local bias committees resolve complaints may result in less confidentiality for the complainant and respondent. Any inquiry by a local bias committee would be known and resolved by a group of local attorneys, judicial officers, and other committee members who would necessarily need to know the particular facts of the complaint. The work group has concerns that such an approach would significantly expand the number of individuals from the local legal community who were aware

	Commenter	Position	Comment	Committee Response
			of the public to voice concerns through the bias committees is a lost opportunity for honest communication with the community the judiciary serves.	of the existence or details of the complaint. Conversely, a CJP complaint is processed and investigated by a CJP investigator outside of the local court system, and with no involvement from the local court. The CJP provides confidentiality for complainants, and has existing procedural safeguards in place to protect complainants from retaliation for asserting good faith complaints to the CJP. Retaliation complaints can be made to either the CJP or the presiding judge or justice. These processes better protect confidentiality of the complainant. The work group is also concerned that referring complaints against judicial officers to local bias committees might trigger various due process concerns, especially given that local bias committees might not be adequately resourced or experienced to conduct the highly specialized inquiries that may need to be undertaken in response to a bias complaint against a judicial officer or court employee. Likewise, recommending that local bias committees resolve complaints of bias against judicial officers may raise ethical conflicts for judicial officers who are members of the local bias committees. Judicial officers who become aware of complaints against other judicial officers have ethical obligations that require them to take appropriate corrective action, which may include reporting the information to the presiding judge or justice or the CJP. (Canons of Judicial Ethics, canon 3D(1) and (2); See also, CJEO Formal Opinion 2020-15). A system where

	Commenter	Position	Comment	Committee Response
				those complaints are handled informally, at a local level, could undercut those obligations. Conversely, the existing procedures for resolving complaints against judges appropriately address those concerns. The CJP is best equipped to resolve complaints about judicial officer bias, given that the CJP has its own experienced investigators, established investigation procedures, and the ability to subpoena witnesses–tools that may not be available to local bias committees. Alternatively, complaints about judicial officers may also be made directly to the presiding judge or justice. Presiding judges, presiding justices, and judges with supervisory authority who are informed of complaints against other judicial officers have ethical obligations to handle those complaints appropriately. (See Code of Judicial Ethics, canon 3C(4); Cal. Rules of Court, rules 10.603(c)(4) and 10.703; CJA Jud. Ethics Committee Op. No. 64.) Most courts have formal procedures for how complaints to the presiding judge or justice are processed, and the presiding judge or justice has the unique ability and responsibility to address issues of bias immediately and directly with the judicial officer, if warranted. Creating an alternative complaint resolution system through local bias committees may cause complaints to go unreported to the CJP and the presiding judges or justices, which may lead to inconsistent and less optimal handling of these complaints.

	Commenter	Position	Comment	Committee Response
				However, the work group acknowledges that some local bias committees have established effective informal complaint resolution procedures for complaints against judicial officers. As discussed in the accompanying report, the work group recognizes that there is no one correct way to eliminate bias in court interactions, and the work group advocates for each court and local bias committee to find solutions that work best for that local community. The work group's proposal does not prevent courts and local bias committees from choosing to create informal complaint resolution procedures for complaints against judicial officers if those courts and committees conclude that is the best way to address bias complaints in their communities. If so, the work group recommends that they fully consider how best to address the concerns raised above. However, given the existence of California Rules of Court, rule 10.351, and the fact that courts already have personnel policies and memorandums of understanding that govern complaints against court employees, having local bias committees resolve complaints against court employees is not recommended. The commenter also raises concerns that the CJP complaint process is not designed to address judicial officer bias. However, CJP complaints include judicial misconduct, which may involve conduct in conflict with the standards set forth in the California Code of Judicial Ethics. The California Code of Judicial Ethics addresses

	Commenter	Position	Comment	Committee Response
				judicial officer responsibilities for performing judicial duties without bias, prejudice, or harassment (canon 3(B)(5)); for requiring attorneys in proceedings before the judicial officer to refrain from manifesting bias, prejudice, or harassment (canon 3(B)(6)); for discharging judicial administrative duties without bias or prejudice (canon 3(C)(1)); and for requiring staff and court personnel under the judicial officer's control to refrain from manifesting bias, prejudice, or harassment in the performance of their duties (canon 3(C)(3)). The work group notes the commenter's position that eliminating the informal complaint procedure is a lost opportunity for communications within the local community. One purpose of the proposed amendments to standard 10.20 is to facilitate partnerships between courts and their communities through the local bias committees to raise awareness regarding unconscious and explicit biases and to find ways to address and eliminate bias. While local bias committees would not be explicitly tasked with resolving informal complaints against specifically named judicial officers and employees, they would still play an important role in fostering discussions about bias, identifying and resolving systemic concerns, promoting community engagement, delivering formal and informal education about bias, and discussing formal complaint mechanisms through the CJP or the presiding judge.

	Commenter	Position	Comment	Committee Response
			We are further disappointed that the revised standard 10.20 does not make the formation of bias committees mandatory. By drafting the subsection (c) to state "To assist in providing court interactions free of bias and the appearance of bias, courts should collaborate with local bar associations to establish a local or regional committee" (emphasis added), the bias committees appear to be a mere suggestion. The bias committees are necessary to field bias complaints and to further educate the judiciary on diversity.	The work group notes the commenter's concern that standard 10.20 does not make local bias committees mandatory. As stated in California Rules of Court, rule 1.5(c), the Standards of Judicial Administration within the rules of court are guidelines or goals recommended by the Judicial Council. The nonbinding nature of the standards is indicated by the use of "should" in the standards instead of the mandatory "must" used in the rules. Maintaining the recommendations in the standard as guidelines and goals is consistent with the work group's overall goal of creating a framework within which courts can work with their local communities toward the elimination of bias in court interactions, rather than creating top-down mandates. The proposal recognizes that each community varies greatly in size, demographics, needs, and viewpoints, and that the issues that confront each local community are unique and require direct dialogue between the local bias committee and the community. The intent of the proposed amendments is to provide courts and local committees with the framework to take the essential steps to engage their local communities in the important discussions required to prevent and eliminate bias. Thus, while the proposal makes recommendations, the work group also recognizes that there is not just one correct approach. The current proposal gives courts the latitude to create customized processes, and

	Commenter	Position	Comment	Committee Response
				partner with their local communities to find solutions that meet the unique and specific needs of each court and the local community that it serves.
			Last, we are disappointed that the proposed changes to standard 10.20 do not provide a concrete timeline to act upon the suggestion to form bias committees. The nebulous requirement that bias committees be formed "as soon as possible" could result in this being ignored as it has been since 1997 when the standard was last revised. We suggest that the committee consider revising the standard to require the formation of bias committees and set a reasonable timeline to do so (e.g., within a year of when the rule takes effect).	The proposal encourages courts to implement the revised standard "as soon as possible." This acknowledges the importance of addressing bias in court interactions. If the Judicial Council adopts the proposed amendments to standard 10.20, the amended standard will go into effect on January 1, 2022, and courts may begin immediate implementation. The work group has not identified a specific implementation date because it recognizes that each court will follow a unique process in forming a local or regional committee on bias and that, as a result, the timeframes for forming local or regional committees in each community may vary.
			We echo the voices of other respected organizations in opposition to the proposed changes and request that a revision of standard 10.20 in the California Rules of Court be conducted with a meaningful Work Group which includes employment attorneys, civil rights attorneys, and members of diversity bar associations. This should be done with care and with all appropriate voices included. Thank you for your time and attention to this matter.	Amending standard 10.20 is a necessary step in renewing the branchwide commitment to the elimination of bias in all court interactions. The amended standard will provide a framework that will allow courts and local bias committees to do further work on the local level to build partnerships with the legal communities and engage in the process of conceptualizing outreach and educational programs. Given the need to promptly amend standard 10.20 to provide a framework and guidance that will allow courts to take these important steps to

	Commenter	Position	Comment	Committee Response
				eliminate bias in all court interactions, Chief Justice Tani G. Cantil-Sakauye appointed a small work group comprised entirely of Judicial Council members, and gave it a limited charge, which enabled the work group to swiftly and efficiently propose amendments to update the standard. The work group includes judicial officers, attorneys, and a court executive officer. Several members of the work group have experience in these and related issues from serving on the Work Group for the Prevention of Discrimination and Harassment and the committee to develop California Rules of Court, rule 10.351, creating standardized expectations for harassment prevention policies. The work group also had an early comment period specifically designed to seek input from interested groups and persons, met with various local bias committees, and met with interested groups throughout the process who wanted to share thoughts and ideas for amending the standard.
42.	David Yamasaki, Court Executive Officer, Superior Court of Orange County	A	Thank you for overseeing the work of the Work Group tasked with enhancing administrative standards to address bias in court proceeding. I support the proposed changes contained in Standard 10.20 and believe they very appropriately provide important direction to courts on this evolving subject matter and further recognizes the extensive and effective mechanisms already in place throughout the judicial branch in addressing issues that arise. While there may be additional responsibilities assumed by courts to comply with changes to Standard 10.20, I believe they will be	The work group notes the commenter's support for the proposed amendments and appreciates this input.

	Commenter	Position	Comment	Committee Response
			reasonable and achievable within existing resources.	

Item number: 02

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Rules Committee Meeting Date: October 8, 2021

Title of proposal: Jury Instructions: Civil Jury Instructions (Release 40)

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Judicial Council of California Civil Jury Instructions (CACI)

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions

Staff contact (name, phone and e-mail): Eric Long, 415-865-7691, eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: November 2, 2020
Project description from annual agenda: Maintenance—Case Law; Maintenance—Legislation; New Instructions and Expansion into New Subject Matter Areas; Maintenance—Comments from Users; Maintenance—Sources and Authority

If requesting July 1 or out of cycle, explain:
N/A

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
California Rules of Court, rules 2.1050(d) and 10.58(a), require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Upon approval by the Judicial Council, release 40 will be published as the official 2022 edition of the Judicial Council of California Civil Jury Instructions (CACI). Release 39 was approved by the Judicial Council in May 2021.

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:*
- *List any new forms that require translation by statute or that you will request to be translated:*

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.: 21-171
For business meeting on November 19, 2021

Title
Jury Instructions: Civil Jury Instructions (Release 40)

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
November 19, 2021

Date of Report
September 28, 2021

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions prepared by the committee. These changes bring the instructions up to date with developments in the law over the previous six months. Upon Judicial Council approval, the instructions will be published in the official 2022 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective November 19, 2021, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 7 new instructions: CACI Nos. 2750, 2752, 2753, 2754, 3046, 3714, and 4330; and

2. Revisions to 20 instructions and verdict forms: CACI Nos. 2334, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2702, 2704, 2705, 3041, 3050, 3709, and 4304.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 7–107.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At that meeting, the council approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI* to ensure that the instructions remain clear, accurate, current, and complete.

This is release 40 of *CACI*. The council approved release 39 at its July 2021 meeting.

Analysis/Rationale

A total of 27 instructions are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on October 8, 2021, changes to 10 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

New instructions

The committee proposes adding seven new instructions, four of which pertain to employment and labor law.

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

[2] At its October 20, 2006, meeting, the Judicial Council delegated to the Rules Committee (formerly called the Rules and Projects Committee or RUPRO) the final authority to approve nonsubstantive technical changes and corrections and minor substantive changes to jury instructions unlikely to create controversy. The council also gave the Rules Committee the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which the Rules Committee has done.

Under the implementing guidelines that the Rules Committee approved on December 14, 2006, which were submitted to the council on February 15, 2007, the Rules Committee has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use.

CACI series 2700. Based on suggestions from an employment lawyers bar association, the committee proposes four new instructions for claims under the Labor Code and the Industrial Welfare Commission's wage orders:

- No. 2750, *Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))*;
- No. 2752, *Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)*;
- No. 2753, *Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)*; and
- No. 2754, *Reporting Time Pay—Essential Factual Elements*.

The committee's expansion into this area recognizes the prevalence of lawsuits against employers for wage and hour violations and other statutory violations. The committee will continue to monitor closely developments in this area, and will consider developing additional instructions, including new instructions on meal periods and rest periods.

CACI No. 3046, *Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)*. Based on Supreme Court authority,[3] the Ninth Circuit has clarified that a different standard for deliberate indifference applies to individuals who are detained but who have not yet been convicted of a crime.[4] The committee recommends a new instruction addressing the Fourteenth Amendment standard applicable to pretrial detainees under section 1983.

CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship*. Citing two appellate court decisions,[5] the Directions for Use of CACI's ostensible agent instruction (CACI No. 3709) had noted that a different instruction was required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. The committee now proposes a new instruction for use in that context. One commenter objected to the new instruction, but the committee believes that the instruction correctly states the requirements of the cases cited by the commenter.

CACI No. 4330, *Denial of Requested Accommodation*. In release 39, the council approved a new affirmative defense instruction in the unlawful detainer series relating to reasonable accommodation requests by tenants or other household members. In public comments during that last cycle, the California Apartment Association observed that the California Code of Regulations, title 2, section 12176(b) also specifies reasons for denying an accommodation. The committee believes the regulation is too fact specific to propose standard language on the

[3] *Kingsley v. Hendrickson* (2015) 576 U.S. 389 [135 S.Ct. 2466, 192 L.Ed.2d 416].

[4] *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125.

[5] *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363] and *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].

exceptions, but agrees that an instruction directing users to specify the relevant factors listed in section 12179(b) would be useful.

Revised instructions

CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements*. When this instruction was last revised in 2016, the invitation to comment resulted in more than 170 comments.[6] A recent case, *Pinto v. Farmers Insurance Exchange*,[7] brought the committee's attention back to CACI No. 2334. The court in *Pinto* held that the instruction "lacks a crucial element: Bad faith."[8] The court went on to explain that an insurer's failure to accept a settlement demand must be unreasonable; "it must act or fail to act without proper cause, for example by placing its own interests above those of its insured."[9]

Recognizing that this instruction's prior revision caused substantial commentary, the committee considered at some length how best to state the bad faith element.[10] The committee opted to state the element in the way advanced by the insurer in *Pinto*, which the court said would have been the correct question: "[the defendant's] failure to accept [the plaintiff's] settlement offer was 'the result of unreasonable conduct by [the defendant]' "[11] And because jurors may be inclined to think *conduct* requires an affirmative act, the committee thought it important to note, as the court in *Pinto* observed, that bad faith conduct may involve action or failure to act.

Three commenters (an attorney and two bar associations) agreed with the proposed changes; two of those three offered minor suggestions. Four commenters representing the insurance defense bar contended that the instruction required more substantial revisions and suggested that the bad faith element would be better framed as whether the insurer "unreasonably refused a settlement offer." As set forth in more detail in the attached comment chart, the committee finds the commenter's preferred language too narrow. Many cases discuss an insurer's unreasonable refusal of a settlement demand, but the cases also refer to an insurer's "failure to accept" and "rejection" of a demand. The committee chose "failure to accept" because it is inclusive of both an insurer's refusal and rejection (affirmative acts) as well as an insurer's inaction, and because

---

[6] See Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Revised Civil Jury Instruction No. 2334—Supplemental Report* (June 24, 2016), https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28.

[7] (2021) 61 Cal.App.5th 676 [276 Cal.Rptr.3d 13].

[8] 61 Cal.App.5th at p. 692.

[9] *Id.*

[10] The committee's omission of the bad faith element was not an oversight. The instruction's Directions for Use discussed the state of the law in four paragraphs and acknowledged that the issue remained unresolved. (See *supra* note 6 at p. 16.) Because the court in *Pinto* directly addressed the issue, the committee recommends striking that discussion from the Directions for Use in this release.

[11] 61 Cal.App.5th at p. 694.

the court in *Pinto* expressly endorsed the language proposed by the committee in element 3.[12] The commenters who opposed the committee's proposed language for element 3 made several other suggestions.

Based on the comments, the committee proposes refining language in the instruction itself and in the Directions for Use. Several of the commenters suggested changes that are beyond the scope of the invitation to comment, such as (1) suggestions to revise the reasonable-offer element, (2) suggestions to add causation and harm elements, and (3) suggestions to reference "the totality of the circumstances" and the possibility of mistakes, errors, and negligence in the final paragraph addressing the jury's reasonableness of an insurer's conduct. The committee takes no position on these suggestions now. They will be considered at the committee's next meeting.

CACI Nos. 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, and related verdict forms (Fair Employment and Housing Act series). At the prompting of a commenter in the last public comment cycle, the committee recommends revising these six work environment harassment instructions and the accompanying verdict forms to include applicants because the governing statute covers them.[13] All three commenters agreed with the proposed revisions, but one attorney questioned whether a claim of sexual favoritism harassment (CACI Nos. 2521C and 2522C) would ever apply to applicants. The committee appreciates the attorney's concern given the nature of these harassment claims, but the committee believes an applicant could be impacted by favoritism based on sex. The committee therefore recommends including applicants in the favoritism instructions and their related verdict forms.

CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*. Upon posting for public comment, the committee proposed revisions to the Directions for Use noting the potential need for users to modify the instruction if the Tenant Protection Act of 2019's dual-notice requirement applied to the facts of the case. Two commenters urged the committee to include more information. Based on the commenters' suggestions, the committee recommends adding an optional bracketed element that addresses the second notice required under the act, and adding a discussion to the Directions for Use about the duration of the tenancies the act requires for the dual-notice requirement to apply.

Policy implications

Jury instructions express the law; there are no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from July 21 through September 2, 2021. Comments were received from ten different commenters. Four commenters submitted comments on multiple instructions. Seven comments were received on an insurer's

[12] See *id.*

[13] See Gov. Code, § 12940(j).

bad faith refusal to accept a reasonable settlement demand (CACI No. 2334). Except for that insurance instruction, no other instructions garnered a particularly large number of comments.

The committee evaluated all comments and proposes refining some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 108–170.

Alternatives considered

Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider. The committee did, however, consider suggestions received from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration while others were declined for lack of support.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2022 version of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties. The official publisher will also make the revised content available free of charge to all judicial officers in both print and online document assembly software.

Attachments and Links

1. Jury instructions, at pages 7–107
2. Chart of comments, at pages 108–170

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 40: November 2021

LABOR CODE ACTIONS

CIVIL RIGHTS

VICARIOUS RESPONSIBILITY

UNLAWFUL DETAINER

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

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

1. That [*name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*];

2. That [*name of plaintiff in underlying case*] ~~brought a lawsuit~~ made a claim against [*name of plaintiff*] ~~for a claim~~ that was covered by [*name of defendant*]'s insurance policy;

~~2~~3. That [*name of defendant*] failed to accept a reasonable settlement demand for an amount within policy limits;

4. That [*name of defendant*]'s failure to accept the settlement demand was the result of unreasonable conduct by [*name of defendant*]; and

~~3~~5. That a monetary judgment was entered against [*name of plaintiff*] for a sum greater than the policy limits.

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

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

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

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

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits.

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

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

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

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

~~Under this instruction, if the jury finds that the policy-limits demand was reasonable, then the insurer is automatically liable for the entire excess judgment. Language from the California Supreme Court supports this view of what might be called insurer "strict liability" if the demand is reasonable. (See *Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744] ["[W]henever it is likely that the judgment against the insured will exceed policy limits 'so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest *requires the insurer to settle* the claim,' " italics added].)~~

~~However, there is language in numerous cases, including several from the California Supreme Court, that would require the plaintiff to also prove that the insurer's rejection of the demand was "unreasonable." (See, e.g., *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128] ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits," italics added]; *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717] [claim for bad faith based on an alleged wrongful refusal to settle *also* requires proof the insurer *unreasonably* failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance, italics added].) Under this view, even if the policy-limits demand was reasonable, the insurer may assert that it had a legitimate reason for rejecting it. However, this option, if it exists, is not available in a denial of coverage case. (*Johansen, supra,* 15 Cal.3d at pp. 15–16.)~~

~~None of these cases, however, neither those seemingly creating strict liability nor those seemingly providing an opportunity for the insurer to assert that its rejection was reasonable, actually discuss, analyze, and apply this standard to reach a result. All are determined on other issues, leaving the pertinent language as arguably dicta.~~

~~For this reason, the committee has elected not to change the elements of the instruction at this time. Hopefully, someday there will be a definitive resolution from the courts. Until then, the need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement. For a thorough analysis of the issue, see the committee's report to~~

~~the Judicial Council for its June 2016 meeting, found at https://jcc.legistar.com/View.ashx?M=F&ID=4496094&GUID=53DBD55C-AF07-498F-B665-D6BDD6DEFB28~~

~~.~~

Sources and Authority

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

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra,* 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen* *v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744]~~, *supra,* 15 Cal.3d at p. 16~~, internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton* *v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128]~~, *supra,* 27 Cal.4th at 724–725~~.)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra,* 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer,

among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

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

- "An insurer's duty to accept a reasonable settlement offer is not absolute. ' "[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests *may* require the insurer to settle the claim within the policy limits. An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." ' [¶] Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' " *(Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 [276 Cal.Rptr.3d 13], internal citations omitted, original italics.)

- "A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. [¶] Simply failing to settle does not meet this standard." (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citation omitted.)

- "To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Pinto, supra,* 61 Cal.App.5th at p. 692.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause,* to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra,* 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson*

v. California Ins. Guarantee Assn. (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless,* if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.…' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra,* 27 Cal.4th at p. 725, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a

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

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no "'opportunity to settle'" that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

~~"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' " [(*Howard v. American Nat'l Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 529 [, 115 Cal.Rptr.3d 42].), 69 (quoting text)]~~

- "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*.' " ' " (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citations omitted, original italics.)

~~•~~

~~• (a) [12:246] **Good faith or mistake as excuse:** 'If the insurer has exercised good faith in all of its dealings … and if the settlement which it has rejected has been fully and fairly considered and has been based upon an *honest belief* that the insurer could defeat the action or keep any possible judgment within the limits of the policy, and its judgments are based on a fair review of the evidence after reasonable diligence in ascertaining the facts, and upon sound legal advice, a court should not subject the insurer to further liability if it ultimately turns out that its judgment is a mistaken judgment.' [See *Brown v. Guarantee Ins. Co.* (1957) 155 CA2d 679, 684, 319 P2d 69, 72 (emphasis added); *Howard v. American Nat'l Fire Ins. Co.,* supra, 187 CA4th at 529, 115 CR3d at 69 — 'an insurer may reasonably underestimate the value of a case, and thus refuse settlement' on this basis (acknowledging but not applying rule)]~~

~~•~~

~~•~~ "'In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake.'" ([*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [, 7 Cal.Rptr.2d 513, 521].)1) [12:246.1] **Comment: These cases are difficult to reconcile with the 'only permissible consideration' standard of a 'reasonable settlement demand' set out in *Johansen* and CACI 2334 (see ¶12:235.1). A possible explanation is that**

~~these cases address the 'reasonableness' of the insurer's refusal to settle based on a dispute as to the value of the case (or other matters unrelated to coverage), whereas *Johansen* addressed 'reasonableness' in the context of a coverage dispute (see ¶12:235). [See *Howard v. American Nat'l Fire Ins. Co.*, supra, 187 CA4th at 529, 115 CR3d at 69 (quoting text)]" (Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:245–12:246.1 (The Rutter Group), bold in original.)~~

•

Secondary Sources

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

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

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

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

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

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

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

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

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

2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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

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

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

   [*or***]**

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

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

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

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

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

Sources and Authority

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

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Servs., supra,* 31 Cal.4th at p. 1042.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of

the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

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

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

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra,* 13 Cal.App.4th at p. 1000.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

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

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

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same

standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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

- "The stray remarks doctrine … allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra,* 50 Cal.4th at p. 545.)

- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

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

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

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

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527 fn. 8, original italics.)

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

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

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

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

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

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

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

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

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

2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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

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

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

   [*or***]**

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

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

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

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

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

Sources and Authority

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

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

sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

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

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

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

Secondary Sources

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

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

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

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

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

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

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

2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

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

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

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was severe or pervasive;**

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

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

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

   [That a supervisor [engaged in the conduct/created the sexual favoritism];]

   [*or***]**

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

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

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

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the facts of the case support it, the instruction should be modified as appropriate for the applicant's circumstances.

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

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

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

Sources and Authority

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

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this

negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040–1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

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

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

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

Secondary Sources

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

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

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

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

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity*

Laws, § 43.01[10][g][i] (Matthew Bender)

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

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

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

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

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

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***];**

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

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

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

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

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

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

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

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

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

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

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

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

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

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

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an individual such as the alleged harasser or plaintiff's coworker. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-

related context, the employer is liable"].)

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

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

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

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).

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

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

1. **That [*name of plaintiff*] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [*name of employer*];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was severe or pervasive;**

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

5. **That [*name of plaintiff*] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an individual such as the alleged harasser or plaintiff's coworker. The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

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

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

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

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the

harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)

- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

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

Secondary Sources

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

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68,

2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.36–3.45

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

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

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

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

VF-2506A. Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

____ Yes ____ No

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

7. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

____ Yes ____ No

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

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

____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

[d. Future noneconomic loss, including [physical

pain/mental suffering:]

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521A. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

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

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

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

any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2506B. Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   ____ Yes ____ No

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

6. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] know or should [he/she/***nonbinary pronoun***/it/they] have known of the harassing conduct?**

____ Yes ____ No

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

7. Did [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] fail to take immediate and appropriate corrective action?**

____ Yes ____ No

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

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

____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521B. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

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

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

VF-2506C. Work Environment Harassment—Sexual Favoritism—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Was there sexual favoritism in the work environment?**
   ____ Yes ____ No

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

3. **Was the sexual favoritism severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***describe member of protected group, e.g.,* **woman] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] know or should [he/she/*nonbinary pronoun*/it/they] have known of the sexual favoritism?
____ Yes ____ No

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

7. Did [*name of defendant*] [or [his/her/*nonbinary pronoun*/its] supervisors or agents] fail to take immediate and appropriate corrective action?
____ Yes ____ No

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

8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Derived from former CACI No. VF-2506 December 2007; Revised December 2010, December 2016, May 2020, May 2021, November 2021

Directions for Use

This verdict form is based on CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

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

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

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

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

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

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

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] personally witness harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment?**
   ____ Yes ____ No

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

3. **Was the harassment severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***]?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

7. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of employer***]?**
   ____ Yes ____ No

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

2. **Was there sexual favoritism in the work environment?**
   ____ Yes ____ No

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

3. **Was the sexual favoritism severe or pervasive?**
   ____ Yes ____ No

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

4. **Would a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism?**
   ____ Yes ____ No

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

6. Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?
____ Yes ____ No

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

7. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

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

Directions for Use

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

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

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions 6 and 7, as in element 6 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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

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

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] overtime pay as required by state law. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] performed work for [*name of defendant*];**
2. **That [*name of plaintiff*] worked overtime hours;**
3. **That [*name of defendant*] knew or should have known that [*name of plaintiff*] had worked overtime hours;**
4. **That [*name of plaintiff*] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours*].

Overtime pay is [*insert applicable formula*].

An employee is entitled to be paid the legal overtime pay rate even if the employee agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015, May 2020, November 2021

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) If an employee earns a flat sum bonus during a pay period, under state law the overtime pay rate is calculated using the actual number of nonovertime hours worked by the employee during the pay period. (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 573 [229 Cal.Rptr.3d 347, 411 P.3d 528].) The jury must be instructed ~~accordingly~~on the applicable overtime pay formula. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code, and a series of 18 wage orders adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See, e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]). The assertion of an employee's exemption is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*,

and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- What Hours Worked Are Overtime. Labor Code section 510.
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)
- "The FLSA [federal Fair Labor Standards Act] requires overtime pay only if an employee works more than 40 hours per week, regardless of the number of hours worked during any one day. California law, codified at Labor Code section 510, is more stringent and requires overtime compensation for '[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek.' " (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 83 [196 Cal.Rptr.3d 352], internal citation omitted.)
- "We conclude that the flat sum bonus at issue here should be factored into an employee's regular rate of pay by dividing the amount of the bonus by the total number of nonovertime hours actually worked

during the relevant pay period and using 1.5, not 0.5, as the multiplier for determining the employee's overtime pay rate." (*Alvarado, supra,* 4 Cal.5th at p. 573.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 417, 420, 421, 437, 438, 439

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.40 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

2704. ~~Damages —~~Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

~~**If you decide that [***name of plaintiff***] has proved [his/her/***nonbinary pronoun***] claim against [***name of defendant***] for [unpaid wages/[***insert other claim***]], then [***name of plaintiff***] may be entitled to receive an award of an additional penalty based on the number of days [***name of defendant***] failed to pay [his/her/***nonbinary pronoun***] [wages/***other***] when due.**~~

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] is entitled to recover a penalty based on [***name of defendant***]'s failure to pay [his/her/***nonbinary pronoun***] [wages/***insert other claim***] when due after [***name of plaintiff***]'s employment ended. [***Name of defendant***] was required to pay [***name of plaintiff***] all wages owed [on the date that/within 72 hours of the date that] [***name of plaintiff***]'s employment ended.**

You must decide whether [*name of plaintiff***] has proved [he/she/***nonbinary pronoun***] is entitled to recover a penalty. I will decide the amount of the penalty, if any, to be imposed. To recover this penalty, [***name of plaintiff***] must prove ~~all~~ both of the following:**

1. **That [***name of plaintiff***]'s employment with [***name of defendant***] ended; and**

2. **That [***name of defendant***] willfully failed to pay [***name of plaintiff***] all wages when due~~; and~~**

~~3. That [***name of defendant***] willfully failed to pay these wages~~**.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

[*Name of plaintiff***] must also prove the following:**

1. ~~**The date on which [***name of plaintiff***]'s wages were due;**~~

~~2.~~ **[***Name of plaintiff***]'s daily wage rate at the time [his/her/***nonbinary pronoun***] employment with [***name of defendant***] ended~~[~~**; and**~~/.]~~

~~[~~3~~2~~. **[The date on which [***name of defendant***] finally paid [***name of plaintiff***] all wages due/That [***name of defendant***] never paid [***name of plaintiff***] all wages].**~~]~~

[The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.]

New September 2003; Revised June 2005, May 2019, May 2020, November 2021

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. ~~Give the third optional fact if the employer eventually paid all wages due, but after their due date.~~Select between the factual scenarios in element 2 of the second part: the employer eventually paid all wages due or the employer never paid the wages due.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. Code, §§ 201, 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).)

If there is a factual dispute, for example, whether plaintiff gave advance notice of the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

The definition of "wages" may be deleted if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is

fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)

- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, 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." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)

- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute.

Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378 [36 Cal.Rptr.3d 31].)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

2705. Independent Contractor—Affirmative Defense ~~to Labor Code, Unemployment Insurance Code, and Wage Order Violations—Plaintiff~~ Worker Was Not ~~Defendant's~~ Hiring Entity's Employee (Lab. Code, § 2775)

[*Name of defendant***] claims that ~~[he/she/*nonbinary pronoun*/it] is not liable for [*specify violation(s) of the Labor Code, the Unemployment Insurance Code, and/or wage order(s), e.g., failure to pay minimum wage*] because~~ [***name of plaintiff***] was not [his/her/*nonbinary pronoun*/its] employee, but rather an independent contractor. To establish ~~this defense~~ that [*name of plaintiff*] was an independent contractor, [*name of defendant*] must prove all of the following:**

~~a~~1. **That [*name of plaintiff*] is under the terms of the contract and in fact free from the control and direction of [*name of defendant*] in connection with the performance of the work that [*name of plaintiff*] was hired to do;**

~~b~~2. **That [*name of plaintiff*] performs work for [*name of defendant*] that is outside the usual course of [*name of defendant*]'s business; and**

~~c~~3. **That [*name of plaintiff*] is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for [*name of defendant*].**

New November 2018; Revised May 2020, May 2021, November 2021

Directions for Use

This instruction may be used if a hiring entity claims that the worker is an independent contractor and not an employee, and is primarily intended for use in cases involving claims under the Labor Code, the Unemployment Insurance Code, or a wage order. Any person providing services or labor for remuneration is presumptively an employee. (Lab. Code, § 2775 ~~This instruction may be needed if there is a dispute as to whether the defendant was the plaintiff's employer for purposes of a claim covered by the Labor Code, the Unemployment Insurance Code, or a California wage order. (Lab. Code, § 2775~~; see *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, 913–914, & fn. 3 [232 Cal.Rptr.3d 1, 416 P.3d 1].) The ~~defendant~~ hiring entity has the burden to prove independent contractor status. (Lab. Code, § 2775(b)(1); *Dynamex, supra,* 4 Cal.5th at p. 916.) This instruction may not be appropriate if the ~~defendant~~ hiring entity claims independent contractor status based on Proposition 22 (Bus. & Prof. Code, § 7451) or one of the many exceptions listed in Labor Code sections 2776–2784. For an instruction on employment status under the *Borello* test, see CACI No. 3704, *Existence of "Employee" Status Disputed*.

The ~~rule on employment status has been that if there are disputed facts, it's for the~~ jury ~~to~~ only decides whether ~~one~~ a worker is an employee or an independent contractor when there are disputed issues of fact material to the determination. (*Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342 [221 Cal.Rptr.3d 1].) However, on undisputed facts, the court ~~may~~ decides ~~that~~ whether the relationship is

employment as a matter of law. (*Dynamex, supra,* 4 Cal.5th at p. 963.) ~~The court may address the three factors in any order when making this determination, and if the defendant's undisputed facts fail to prove any one of them, the inquiry ends; the plaintiff is an employee as a matter of law and the question does not reach the jury.~~

~~If, however, there is no failure of proof as to any of the three factors without resolution of disputed facts, the determination of whether the plaintiff was defendant's employee should be resolved by the jury using this instruction. If the court concludes based on undisputed facts that the defendant *has* proved one or more of the three factors, that factor (or factors) should be removed from the jury's consideration and the jury should only consider whether the employer has proven those factors that cannot be determined without further factfinding.~~

Sources and Authority

- Worker Status: Employees. Labor Code section 2775.

- "The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies each of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; and (b) that the worker performs work that is outside the usual course of the hiring entity's business; and (c) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (*Dynamex, supra,* 4 Cal.5th at pp. 955–956.)

- "A business that hires any individual to provide services to it can always be said to knowingly 'suffer or permit' such an individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business--including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like--who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business." (*Dynamex, supra,* 4 Cal.5th at pp. 948–949.)

- "A multifactor standard--like the economic reality standard or the *Borello* standard--that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." (*Dynamex, supra,* 4 Cal.5th at p. 954.)

- "Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. On the other hand, when a clothing manufacturing company hires work-at-

home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company, or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes, the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor." (*Dynamex, supra,* 4 Cal.5th at pp. 959–960, internal citations omitted.)

- "A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself." (*Dynamex, supra,* 4 Cal.5th at p. 962.)

- "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 and, as such, must be affirmed on appeal if supported by substantial evidence. The question is one of law only if the evidence is undisputed. 'The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.' " (*Espejo, supra,* 13 Cal.App.5th at pp. 342–343.)

- "It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, *a court* is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for *a court* to determine whether or not part B or part C of the ABC standard has been satisfied than for *the court* to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the significant advantages of the ABC standard--in terms of increased clarity and consistency--will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question." (*Dynamex, supra,* 4 Cal.5th at p. 963, italics added.)

- "An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. Multiple entities may be employers where they 'control different aspects of the employment relationship.' 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' 'Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as one of the "working conditions" … .' " (*Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019 [177 Cal.Rptr.3d 581].)

Secondary Sources

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

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-B, Coverage and Exemptions—In General, ¶ 11:115 et seq. (The Rutter Group)

Wilcox, California Employment Law, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 1, *Overview of Wage and Hour Laws*, § 1.04 (Matthew Bender)

2750. Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (Lab. Code, § 2802(a))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reimburse [him/her/***nonbinary pronoun***] for necessary [expenditures/ [and] losses]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] incurred [expenditures/ [and] losses] as a direct consequence of [discharging [his/her/***nonbinary pronoun***] job duties/obeying the directions of [***name of defendant***]];**

2. **That the [expenditures/ [and] losses] were necessary and reasonable;**

3. **That [***name of defendant***] failed to reimburse [***name of plaintiff***] for the full amount of the [expenditures/ [and] losses]; and**

4. **The amount of the [expenditures/ [and] losses] that [***name of defendant***] failed to compensate.**

["Necessary [expenditures/ [and] losses]" may include [expenditures/ [and] losses] [*name of plaintiff***] would have incurred even if [he/she/***nonbinary pronoun***] did not also incur them as a direct consequence of discharging [his/her/***nonbinary pronoun***] job duties or obeying the directions of [***name of defendant***].]**

New November 2021

Directions for Use

This instruction assumes the plaintiff is an employee and the defendant is the employer. The instruction will need to be modified if there is a dispute about the defendant's status as an employer or the plaintiff's status as an employee of the defendant. Labor Code section 2802 covers necessary expenditures and losses. If only one of those is at issue, select the appropriate option.

If there is an argument that the directions of the employer were unlawful, modify the instruction as necessary. (See Lab. Code, § 2802(a).)

Necessary expenditures and losses may include some personal expenses, for example, the cost of a personal cellphone that is used to make work-related calls. (See *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144 [176 Cal.Rptr.3d 407].) Omit the final paragraph if personal expenses are not at issue.

Sources and Authority

- Obligations of Employer to Indemnify. Labor Code section 2802(a).

- "We conclude that an employer may satisfy its statutory reimbursement obligation by paying employees enhanced compensation in the form of increases in base salary or increases in commission rates, or both, provided there is a means or method to apportion the enhanced compensation to determine what amount is being paid for labor performed and what amount is reimbursement for business expenses." (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 559 [67 Cal.Rptr.3d 468, 169 P.3d 889].)

- "Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise, the employer would receive a windfall because it would be passing its operating expenses on to the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill." (*Cochran, supra,* 228 Cal.App.4th at p. 1144.)

- "In calculating the reimbursement amount due under section 2802, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices. For example, an employee's choice of automobile will significantly affect the costs incurred. An employee who chooses an expensive model and replaces it frequently will incur substantially greater depreciation costs than an employee who chooses a lower priced model and replaces it less frequently. Similarly, some vehicles use substantially more fuel or require more frequent or more costly maintenance and repairs than others. The choice of vehicle will also affect insurance costs. Other employee choices, such as the brand and grade of gasoline or tires and the shop performing maintenance and repairs, will also affect the actual costs. Thus, calculation of automobile expense reimbursement using the actual expenses method requires not only detailed recordkeeping by the employee and complex allocation calculations, but also the exercise of judgment (by the employer, the employee, and officials charged with enforcement of § 2802) to determine whether the expenses incurred were reasonable and therefore necessary." (*Gattuso, supra,* 42 Cal.4th at p. 568.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 440, 442

2 Wilcox, California Employment Law, Ch. 30, *Employer's Tort Liability to Third Parties for Conduct of Employees*, § 30.09 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.21 (Matthew Bender)

2752. Tip Pool Conversion—Essential Factual Elements (Lab. Code, § 351)

[*Name of plaintiff***] claims that [***name of defendant***] [took money/allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money] from a tip pool that [***name of plaintiff***] was entitled to receive. [The court has determined that [***specify ineligible individual(s) or class(es) of individuals***] [was/were] not eligible to receive money from a tip pool.]**

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

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

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

3. **That [***name of defendant***] maintained a tip pool in which money left by patrons in an amount over and above the actual amount due for [***specify services rendered or goods, food, drink, or articles sold***] was pooled to be distributed among employees including [***name of plaintiff***]; and**

4. **[That [***name of defendant***] took money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

   [*or***]**

   [That [*name of defendant***] allowed [***specify ineligible individual(s) or class(es) of individuals***] to take money from the tip pool that [***name of plaintiff***] was entitled to receive.]**

[*Name of plaintiff***] does not have to prove the exact amount of money that was taken.**

[*Name of defendant***] is required to keep accurate records of all tips or gratuities received by [him/her/***nonbinary pronoun***/it] for [his/her/***nonbinary pronoun***/its] employees.**

New November 2021

Directions for Use

This instruction sets forth the elements required for an employee to establish wrongful conversion of tip pool money.

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

Element 5 presents alternative factual scenarios: the defendant's direct conversion of tip pool money and the defendant's misallocation of tip pool money to any individual who should not be included in the tip pool, for example, the employer, the owner, managers, and supervisors. For the second option, the court must determine as a matter of law whether an individual was properly included in the tip pool. (See Lab.

Code, § 350(a), (d) [defining employer and agent to include "every person other than the employer having the authority to hire or discharge any employee or supervise, direct, or control the acts of employees"], § 351 [prohibiting employers and agents from receiving any gratuity paid to an employee by a patron]. Include the optional sentence in the introductory paragraph if the court has determined that the defendant allowed ineligible individuals to partake in the tip pool.

Sources and Authority

- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "Gratuity" Defined. Labor Code section 350(e).
- Employee Gratuities. Labor Code section 351.
- Employer's Duty to Keep Records. Labor Code section 353.
- "The purpose of section 351, as spelled out in the language of the statute, is to prevent an employer from collecting, taking or receiving gratuity income or any part thereof, as his own as part of his daily gross receipts, from deducting from an employee's wages any amount on account of such gratuity, and from requiring an employee to credit the amount of the gratuity or any part thereof against or as a part of his wages. And the legislative intent reflected in the history of the statute, was to ensure that employees, not employers, receive the full benefit of gratuities that patrons intend for the sole benefit of those employees who serve them." (*Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal.App.3d 1062, 1068 [268 Cal.Rptr. 647].)
- "[W]hen a customer leaves a tip in a collective tip box, the customer necessarily understands the tip is not intended for a particular person and the tip will be divided among the behind-the-counter service employees. It is undisputed that these employees consist of baristas and shift supervisors. It would be inconsistent with the purpose of the statute to *require* an employer to disregard the customer's intent and to instead compel the employer to redirect the tips to only some of the service personnel." (*Chau v. Starbucks Corp.* (2009) 174 Cal.App.4th 688, 699 [94 Cal.Rptr.3d 593], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 456

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10 (Matthew Bender)

2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (Lab. Code, § 227.3)

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] compensation for unpaid vacation time that [*name of plaintiff*] earned but did not use before being terminated.

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

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

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

3. **That [*name of defendant*] did not pay [him/her/*nonbinary pronoun*] for all earned and unused vacation time at [his/her/*nonbinary pronoun*] final rate of pay in accordance with the [contract of employment/employer policy]; and**

4. **The amount owed to [*name of plaintiff*] for earned and unused vacation time.**

New November 2021

Directions for Use

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

An employee's proportionate right to a paid vacation vests as the labor is rendered. (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 784 [183 Cal.Rptr. 846, 647 P.2d 122].) If there is a dispute as to the amount of vested vacation time, the jury should be instructed to determine a pro rata share of vested vacation time. "[A]n employment contract or employer policy shall not provide for forfeiture of vested vacation upon termination." (Lab. Code, § 227.3.)

Sources and Authority

- Payment of Vested Vacation Wages Upon Termination. Labor Code section 227.3.
- "Employer" Defined. Labor Code section 350(a).
- "Employee" Defined. Labor Code section 350(b).
- "The right to a paid vacation, when offered in an employer's policy or contract of employment, constitutes deferred wages for services rendered. Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to a paid vacation 'vests' as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay." (*Suastez, supra,* 31 Cal.3d at p. 784.)

- "Under Labor Code section 227.3, an employee has the right to be paid for unused vacation only after the 'employee is terminated without having taken off his vested vacation time.' Thus, termination of employment is the event that converts the employer's obligation to allow an employee to take vacation from work into the monetary obligation to pay that employee for unused vested vacation time. Consequently, [the plaintiff's] cause of action to enforce his statutory right to be paid for vested vacation did not accrue until the date his employment was terminated." (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1576–1577 [50 Cal.Rptr.3d 166], footnote omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, §§ 461–463

1 Wilcox, California Employment Law, Ch. 4, *Payment of Wages*, § 4.10; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16 (Matthew Bender)

2754. Reporting Time Pay—Essential Factual Elements

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

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

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

3. **That [***name of defendant***] required [***name of plaintiff***] to report to work for one or more [workdays/second shifts];**

4. **That [***name of plaintiff***] reported for work; and**

5. **That [***name of defendant***] [failed to put [***name of plaintiff***] to work/furnished less than [half of the usual day's work/two hours of work on a second shift]].**

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

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

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

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

New November 2021

Directions for Use

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant's failure to pay reporting time under section 5 of the Industrial Welfare Commission's wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040, subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 4, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 4. If the case involves both first and second shifts, the instruction will need to be modified.

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

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

Sources and Authority

- "Employee" and "Employer" Defined. Title 8 California Code of Regulations sections 11010–11160.
- "Person" Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections11010–11160 (subd. 5 of each section).

Secondary Sources

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

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

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

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] provided [him/her/*nonbinary pronoun*] with inadequate medical care in violation of [his/her/*nonbinary pronoun*] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] had a serious medical need;**

2. **That [*name of defendant*] knew that [*name of plaintiff*] faced a substantial risk of serious harm if [his/her/*nonbinary pronoun*] medical need went untreated;**

3. **That [*name of defendant*] consciously disregarded that risk by not taking reasonable steps to treat [*name of plaintiff*]'s medical need;**

4. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties;**

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.**

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff*]'s constitutional rights.
[In determining whether [*name of defendant*] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her/*nonbinary pronoun*] or those that [he/she/*nonbinary pronoun*] could reasonably have obtained. [*Name of defendant*] is not responsible for services that [he/she/*nonbinary pronoun*] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015, May 2020, November 2021

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on a pretrial detainee's claim of inadequate medical care, see CACI No. 3046, *Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of*

Confinement.

For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to the inmate's health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104–105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

  "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "Consistent with that concept and the clear connections between mental health treatment and the dignity and welfare of prisoners, the Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' When the level of a prison's mental health care 'fall[s] below the evolving standards of decency that mark the progress of a maturing society,' the prison fails to uphold the constitution's dignitary principles." (*Disability Rights Montana, Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1097, internal citation omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177

F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...' " (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "Where a plaintiff alleges systemwide deficiencies, 'policies and practices of statewide and systematic application [that] expose all inmates in [the prison's] custody to a substantial risk of serious harm,' we assess the claim through a two-pronged inquiry. The first, objective, prong requires that the plaintiff show that the conditions of the prison pose 'a substantial risk of serious harm.' The second, subjective, prong requires that the plaintiff show that a prison official was deliberately indifferent by being 'aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' and 'also draw[ing] the inference.' " (*Disability Rights Montana, Inc., supra,* 930 F.3d at p. 1097, internal citations and footnote omitted.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.' " (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)

- "Although claims by pretrial detainees arise under the Fourteenth Amendment and claims by convicted prisoners arise under the Eighth Amendment, our cases do not distinguish among pretrial and postconviction detainees for purposes of the excessive force, conditions of confinement, and medical care deference instructions." (*Shorter v. Baca* (9th Cir. 2018) 895 F.3d 1176, 1182, fn. 4.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct

must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–1125, internal citations omitted.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 901

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3046. Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] failed to provide [him/her/*nonbinary pronoun*] [safe conditions of confinement/needed medical care] in violation of [his/her/*nonbinary pronoun*] constitutional rights. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made an intentional decision regarding the [conditions of confinement/denial of needed medical care];**

2. **That the [conditions of confinement/denial of needed medical care] put [*name of plaintiff*] at substantial risk of serious harm;**

3. **That [*name of defendant*] did not take reasonable available measures to prevent or reduce the risk of serious harm, even though a reasonable officer under the same or similar circumstances would have understood the high degree of risk involved;**

4. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties;**

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

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

New November 2021

Directions for Use

Give this instruction in a case involving a pretrial detainee's conditions of confinement, including access to medical care. (See *Gordon v. County of Orange* (9th Cir. 2018) 888 F.3d 1118, 1124–25.)

The instruction may be modified for use in a failure to protect case. (See *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060 (en banc).) The instruction may also be modified to specify the condition of confinement at issue. For example, if the plaintiff claims that the defendant delayed or intentionally interfered with needed medical treatment, it may not be sufficiently clear to describe the defendant's conduct in the introductory paragraph and in elements 1 and 2 as a denial of needed medical care.

Sources and Authority

- Deprivation of Civil Rights. Title 42 United States Code section 1983.
- "Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth

Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause. Under both clauses, the plaintiff must show that the prison officials acted with 'deliberate indifference.' " (*Castro, supra,* 833 F.3d at pp. 1067–1068, internal citation omitted.)

- "[W]e hold that claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard." (*Gordon, supra,* 888 F.3d at pp. 1124–25.)

- "[C]laims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard. Based thereon, the elements of a pretrial detainee's medical care claim against an individual defendant under the due process clause of the Fourteenth Amendment are: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. 'With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily "turn[ ] on the facts and circumstances of each particular case." ' The ' "mere lack of due care by a state official" does not deprive an individual of life, liberty, or property under the Fourteenth Amendment.' Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.' " (*Gordon, supra,* 888 F.3d at pp. 1124–1125, internal citations omitted.)

- "Our cases make clear that prison officials violate the Constitution when they 'deny, delay or intentionally interfere' with needed medical treatment. The same is true when prison officials choose a course of treatment that is 'medically unacceptable under the circumstances.' " (*Sandoval v. County of San Diego* (9th Cir. 2021) 985 F.3d 657, 679.]

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 356

7 Civil Rights Actions, Ch. F10, *Prisoner's Rights* (Matthew Bender)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.16 (Matthew Bender)

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

3050. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for exercising a constitutional right. To establish retaliation, [*name of plaintiff*] must prove all of the following:

1. That [he/she/*nonbinary pronoun*] was engaged in a constitutionally protected activity[, which I will determine after you, the jury, decide certain facts];

[2. That [*name of defendant*] did not have probable cause for the [arrest/prosecution][, which I will determine after you, the jury, decide certain facts];]

3. That [*name of defendant*] [*specify alleged retaliatory conduct*];

4. That [*name of plaintiff*]'s constitutionally protected activity was a substantial or motivating factor for [*name of defendant*]'s acts;

5. That [*name of defendant*]'s acts would likely have deterred a reasonable person ~~of ordinary firmness~~ from [*specify ~~engaging in that~~ protected activity, e.g., filing a lawsuit*]; and

6. That [*name of plaintiff*] was harmed as a result of [*name of defendant*]'s conduct.

The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] has proven element 1 [and element 2] above.

[But before I can do so, you must decide whether [*name of plaintiff*] has proven the following: [*list all factual disputes that must be resolved by the jury~~:~~*].]

[*or*]

[The court has determined that by [*specify conduct*], [*name of plaintiff*] was exercising [his/her/*nonbinary pronoun*] constitutionally protected right of [*insert right, e.g., privacy*].]

[*or*]

[The court has determined that [*name of defendant*] did not have probable cause for the [arrest/prosecution].]

New June 2010; Revised December 2010~~,~~; Renumbered from CACI No. 3016 and Revised December 2012; Revised June 2013, May 2020, May 2021, November 2021

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, if the claimed civil rights violation is retaliation for exercising

constitutionally protected rights, including exercise of free speech rights as a private citizen. For a claim by a public employee who alleges that they suffered an adverse employment action in retaliation for their speech on an issue of public concern, see CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Public Employee—Essential Factual Elements*.

The retaliation should be alleged generally in element 1 of CACI No. 3000. The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000.

Element 2 applies only in retaliatory arrest and prosecution cases. Omit element 2 if the retaliation alleged is not based on an arrest or prosecution.

Whether plaintiff was engaged in a constitutionally protected activity and, if applicable, whether probable cause for arrest or prosecution was absent (or whether the no-probable-cause requirement does not apply because of an exception) will usually have been resolved by the court as a matter of law before trial. (See *Nieves v. Bartlett* (2019) __ U.S. __ [139 S.Ct. 1715, 1724, 1727, 204 L.Ed.2d 1] [requiring a plaintiff to plead and prove the absence of probable cause for arrest but stating an exception to the no-probable-cause requirement "when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"].) If there is a question of fact that the jury must resolve, include the optional bracketed language with element 1 and/or element 2, and give the first bracketed option of the final paragraph, identifying with specificity all disputed factual issues the jury must resolve for the court to determine the contested element or elements. If the court has determined element 1 or element 2, omit the optional bracketed language of the element and instruct the jury that the element has been determined as a matter of law by giving the second and/or third optional sentence(s) in the final paragraph. If there are contested issues of fact regarding the exception to the no-probable-cause requirement, this instruction may be augmented to include the specific factual findings necessary for the court to determine whether the exception applies.

The plaintiff must show that the defendant acted with a retaliatory motive and that the motive was a "but for" cause of the plaintiff's injury, i.e., that the retaliatory action would not have been taken absent the retaliatory motive. (See *Nieves, supra,* 139 S.Ct. at p. 1722.) A plaintiff may prove causal connection with circumstantial evidence but establishing a causal connection between a defendant's animus and a plaintiff's injury will depend on the type of retaliation case. (*Id.* at pp. 1722–1723 [distinguishing straightforward cases from more complex cases].)

If the defendant claims that the response to the plaintiff's constitutionally protected activity was prompted by a legitimate reason, the defendant may attempt to persuade the jury that the defendant would have taken the same action even in the absence of the alleged impermissible, retaliatory reason. See CACI No. 3055, *Rebuttal of Retaliatory Motive*. (*Id.* at p. 1727.)

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity."

(*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661].)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)

- "The plaintiff must show that the retaliation was a substantial or motivating factor behind the [arrest], and, if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." (*Nieves, supra,* 139 S.Ct. at p. 1725, internal citation omitted.)

- "To state a First Amendment retaliation claim, a plaintiff must plausibly allege 'that (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.' To ultimately 'prevail on such a claim, a plaintiff must establish a "causal connection" between the government defendant's "retaliatory animus" and the plaintiff's "subsequent injury." Specifically, a plaintiff must show that the defendant's retaliatory animus was 'a "but-for" cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive.' " (*Capp v. County of San Diego* (9th Cir. 2019) 940 F.3d 1046, 1053, internal citations omitted.)

- "For a number of retaliation claims, establishing the causal connection between a defendant's animus and a plaintiff's injury is straightforward. Indeed, some of our cases in the public employment context 'have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other,' shifting the burden to the defendant to show he would have taken the challenged action even without the impermissible motive. But the consideration of causation is not so straightforward in other types of retaliation cases." *Nieves, supra,* 139 S.Ct. at pp. 1722–1723.)

- "To demonstrate retaliation in violation of the First Amendment, [the plaintiff] must ultimately prove first that [defendant] took action that 'would chill or silence a person of ordinary firmness from future First Amendment activities.' " (*Skoog v. County of Clackamas* (9th Cir. 2006) 469 F.3d 1221, 1231–1232, footnote and citation omitted.)

- "The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest." (*Nieves, supra,* 139 S.Ct. at p. 1724.)

- "[W]e conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." (*Nieves, supra,* 139 S.Ct. at p. 1727.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not

determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- "[Defendant] may avoid liability if he shows that a 'final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link' between his retaliatory motive and the adverse employment action. This is because a final decision maker's wholly independent investigation and decision establish that 'the employee's protected speech was not a but-for cause of the adverse employment action.' " (*Karl v. City of Mountlake Terrace* (9th Cir. 2012) 678 F.3d 1062, 1072–1073, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 894, 895, 978

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

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs*, ¶ 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin*, ¶ 21.22(1)(f) (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

3709. Ostensible Agent

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [*name of agent*]'s conduct because ~~[~~he/she/*nonbinary pronoun*~~]~~ [*name of agent*] was [*name of defendant*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] intentionally or carelessly created the impression that [*name of agent*] was [*name of defendant*]'s [employee/agent];**

2. **That [*name of plaintiff*] reasonably believed that [*name of agent*] was [*name of defendant*]'s [employee/agent]; and**

3. **That [*name of plaintiff*] reasonably relied on [his/her/*nonbinary pronoun*] belief.**

New September 2003; Revised November 2019, November 2021

Directions for Use

Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements,* if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

For an instruction on ostensible agency in the physician-hospital context, see CACI No. 3714, *Ostensible Agency—Physician-Hospital Relationship.* ~~A somewhat different instruction is required to hold a hospital responsible for the acts of a physician under ostensible agency when the physician is actually an employee of a different entity. In that context, it has been said that the only relevant factual issue is whether the patient had reason to know that the physician was not an agent of the hospital. (See *Markow v. Rosner* (2016) 3 Cal.App.5th 1027 [208 Cal.Rptr.3d 363]; see also *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1454 [122 Cal.Rptr.2d 233].)~~

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain

authority, and remains silent, such conduct on the part of the principal may give rise to liability." ..." ...' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- "Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances." (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222].)

- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)

- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

- ~~"But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)~~

- ~~"Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient~~

~~actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow, supra,* 3 Cal.App.5th at p. 1038, internal citations omitted.)~~

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 154–159

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:29 (Thomson Reuters)

3714. Ostensible Agency—Physician-Hospital Relationship

[*Name of plaintiff*] claims that [*name of hospital*] is responsible for [*name of physician*]'s conduct because [*name of physician*] was [*name of hospital*]'s apparent [employee/agent]. To establish this claim, [*name of plaintiff*] must prove both of the following:

1. **That [*name of hospital*] held itself out to the public as a provider of care; and**

2. **That [*name of plaintiff*] looked to [*name of hospital*] for services, rather than selecting [*name of physician*] for services.**

[A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [employee/agent] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. In deciding whether [*name of plaintiff*] has proved element 1, you must take into consideration [*name of plaintiff*]'s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [*name of plaintiff*]'s condition notice of the disclaimer.]

New November 2021

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct. Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701.

Include the bracketed paragraph only if the hospital claims it notified the plaintiff that the physician was not its employee or agent.

Sources and Authority

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

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

- "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)

- "[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)

- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884.)

Secondary Sources

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

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

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

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

---

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/***nonbinary pronoun***/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; [and]]**

[7. That [*name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to vacate the property; and]**

~~7~~8. That [*name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010, June 2011, December 2011, May 2020, November 2021

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph, in element 5, and in element ~~7~~8 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial

documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

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

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

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

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements*.

~~Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)~~

The Tenant Protection Act of 2019 and/or local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. (See, e.g., Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined].) This instruction should be modified accordingly if applicable. For example, the Tenant Protection Act of 2019 requires a separate three-day notice to quit after the initial three-day notice to cure that is expressed in element 5. (See Civ. Code, § 1946.2(c).)

Element 7 applies only to a just cause eviction under the Tenant Protection Act of 2019, which governs certain residential real property tenancies of specified durations. (See *id.*, subd. (a) [stating occupancy requirement of 12 months of continuous tenancy, or, if any tenants have been added to the lease, after all tenants have lived at the property for a year or if the original tenant has lived there for 24 months or more], subd. (c) ["Before an owner of residential real property issues a notice to terminate a tenancy for just cause that is a curable lease violation, the owner shall first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure. If the violation is not cured within the time period set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy"].)

Include the last paragraph if the tenant alleges that the violation was trivial. (See *Boston LLC v. Juarez* (2016) 245 Cal.App.4th 75, 81 [199 Cal.Rptr.3d 452].) It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Unlawful Detainer Based on Failure to Perform Conditions. Code of Civil Procedure section 1161(3), (4).
- Tenant Protection Act of 2019. Civil Code section 1946.2.
- Dual Notice Requirement for Certain Residential Tenancies. Civil Code section 1946.2(c).
- Conversion of Unlawful Detainer to Ordinary Civil Action ~~i~~If Possession No Longer at Issue. Civil Code section 1952.3(a).
- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of

this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent *or* quit, perform the covenant *or* quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.)

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- " '[A] lease may be terminated only for a substantial breach thereof, and not for a mere technical or trivial violation.' This materiality limitation even extends to leases which contain clauses purporting to dispense with the materiality limitation." (*Boston LLC, supra,* 245 Cal.App.4th at p. 81, internal citation omitted.)

- " 'Normally the question of whether a breach of an obligation is a material breach … is a question of fact,' however ' "if reasonable minds cannot differ on the issue of materiality, the issue may be resolved as a matter of law." ' " (*Boston LLC, supra,* 245 Cal.App.4th at p. 87.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist., supra,* 256 Cal.App.2d at p. 529.)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 753, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination of Section 8 Tenancies*, ¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:93 et seq. (The Rutter Group)

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

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

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

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

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

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34.182 (Thomson Reuters)

4330. Denial of Requested Accommodation

[*Name of plaintiff***] claims that the requested accommodation for [[***name of defendant***]'s/a member of [***name of defendant***]'s household's] disability was properly denied because of an exception to [***name of plaintiff***]'s duty to reasonably accommodate a tenant's disability. To defeat [***name of defendant***]'s accommodation defense, [***name of plaintiff***] must prove:**

> **[***Specify the provision(s) at issue from California Code of Regulations, title 2, section 12179, e.g., that the requested accommodation would impose an undue financial and administrative burden on the plaintiff***].**

New November 2021

Directions for Use

This instruction is for use with CACI No. 4329, *Affirmative Defense—Failure to Provide Reasonable Accommodation*. Give this instruction only if the plaintiff in an unlawful detainer case claims that the requested accommodation was properly denied. (See Cal. Code Regs., tit. 2, § 12179.) Include only factors from the regulation that are at issue.

Sources and Authority

- Denial of Reasonable Accommodation in Unlawful Detainer Case. Title 2 California Code of Regulations section 12179.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 734-738, 752

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

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements (Revise)	Association of Southern California Defense Counsel by David P. Pruett Carroll, Kelly, Trotter & Franzen Sacramento	"In response to the Invitation to Comment, the Association of Southern California Defense Counsel ('ASCDC') writes to join in the comments submitted by the letter of Karen M. Bray, of Horvitz & Levy, dated August 27, 2021."	See the committee's responses to the comments of Karen M. Bray, below.
	Karen M. Bray Attorney Horvitz & Levy Burbank	"We write to provide comments on the Committee's proposed changes to CACI No. 2334, the jury instruction that addresses an insurer's potential liability for bad faith refusal to accept a reasonable settlement demand. Our firm represented the insurer in *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676 (*Pinto*), the recent appellate case that served as the impetus for the Committee's proposed changes to CACI No. 2334. We are therefore very familiar with the law governing claims that allege bad faith refusal of a policy limits settlement demand, as well as the law governing bad faith more broadly. We are also familiar with some of the difficulties trial judges have had attempting to tailor the text of CACI No. 2334 to the facts of a particular case. In part I of this letter, we set forth our suggested text for CACI No. 2334, followed by a copy of the version proposed by the Committee that is redlined to reflect the changes we suggest. We then explain our suggested changes. Parts II and III of this letter provide comments on the 'Directions for Use' and 'Sources and Authorities' sections following CACI No. 2334."	No response required. See the committee's responses to specific comments below.
		"[Proposed text of CACI No. 2334B, without redlines, omitted] **B. Committee's proposed text, redlined to reflect the changes incorporated above**	See the committee's responses to specific comments below.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		2334. Faith (Third Party)—Refusal to Accept Reasonable Settlement Offer Within Liability Policy Limits—Essential Factual Elements [*Name of plaintiff*] contendsclaims that [he/she/nonbinary pronoun/it] was harmed by [*name of defendant*]'s breached of the obligation of good faith and fair dealing because [*name of defendant*] did notfailed to accept a reasonable settlement demandoffer on a claim in a lawsuit against [*name of plaintiff*]. To prevail on establish this cause of actionclaim, [*name of plaintiff*] must prove all of the following: 1. [*Name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*]; 21. That [*Name of claimantplaintiff in underlying case*] madebrought a claimlawsuit against [*name of plaintiff*] for a claim that was covered by [*name of defendant*]'s insurance policy; 3. [*Name of claimant*] made a reasonable offer to settle this claim against [*name of plaintiff*] for an amount that was within the limits of the insurance coverage; 42. That [*nName of defendant*] unreasonably refusedfailed to accept the a reasonable settlement offerdemand for an amount within policy limits; and 3. That [*name of defendant*]'s failure to accept the settlement, whether by action or by failure to act, was the result of unreasonable conduct by [*name of defendant*]; and 54. The unreasonable refusal to accept the settlement offer caused That a monetary judgment to be was entered against [*name of plaintiff*] for a sum of money greater than the policy limits. The "Policy limits" of insurance coverage means the highest amount available under the policy for the claim against [*name of plaintiff*]. A settlement offerdemand for an amount within policy limits of coverage may beis reasonable if [*name of defendant*] knew or should have known at the time the offerdemand was rejected that athe potential judgment against [*name of plaintiff*] was likely to exceed the limits of insurance coverageamount of the demand based on	

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		[*name of claimant~~plaintiff in underlying case~~*]'s injuries or losses and [*name of plaintiff*]'s probable liability. However, ~~the~~an offer~~demand~~ may be unreasonable for reasons other than the amount demanded. For example, an offer may be unreasonable if it does not allow sufficient time to respond or if it includes conditions that are unnecessarily cumbersome. [*Name of defendant*]'s refusal to accept the settlement offer is unreasonable if, in light of all of the circumstances, the refusal was without proper cause. Mere errors or mistakes do not demonstrate a lack of proper cause.~~An insurer's conduct is unreasonable when, for example, it places its own interests above those of the insured.~~	
		"**C. Explanation of our proposed text for CACI No. 2334** Title and throughout–use 'offer' instead of 'demand': In the title and throughout the instruction, we suggest using the word 'offer' instead of "demand" because it is more accurate to refer to an acceptance of an 'offer' than acceptance of a 'demand.' "	The committee sees no improved clarity with the suggested language. In this context, an offer is commonly sent in the form of a settlement demand.
		"Opening paragraph and throughout—use 'claim' instead of referring to an underlying lawsuit: In the opening paragraph and as appropriate throughout the instruction, we suggest revisions to reflect the fact that some causes of action arising under this jury instruction involve circumstances in which a claim is made *before* any lawsuit is filed. (E.g., *Pinto*, *supra*, 61 Cal.App.5th at pp. 683-686.) Thus, for example, we suggest referring to a 'claim' and a 'claimant,' rather than a 'lawsuit' or a 'plaintiff in the underlying case.' "	The committee agrees in part, and has changed "lawsuit" to "claim" as appropriate throughout the instruction. The committee, however, believes that the bracketed content ("*name of plaintiff in underlying case*") is sufficiently clear because the bracket calls for specification of a person's name.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		"Elements 1 and 2–address the existence of a policy and the coverage of the claim separately: As currently written, element one in CACI No. 2334 combines two separate factors: (a) the existence of a liability policy under which the plaintiff was an insured, and (b) the existence of coverage for the claim made against the insured. Because either of these points may be contested, we suggest breaking the factors into separate elements. This should be easier for the jury to follow and will serve as a better model for a verdict form based on the instruction."	The committee agrees, and has separated element 1 into two elements. The committee will consider developing a related verdict form in a future release.
		"Elements 3 and 4—separately address the reasonableness of the offer and the reasonableness of the insurer's response: As explained in *Pinto, supra,* 61 Cal.App.5th at pages 687–688, 692, a plaintiff must prove both that the claimant's offer was reasonable and that the insurer's response to the offer was unreasonable. (Accord, *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425–426 (*Graciano*).) These are very different inquiries. The first centers upon the terms of the offer such as the time allotted for a response, the conditions imposed, and the clarity of the terms. The second centers upon the efforts by the insurer to respond to the offer and the decisions made in doing so. However, the version of CACI No. 2334 proposed by the Committee does not adequately set forth the requirement that the settlement offer must be reasonable. Instead, the 'reasonable offer' requirement is buried within an element focused on the insurer's conduct, i.e., its failure to accept the offer. To clarify the requirements for the tort and guide the jury's deliberations, we suggest separating the requirements into individual elements, with one addressing the reasonableness of the offer and the other addressing the reasonableness of the insurer's response."	To the extent that the commenter is advocating for revisions to the reasonable-demand element (re-numbered as element 3 in this report), the comment is beyond the scope of the invitation to comment. The committee notes that the reasonable-demand element has been expressed in this way since 2007. The committee will consider the suggestion in a future release.
		"Element 4–streamline and clarify the terms: With respect to the Committee's new proposed element, we suggest revisions that serve three purposes:	The committee agrees in part as set forth below.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		(a) Clarify that the cause of action addresses an insurer's response to a particular 'settlement *offer*' presented by the claimant, not merely to 'settlement' as a general matter.	The committee has added "demand" to clarify that a *settlement demand* is at issue.
		(b) Streamline the element by removing the awkward and unnecessary clause 'whether by action or by failure to act' from the middle of the sentence.	To streamline the language of the element, the committee has moved the language contained in the clause to a paragraph following the elements.
		(c) Simplify the element by focusing the jury's attention upon the question whether the insurer 'unreasonably refused' a settlement offer rather than whether the failure to accept 'was the result of unreasonable conduct.' "	The committee does not see improved clarity with the proposed phrasing. The commenter's language suggests that the defendant has affirmatively "refused" a demand, which may not be the situation in all cases. Among other terms, the cases refer to an insurer's "failure to accept," "refusal," and "rejection." The committee has chosen "failure to accept" because it is inclusive of both refusal and rejection, as well as inaction.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			Moreover, in selecting this language, the committee looked to the insurer's proposed language in *Pinto* that the court expressly said would have been correct: "Farmers proposed that a special verdict question mirroring CACI No. 2334 be modified to ask whether Farmers's failure to accept Pinto's settlement offer was 'the result of unreasonable conduct by Farmers,' which Farmers at all times argued was essential to Pinto's bad faith failure-to-settle theory. **This would have been the correct question**[.]" (*Pinto, supra,* 61 Cal.App.5th at p. 694, emphasis added.)
		"Element 5—add causation requirement: Like any other bad faith claim, a plaintiff may not recover for a bad faith refusal to accept a settlement offer absent proof that the insurer's bad faith caused the damages plaintiff seeks to recover. (E.g., *Pinto*, *supra*, 61 Cal.App.5th at p. 687; accord, *Hamilton v. Maryland Cas. Co*. (2002) 27 Cal.4th 718, 725; *PPG Industries, Inc. v. Transamerica Ins. Co*. (1999) 20 Cal.4th 310, 312, 315; *Graciano*, *supra*, 231 Cal.App.4th at p. 425.)	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		However, as currently written, CACI No. 2334 does not include any causation requirement. We accordingly suggest adding causation language to the instruction."	
		"Second paragraph following list of elements—provide examples of factors that may render an offer unreasonable: We suggest identifying some of the factors a jury may consider in evaluating the reasonableness of a settlement offer. (See *Graciano*, *supra*, 231 Cal.App.4th at pp. 425-426 [listing factors and identifying cases in which they were considered].)"	The committee believes that adding examples like cumbersome conditions or tight deadlines might create confusion if they do not have relevance to the case.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

		"New final paragraph—eliminate and substitute with clarifying text: Whether an insurer's conduct amounts to bad faith must be evaluated under all of the circumstances pertinent to a particular case. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723 (*Wilson*); *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1455–1456 (*Walbrook*).) The final paragraph of the instruction proposed by the Committee conflicts with that principle by making a single factor determinative, i.e., an insurer has acted unreasonably if it 'places its own interests above those of the insured.' But that may not always be true. For example, an insurer may refuse a settlement offer because (1) there is a dispute whether the claim is covered, and (2) it wants to avoid paying policy limits for one insured when there is another insured under the policy. The first reason is improper and unreasonable because it places the interests of the insurer in avoiding paying out on a policy over the interests of the insured in avoiding personal liability. (*Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 502; *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 15–16; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658, 660.) The second reason, however, is an independently proper basis to refuse a settlement offer, because an insurer's duty of good faith extends to all of its insureds, and it cannot pay policy limits to settle a claim against one insured when doing so would leave another insured without coverage. (*Shell Oil Co. v. National Union Fire Ins. Co.* (1996) 44 Cal.App.4th 1633, 1645; *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 72–75; *Strauss v. Farmers Ins. Exchange* (1994) 26 Cal.App.4th 1017, 1019,1021–1022; *Palmer v. Financial Indem. Co.* (1963) 215 Cal.App.2d 419, 426–427, 431.) Nevertheless, the final paragraph of CACI No. 2334 proposed by the Committee would erroneously direct the jury to find that the insurer acted unreasonably notwithstanding the fact that the insurer had a legally valid basis for refusing an offer."	The committee believes that the final paragraph is a correct statement of the law. (See *Pinto, supra,* p. 692.) The committee, however, has revised the paragraph to explain that element 4 can be proved by action or inaction, as noted above, and has rephrased the sentence to conform to the phrasing of CACI No. 2330.

		"Moreover, the requirement that an insurer give equal consideration to the interests of its insureds is a broad, general concept that is already addressed in CACI No. 2330, the introductory instruction that provides an overview of the obligation of good faith and fair dealing: 'To fulfill its implied obligation of good faith and faith dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.' Reiterating that principle in CACI No. 2334 does not provide the jury with any guidance or clarification concerning the specific conduct that a plaintiff must prove to demonstrate the form of bad faith the plaintiff has alleged, i.e., a refusal of a settlement offer without proper cause." We therefore suggest alternative text for the final paragraph of CACI No. 2334 that is consistent with the "totality of the circumstances" principle and focuses on the specific conduct at issue under the instruction, i.e., the basis for the insurer's decision. (*Walbrook*, *supra*, 5 Cal.App.4th at p. 1460 ["the crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement"].) We further suggest language clarifying that a mere error or mistake by an insurer is not sufficient to demonstrate that its conduct was unreasonable. (*Wilson*, *supra*, 42 Cal.4th at p. 726; *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.*"	The committee has rephrased the sentence as noted above. The committee believes the instruction is wholly consistent with the jury's need to consider all relevant facts and circumstances. The suggestion is beyond the scope of the invitation to comment. The committee will consider this suggestion in a future release.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		"**II. Directions for Use** *Pinto* illustrates a common scenario: An injured claimant presents a settlement offer to an insured, contends that the offer was not accepted, pursues litigation against the insured, secures a judgment in excess of policy limits, obtains an assignment from the insured of any potential claims against the insurer in exchange for a covenant not to enforce the judgment, and then sues the insurance company for bad faith refusal to accept a reasonable settlement demand. (*Pinto, supra,* 61 Cal.App.5th at pp. 683-686.) As the second paragraph in the Directions for Use of CACI No. 2334 states, the instruction "assume[s] that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case." We suggest further clarifying this direction by adding: "For example, if the plaintiff in the bad faith action is the insured's assignee, the name of the claimant should be substituted in place of the name of the plaintiff as needed throughout the instruction to accurately reflect the underlying facts and relationship between the parties."	As suggested, the committee has added a sentence to the Directions for Use about modifying the instruction if the plaintiff is the insured's assignee.
		"**III. Sources and Authority** *Pinto* resolved the question previously posed by the Committee concerning whether insurer culpability must be proved to establish a claim for bad faith refusal to accept a settlement offer—it must. (*Pinto, supra,* 61 Cal.App.5th at pp. 687–688.) We accordingly concur with (1) the references to *Pinto* among the sources and authority supporting the instruction, (2) the deletion of the text posing the question 'Insurer culpability required?', and (3) the deletion of the boldface text at the end of the section quoting the comment from the California Practice Guide: Insurance Litigation."	No response required.
		"However, we see no reason to delete the reference to the sources and authorities stating that mere errors, negligence, or mistakes are insufficient to establish that an insurer acted in bad faith, i.e.,	The committee has deleted out-of-format content, specifically

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		without proper cause. Indeed, this is an important point that we have suggested be included within the body of the instruction itself. Otherwise, a jury may interpret the term 'unreasonable' in the instruction to mean mere negligence, which the caselaw has explained does not support a claim for bad faith."	material from the California Practice Guide: Insurance Litigation (a/k/a the Rutter Group guide), which is not authoritative. CACI's Sources and Authority are direct quotes from published cases or other authoritative sources.
		"I suggest that the following be included in the 'Sources and Authority' section for CACI No. 2334: To prove that an insurer acted unreasonably, it must be shown that the insurer's 'decision was prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations' of the insured and thereby 'depriv[es] [the insured] of the benefits of the agreement.' (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726, internal quotation marks omitted; *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346; accord, *Walbrook Ins. Co. v. Liberty Mutual Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460."	The suggested content is not a complete quote from any of the cases cited, and the committee does not add editorial content to clarify quotations. The committee, however, has added a direct quote from *Walbrook*.
	Civil Justice Association of California (CJAC) and American Property Casualty Insurance Association (APCIA) by Jaime	"Thank you for the opportunity for our organizations to comment on proposed revisions to California Civil Jury Instructions – CACI 21-02. Civil Justice Association of California (CJAC) is a more than 40-year-old nonprofit organization representing a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, CJAC confronts legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities. American	No response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Huff, Vice President and Counsel, Public Policy (CJAC) and Mark Sektnan, Vice President, State Government Relations (APCIA) Sacramento	Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions – protecting families, communities, and businesses in the U.S. and across the globe. Our members have concerns about proposed changes as well as existing language set forth in CACI 2334 - Bad Faith (Third Party) - Refusal to Accept Reasonable Settlement Within Liability Policy Limits - Essential Factual Elements. We respectfully request that you consider and address these concerns as outlined below. The proposed changes to CACI 2334 appear to be intended to capture the legal principles set forth in the recent California Court of Appeal decision, *Pinto v. Farmers Insurance* (2021) 61 Cal.App.5th 676, as newly referenced in the Sources and Authority for the instruction. However, CACI 2334, even with proposed amendments, does not adequately follow *Pinto* and other established case law and could create confusion for the jury. Specific concerns with the proposed CACI 2334 instruction are as follows:"	See the committee's responses to specific proposed changes below.
		"1. **The Proposed Amendment That Provides the Example of 'Bad Faith' Is Inadequate and Disregards Well Established Law**. Though perhaps well-intended, this proposed amendment (a proposed new sentence at the end of the Instruction) sets out an example of unreasonable insurer conduct--when an insurer 'places its own interests above those of the insured'--without recognizing that the jury should also consider the totality of circumstances, as directed by the California Supreme Court: "An insurer's good or bad faith must be evaluated in light of the totality of circumstances surrounding its actions." (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723.	See the committee's response to the comment of Karen M. Bray, above. To the extent that commenter is advocating for references to the "totality of circumstances" and mere errors, negligence, or honest mistakes, the comment is beyond the scope of the invitation to comment. The committee

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		There is also no indication of what is *not* unreasonable conduct, such as negligence. Yet, the *Pinto* case makes clear that mere errors and honest mistakes are not unreasonable conduct. (*Pinto* at 688.) We respectfully submit that if the new sentence is included, additional instruction must be added as follows: In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances. An insurer's conduct may be unreasonable when, for example, it places its own interests above those of the insured. Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior."	will consider the suggestions in a future release.
		"2. **CACI 2334 May Be Misinterpreted as Eliminating a Plaintiff's Need to Demonstrate 'Proximate Causation' as an Element of Proving Bad Faith.** *Pinto* and other case law authority confirm that 'proximate causation' is an element of a third-party bad faith claim. Yet, one may misread C2334 as lacking the element of causation. Further, CACI 2334 fails to provide a clear, distinct presentation of two elements of a "bad faith" claim that should be considered by jurors separately: a. whether the claimant made a 'reasonable offer' and b. whether the insurer 'unreasonably refused to accept.' Instead, the focus of the instruction is on the insurer's conduct, without clear treatment of whether the claimant made a "reasonable offer." [Language of element omitted] The jury should determine the reasonableness of the claimant. It should not be permitted or provided the opportunity to assume that the demand made was reasonable. To address our concerns (including the potential for confusion, or even, bias with the jury instruction), we recommend that the Committee on California Civil Jury Instructions Council revise CACI 2334, using language from former BAJI: 12.95(4), (6), [footnote quoting BAJI 12.95 omitted]	To the extent the commenter suggests a discrete causation element be added, the comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle. With respect to a reasonable-offer element, the instruction does not assume the reasonableness of the settlement demand. In addition to element 3 (as renumbered in this report), there is a paragraph following the definition of policy limits

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		to align the instruction more fully and consistently with *Pinto* and other case law authority. We also propose some clarifications below to the labels used to refer to the parties: To establish this claim, [*name of plaintiff*] must prove all of the following: 1. That [*name of plaintiff in underlying case*] brought a lawsuit against [*name of ~~plaintiff~~ defendant in underlying case*] for a claim that was covered by [*name of ~~defendant~~ insurer*]'s insurance policy; 2. That [*name of plaintiff in underlying case*] made a reasonable offer to settle this claim for an amount within policy limits; 23. That [*name of ~~defendant~~ insurer*] ~~failed~~ rejected a reasonable settlement demand for an amount within policy limits; 34. That [*name of ~~defendant~~ insurer*]'s ~~failure~~ rejection of the settlement demand, whether by action or by failure to act, was the result of unreasonable conduct by [*name of ~~defendant~~ insurer*] in light of the totality of the circumstances; and 5. The refusal by [*name of insurer*] was a cause of injury, damage, loss or harm to [*name of defendant in underlying case*]. 46. That a monetary judgment was entered against [name of plaintiff defendant in underlying case] for a sum greater than the policy limits. "Policy limits" means the highest amount available under the policy for the claim against [*name of ~~plaintiff~~ defendant in underlying case*]. A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or	that instructs the jury on the determination of the reasonableness of the plaintiff's demand. To the extent that the commenter is advocating for revisions to the reasonable-demand element, the committee will consider the suggestion in a future release.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		loss and [*name of ~~plaintiff~~ defendant in underlying case*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded."	
		"3. **CACI 2334 Deletes References Under Sources and Authorities that Inform Jurors that Negligence is Not Enough to Establish the Tort**. To support the point that 'bad faith' cannot be established through negligence we recommend that the 'Sources and Authorities' keep citations that make clear that errors, negligence, and mistaken judgment are not enough to establish bad faith. Based on the foregoing, CJAC and APCIA respectfully request that the jury instruction be revised as recommended above to align with the *Pinto* decision and other established case law."	*CACI*'s Sources and Authority are a reference for users, not jurors. The committee has deleted out-of-format content. The committee believes that the instruction correctly states the applicable legal standards and is consistent with the case law, including *Pinto*.
	Bruce Greenlee Attorney Richmond	1. I agree that the *Pinto* case compels adding the new element 4 and the excision in the Directions for Use. Too bad that the Supreme Court didn't grant review and put the issue to bed forever, but I think it's safe to conclude that the denial of review means that the war is over.	No response required.
		2. I would not add the additional sentence at the end of the instruction. While it's a correct statement of law, it's just a general principle disassociated from any facts, and as such would not be helpful to a jury. What is or is not reasonable insurer conduct will involve analysis of the facts of the case.	The committee agrees that the sentence is a correct statement of the law. (See *Pinto, supra,* p. 692.) The committee, however, has revised the sentence in response to other comments, as noted above.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		3. The DforU needs a sentence about element 4 to replace the current discussion. Something like: "The jury must find that the settlement demand was reasonable (Element 3), and also that the insurer's rejection of the demand was unreasonable (Element 4). (full cite *Pinto*.)." This will fix the problem of the first citation to *Pinto* in the S&A being a *supra* cite.	Because the new element does not need explanation, the committee has not included *Pinto* in the Directions for Use. As noted by the Orange County Bar Association (see comment below), the committee has corrected the first citation to *Pinto* in the Sources and Authority.
	Peter Klee Attorney Sheppard, Mullin, Richter & Hampton LLP San Diego, on behalf of: Allstate Insurance Company Alliance United Insurance Company Anchor General Insurance Crusader Insurance Company Fred Loya Insurance	"We write to provide our comments on the recent amendments to CACI 2334 that have been proposed as a result of the California Court of Appeal's recent decision in *Pinto v. Farmers Insurance* (2021) 61 Cal.App.5th 676. Our principal suggestion is that, instead of trying to fix the broken instruction, the Judicial Council revert to the language used in BAJI 12.95, the approved instruction that was in use for decades before CACI was adopted. As explained below, BAJI 12.95 is a more accurate and complete instruction. In addition, we identify several separate and independent reasons for not adopting some of the proposed amendments to the instruction."	See the committee's responses to specific comments below.
		"These comments are submitted by the following auto insurance companies: [list of companies omitted; see commenter information] Collectively, we issue a significant number of policies in the State of California and command a substantial share of the automobile insurance market in the state.	No response required. No response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Company Government Employees Insurance Company (GEICO) Infinity Insurance Company Interinsurance Exchange of the Automobile Club (Auto Club) Mercury Insurance Travelers Insurance Wawanesa General Insurance Company	We process tens of thousands of third-party auto liability claims in California every year. A small percentage of those claims are not settled and result in 'bad faith failure to settle' lawsuits. In a large number of those cases, there is significant confusion concerning CACI 2334 and whether it is accurate and complete. In our experience, trial judges (applying both the use notes and case law) have been receptive to modifying CACI 2334. Some trial judges, however, will simply give the model instruction. This engenders both confusion and uncertainty, which is unnecessary. As interpreted by the courts, the tort has more or less remained the same for over half a century. There is no reason of which we can conceive why the instruction is constantly undergoing significant revisions when the law has basically not changed."	No response required. A recent case, *Pinto, supra,* 61 Cal.App.5th 676, is the impetus for the committee's proposed changes. The content removed from the Directions for Use, including a link to the committee's supplemental report to the Judicial Council for its June 2016 meeting, explains some of the prior revisions. (A link is also at footnote 6 of this report.)
		"**A. Requested Change: Revert to BAJI 12.95** In 2003, the Judicial Council adopted CACI as California's official jury instructions. Before then, BAJI instructions were in common use throughout the state. BAJI 12.95 addressed the tort of bad faith failure to settle. The CACI instructions replaced BAJI 12.95 with CACI 2334 in 2003. The idea was not to change the law, but to write the instructions in a more user-friendly way. (See https://www.courts.ca.gov/ partners/315.htm ['Does CACI change the law in California? No. In drafting the new instructions, the Task Force was charged with accurately stating the law in a way that is understandable to the average juror. The articulation and	The committee disagrees. Under California Rules of Court, rule 2.1050, the *CACI* instructions are designated as the "official instructions for use in the state of California." CACI No. 2334 replaced the BAJI instruction in 2003. As with the revisions proposed in this

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		interpretation of California law remains in the purview of the Legislature and court of review.'].) If CACI is intended to make jury instructions 'more understandable to the average juror,' the recently proposed changes to CACI 2334 do not advance the mission. A simple juxtaposition of BAJI 12.95 and the proposed CACI 2334 demonstrates the point. [Language of BAJI 12.95 and proposed CACI No. 2334 omitted] There are a number of problems with CACI 2334, both as it currently exists and as it is proposed to be amended, that would be remedied by a return to BAJI 12.95."	report, new case law or efforts to clarify prior language in CACI No. 2334 led to revisions at various points over the last two decades. Each of the prior iterations of this instruction was approved by the council after public comment.
		"***1. CACI 2334 Eliminates 'Proximate Causation' As An Element of the Tort*** BAJI 12.95, which had been used in California for decades, contains the requisite causation element (element 6), and for that reason is preferable to proposed CACI 2334. *Pinto*, like BAJI, confirms that 'proximate causation' is an element of a third-party bad faith claim. To recover in any bad faith case, the insured must show that the insurance company's breach of the implied covenant is the proximate cause of the damages they seek to recover: > If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages *proximately caused* by the insurer's breach.' (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 312, 84 Cal.Rptr.2d 455, 975 P.2d 652.) *Pinto*, 61 Cal.App.5th at 687 [Emphasis added]. See also *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725 ['An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits']; *PPG Indus., Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 ['Because breach of the implied covenant is actionable as a tort, the measure of damages for tort actions applies	No elements were eliminated from the instruction in the committee's proposed revisions. To the extent that the commenter is advocating for the addition of a discrete causation element, the comment is beyond the scope of the invitation to comment. The committee will consider the issue in a future release.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		and the insurance company generally is liable for any damages which are the proximate result of that breach.']; *Graciano v. Mercury Gen. Corp.* (2014) 231 Cal.App.4th 414, 425 ['If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages *proximately* caused by the insurer's breach.']	
		The current proposed version of CACI 2334 is missing the element of causation. This omission is compounded by the fact that CACI does not provide trial courts with a special verdict form in third-party bad faith cases, so the trial court may be inclined to use the model jury instruction as the basis for the special verdict form (which is missing the element of causation)."	The committee will consider the issue in a future release cycle and will also consider developing a related verdict form.
		"***2. The Proposed Version of CACI 2334 Muddles and Buries the Pinto Requirement*** BAJI 12.95 provides a clearer description of the separate elements of the tort. For example, it separately states two elements that should not be comingled: (i) that the third-party claimant made a 'reasonable offer' and (ii) that the insurer 'unreasonably refused to accept.' The proposed revision to CACI 2334, however, confusingly commingles these distinct elements. In particular, element #2 of the proposed revision reads: 'That [name of defendant] failed to accept a reasonable settlement demand for an amount within policy limits.'	With respect to the commenter's suggestion to rephrase the reasonable-offer element (element 3 in this report), the comment is beyond the scope of the invitation to comment. The committee will consider it in a future release.
		As phrased, element # [3] is prejudicially confusing. It does not plainly state that the claimant's demand must be reasonable. Instead, it buries the 'reasonable settlement demand' requirement in the middle of the sentence, and the sentence begins with -- *and is principally focused on* -- the insurer's conduct (i.e., 'That [name of defendant] failed to accept'). Many jurors reading this instruction will be misled into focusing on the insurer's failure to accept, rather	No further response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		than on the analytically separate and distinct requirement that the claimant's demand was reasonable. As made clear by *Pinto*, proof of the tort requires the jury to consider two analytically separate issues involving reasonableness: (i) whether the demand made by the claimant was reasonable, and (ii) if so, whether the insurance company unreasonably refused or failed to accept it. Very different considerations go into these two reasonableness elements. The first element focuses on matters within the claimant's control, including: whether the claimant's demand offers to release all persons insured under the policy, not just some; whether the demand offers releases on behalf of all possible claimants, not just some; whether the demand allows the insurer an adequate time to respond; and whether the demand is clear enough to assure that the insurer's acceptance will consummate a binding settlement agreement. *See, e.g., Graciano*, 231 Cal.App.4th at p. 425. The second element, in contrast, focuses on the insurance company's response to the demand, specifically, whether the insurer's response was reasonable given the facts known at the time. *Pinto*, 5 Cal.App.5th at p. 688. Proposed element #3 as drafted reads: "That [name of defendant]'s failure to accept, whether by action or failure to act, was the result of unreasonable conduct by [name of defendant]." The phrasing in BAJI 12.95 is preferable for several reasons. First, it is language that has already passed muster with the disinterested drafters of the BAJI instructions. Second, it avoids the circumlocution "was the result of unreasonable conduct" with the simple adjective "unreasonable." Third, the simple adjective phrase "unreasonably refused" properly focuses the jury on the basis for the insurer's response to the	For the reasons stated above in the committee's response to the comment of Karen M. Bray, the committee does not see improved clarity with the proposed phrasing "unreasonably refused." The committee is not persuaded that the language of the BAJI instruction is preferable. As noted above in the committee's response to the comment of Karen M. Bray, the new language is

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		demand: "'[T]he crucial issue is . . . the basis for the insurer's decision to reject an offer of settlement.'" (Pinto, 61 Cal.App.5th at p. 688, quoting *Walbrook Ins. Co. v. Liberty Mut. Ins. Co.* (1992) 5 Cal. App. 4th 1445, 1460.) In contrast, the "was the result of unreasonable conduct" phraseology invites the jury to hold the insurer liable based on conduct that occurred long before a settlement demand was made and that bears only a tenuous (if any) relationship to the "basis for the insurer's decision to reject." BAJI tracks the language repeatedly used by the California Supreme Court; the proposed CACI instruction does not. *E.g., Hamilton v. Maryland Cas. Co* (2002) 27 Cal.4th 718, 725 ["An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits"]; *Kransco v. American Empire Surplus Ins. Co.* (2002) 23 Cal.4th 390, 401 ["An insurer that breaches its implied duty of good faith and fair dealing by unreasonably refusing to accept a settlement offer within policy limits may be held liable for the full amount of the judgment against the insured in excess of its policy limits"]; *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal.4th 310, 312 (1999) [same]; *Commercial Union Assur. Co. v. Safeway Stores, Inc.*, (1980) 26 Cal.3d 912, 916-917 ["[A]n insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by unreasonably refusing to accept a settlement offer within the policy limits"]; *Comunale v. Traders & Gen. Ins. Co.* (1958) 50 Cal. 2d 654, 663 [third-party bad faith is based on "wrongful refusal to settle"]	taken from *Pinto*, which the court said was correct.
		Indeed, our research has failed to locate <u>any</u> California case employing language that tracks or resembles proposed element #3 ("That [the insurer's] failure to accept the settlement, whether by action or inaction, was the result of unreasonable conduct by [the insurer]"). Proposed element #3 does not, for example, track the	As noted above, element 4 (as renumbered in this report) tracks language in *Pinto*. *See id.* at p. 694.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		Pinto decision. *Pinto*, 61 Cal.App.5th at 687 ["If the insurer breaches the implied covenant by unreasonably refusing to settle the third party suit, the insured may sue the insurer in tort to recover damages proximately caused by the insurer's breach."]; id. at 688 ["An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits.] [italics original]."	
		"B. The Proposed Sentence 'An insurer's conduct is unreasonable when, for example, it places its own interests above those of the insured' Should not be Added; It Is Neither Even-Handed nor Consistent with the Totality of Circumstances Rule. The proposed revisions add a sentence to the end of the CACI 2334, purporting to give an example of what *is* bad faith. The proposed addition is problematic for two reasons: it is formulaic language that violates the 'totality of circumstances' rule, and it is not even-handed. It therefore should not be added. If, however, the Judicial Council is inclined to include the sentence, we suggest the following language be used instead: **In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances. An insurer's conduct may be unreasonable when, for example, it places its own interests above those of the insured. Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior.** We explain the reasoning for our suggestion below."	See the committee's response to the comment of Karen M. Bray.
		"*1. It Violates the Totality of Circumstances Rule and Constitutes an Improper Formula Instruction* It is well-established that the reasonableness of an insurer's conduct must be judged in light of the totality of the circumstances. As explained by the California Supreme Court: 'An insurer's good or	See the committee's response to the comment of Karen M. Bray.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		bad faith must be evaluated in light of the totality of the circumstances surrounding its actions.' *Wilson*, 42 Cal.4th at p. 723. The draft proposed language violates this rule by focusing the jury on only a single factor. Further, it directs the jury to find unreasonableness if it finds this single factor to be true – thus directing the jury to disregard the totality of the circumstances. And for that reason it borders on an improper formula instruction. See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 65; *Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 763-764; see also *Hubbard v. Calvin* (1978) 83 Cal.App.3d 529, 533-534. This is important because cases may arise where there is some evidence of the insurance company putting its own interests first, but also other evidence that it was reasonable to reject the settlement demand. For example, an insurer may have two reasons for rejecting a demand: its belief that the demand may be too high, and the fact that the demand was made early in a claim when few facts were available to assess liability or damages. As drafted, the proposed addition would direct the jury to find unreasonableness if it finds that the insurance company was concerned about overpaying – without allowing the jury to consider whether that concern was reasonable given the limited facts available at the time of the demand."	
		"*2. The Proposed Sentence Is Not Even-Handed* The proposed addition is not even-handed. It provides an example of unreasonable conduct, but it provides no guidance on what conduct is not sufficient to be unreasonable. In particular, it fails to instruct the jury that mere negligence is not enough to constitute unreasonable conduct. *Pinto* reaffirms that mere errors by an insurer do not supply the degree of unreasonableness necessary to establish the tort of bad faith refusal to settle: "[M]ere errors by an insurer in discharging its obligations to its insured '"does not necessarily make the insurer liable in	See the committee's response to the comment of Karen M. Bray.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been unreasonable."'" (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425, 179 Cal.Rptr.3d 717.) "[S]o long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook*, at p. 1460, 7 Cal.Rptr.2d 513; accord *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1280, 31 Cal.Rptr.2d 433 ["erroneous denial of a claim does not alone support tort liability; instead, tort liability requires that the insurer be found to have withheld benefits unreasonably"].) *Pinto*, 61 Cal. App. 5th at p. 688. The tort of bad faith requires something more than negligence. Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 880. The standard of culpability for the tort is, in fact, much higher, Bad faith is 'prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.' *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726; *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.* (2001) 90 Cal.App.4th 335, 346 [Croskey, J.]. Unfortunately, 'reasonable' and 'unreasonable' are vague concepts to lay jurors. Most jurors (and even attorneys) equate 'unreasonableness' with 'negligence.' Indeed, in tort cases with which jurors are more familiar – such as auto accident cases – 'mere errors' and bad judgment are enough to impose liability under the 'reasonable person' standard. Even judges equate unreasonable conduct with negligence. E.g., *Metcalf v. Cty. of San Joaquin* (2008) 42 Cal.4th 1121, 1132 ['The plaintiff is not required to prove that the employee's conduct was unreasonable (i.e., negligent or wrongful) in any other respect'] *Law v. Shoate* (1960) 178 Cal. App. 2d 739, 742 ['[T]the jury must determine the issue of negligence on	

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		the basis of the standard of reasonable conduct, or the degree of care which a reasonable person under similar circumstances would exercise to protect another from harm']; see, e.g., *Kentucky Fried Chicken of Cal., Inc. v. Superior Ct.*, (1997) 14 Cal. 4th 814, 832 ['By framing the issue as a question of duty, the majority usurps the jury's historic function in a negligence case to determine the reasonableness of defendant's conduct under the surrounding circumstances'] [Kennard, J., dissenting]. Indeed, the California's model jury instructions have long defined "negligence" in terms of unreasonable conduct. See CACI 401 and BAJI 3.10. It is therefore critically important that jurors be instructed that "unreasonableness" in the context of a bad faith tort means more than "unreasonable" in the context of negligence-based torts. The need to clarify this important distinction – that mere negligence should not be equated with "unreasonable" conduct in the context of a bad faith claim – has been recognized by both the Court of Appeal and the Ninth Circuit. *E.g., National Life & Accident Ins. Co. v. Edwards* (1981) 119 Cal.App.3d 326, 339 ["mere negligence is not enough to constitute unreasonable behavior for the purpose of establishing a breach of the implied covenant of good faith and fair dealing in an insurance case"]; see *Guebara v. Allstate Ins. Co.*, (9th Cir. 2001) 237 F.3d 987, 995 [quoting *Edwards*]. Therefore, if the proposed new sentence is added, we request that the instruction also state: **'In deciding whether the insurer responded unreasonably to the settlement demand, you should consider the totality of the circumstances' and 'Mere errors, negligence, and honest mistakes are not enough to constitute unreasonable behavior.'** "	
		"**3. Do Not Eliminate From 'Sources and Authorities' Cases Holding That More Than Mere Errors or Negligence is Required to Establish Unreasonableness**	See the committee's response to the comments of Karen M. Bray.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		Apparently because *Pinto* resolved any uncertainty on the issue, the proposed draft completely eliminates the 'Sources and Authority' note that, quoting the Rutter Group, acknowledges a dispute about what degree of culpability is required to support a finding of unreasonableness. It makes sense to delete the Rutter Group note because there can no longer be dispute on that point. But it makes no sense to delete the references to cases that, like *Pinto*, make clear that mere negligence is not enough to establish the tort. Deleting reference to those cases is likely to result in judges and jurors mistakenly believing that mere negligence is enough to establish the tort. Instead, the Judicial Council should include 'Sources and Authorities' citations for the proposition that mere errors, negligence, and mistaken judgment is not enough. These citations should include the passage in *Pinto* quoted above, the cases *Pinto* cites for the proposition (i.e., *Graciano* and *Walbrook*), and the cases the Rutter Group cited for the same proposition (i.e., *Brown, Howard, Walbrook*).	With respect to the suggestion to add additional content from the *Pinto* case, the committee now recommends adding a direct quote on the issue, as suggested. The committee also notes that the Sources and Authority for CACI No. 2334 already includes direct quotes from *Graciano* and *Howard* on this issue. To the extent other cases on this subject exist, *CACI*'s Sources and Authority cannot include every case relevant to an issue.
		As currently drafted, there is nothing in either the body of the proposed instruction, or the accompanying use notes, explaining that negligence is not bad faith. <u>Read literally, the proposed instruction appears to turn third-party bad faith into a negligence-based tort</u>. Indeed, CACI 401 essentially equates negligence with unreasonable conduct: > Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if that person does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. [¶] You must decide how a reasonably careful	The committee believes that the proposed instruction correctly states the applicable legal standard. To the extent the commenter is advocating for the addition of new content on the meaning of bad faith, the comment is beyond the scope of the invitation to comment. The committee will

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		person would have acted in [name of plaintiff/defendant]'s situation. This is why CACI 2334 should be clear that negligence is not bad faith in California."	consider the suggestion in a future release.
	Orange County Bar Association (OCBA) by Larisa M. Dinsmoor, President	Changes are consistent with *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676.	No response required.
		We recommend changing the following sentence in the instruction as follows, to better reflect that this is an example of unreasonableness: An insurer's conduct ~~is~~ may be unreasonable when, for example, it places its own interests above those of the insured.	The committee has rephrased the sentence as noted above, but the committee does not see improved clarity by changing the verb from "is" to "may be."
		The first cite of *Pinto* is incomplete and needs to be a full cite to allow for shorthand citations later, and various typographical errors need to be corrected. Accordingly, the ninth bulleted paragraph under "Sources and Authority" should actually read as follows: [excerpt from *Pinto* contained in ninth bullet omitted]	As suggested, the committee has changed the first citation to *Pinto* in the Sources and Authority to a full cite. The committee has confirmed that the excerpts from the case in the Sources and Authority accurately reflect the case language as published by the court's official publisher.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		We also think the twenty-fourth bulleted paragraph under "Sources and Authorities" should be removed as unnecessary and confusing in light of *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676: ~~"(4) [12:245] Insurer culpability required? A number of cases suggest that some degree of insurer 'culpability' is required before an insurer's refusal to settle a third party claim can be found to constitute 'bad faith.' " [(Howard v. American Nat'l Fire Ins. Co. (2010) 187 Cal.App.4th 498, 529 [, 115 Cal.Rptr.3d 42].), 69 (quoting text)]~~	The committee agrees, and has deleted the quotation, which is out-of-format material from a practice guide.
2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Revise)	Bruce Greenlee Attorney Richmond	1. I agree that adding applicants to element 1 is appropriate.	No response required.
		2. But I think that the structure of the material added to the DforU is a bit clunky. Subdivision (j)(1) extends FEHA harassment protection to applicants. I think that my first added sentence would be the one used in 2522C, noting that applicants are covered, to support the addition to the instruction. Then my next sentence would note the extension of coverage to the other nonemployer entities (unions, etc.); both of these sentences would be cited to (j)(1). Then I would make the point about harassment that does not occur at the workplace, with the cite to *Doe*. I would not include "If the plaintiff is an external applicant for a position or." As applicants are now covered in Element 1; modification of the instruction is not necessary.	The committee has refined the first paragraph of the Directions for Use by adding a sentence and citation regarding the scope of statute. The committee does not see improved clarity by moving the first new sentence concerning "other covered entities," which naturally follows the instruction's introductory sentence. As suggested by the commenter, the committee has deleted the reference to external applicants.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Revise)	Bruce Greenlee Attorney Richmond	1. I agree that adding applicants to element 1 is appropriate.	No response required.
		2. But I think that the structure of the material added to the DforU is a bit clunky. Subdivision (j)(1) extends FEHA harassment protection to applicants. I think that my first added sentence would be the one used in 2522C, noting that applicants are covered, to support the addition to the instruction. Then my next sentence would note the extension of coverage to the other nonemployer entities (unions, etc.); both of these sentences would be cited to (j)(1). Then I would make the point about harassment that does not occur at the workplace, with the cite to *Doe*. I would not include "If the plaintiff is an external applicant for a position or." As applicants are now covered in Element 1; modification of the instruction is not necessary.	See response to CACI No. 2521A.
2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Revise)	Bruce Greenlee Attorney Richmond	For the C instructions and verdict forms, I question whether an applicant can be the victim of widespread sexual favoritism since it involves the workplace culture, which an applicant has not experienced. This claim is case-created, not statutory, so the inclusion of applicants in the statute would not necessarily extend this claim to applicants.	The committee is not aware of a legal or factual bar to an applicant stating a claim of sexual favoritism harassment. As the Directions for Use state, "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances."
2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual	Bruce Greenlee Attorney Richmond	For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group.	The committee did not include content in the Directions for Use concerning "nonemployer entities." The committee, however, has refined the

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
Elements—Individual Defendant (Revise)			first paragraph of the Directions for Use by adding a sentence and citation regarding the scope of the statute.
2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Revise)	Bruce Greenlee Attorney Richmond	For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group.	See response to CACI No. 2522A.
2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant (Revise)	Bruce Greenlee Attorney Richmond	For the 2522 group (Individual Defendant), for which the nonemployer entities sentence is not applicable: I would make the same additions and revisions to the added material in the DforU that I proposed above for the 2521 group.	See response to CACI No. 2522A.
		If my suggestion for 2521C is rejected, I would not include "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances." This language is just too vague to be of help to anyone. What would be helpful would be any theories about what facts might make widespread sexual favoritism applicable to job applicants.	See response to CACI No. 2521C. To the extent the commenter seeks a modification, the committee disagrees. The Directions for Use state, "If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances."
2704. Waiting-Time Penalty for	California Lawyers Association,	a. We believe a waiting time penalty is a separate claim, and this instruction states the essential factual elements, so we would add "Essential Factual Elements" to the title.	The committee disagrees. The instruction concerns a statutory penalty, which

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
Nonpayment of Wages (Revise)	Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento		is derivative of a claim for unpaid wages.
		b. We would reorder the first two sentences of the instruction so it begins, "[*Name of plaintiff*] claims . . . ." Other instructions stating the essential factual elements begin this way, and this makes it clear that this is a separate claim. We would delete the language "I have determined that" as unnecessary and unhelpful.	For consistency and improved clarity, the committee has made the suggested changes.
		c. Labor Code section 203 states that an employee who avoids or refuses payment of wages is not entitled to a waiting time penalty. We would add a reference to this provision to the Directions for Use.	The provision is included in the Sources and Authority.
	Bruce Greenlee Attorney Richmond	1. No authority is provided to explain why these changes are proposed. I am left to speculate that it is for the court to decide whether there has been a failure to timely pay final wages, and that the jury decides only whether the failure was "willful." Then the court computes the amount of the penalty. The entitlement to the penalty stands or falls on willfulness. Some authority should be provided to explain why the current first paragraph has been replaced by the new first paragraph.	The committee has proposed revisions (and further refinements based on public comments) to improve the instruction's clarity. The Directions for Use already address what the jury needs to determine and what the court must determine.
		2. I don't really understand the intent of the proposed changes to the last part of the instruction. These three findings are to help the jury compute the amount of the penalty. If the court is going to compute the amount, then this entire part of the instruction should be removed, along with the sentence in the DforU.	As the Directions for Use have stated since at least 2005, "The second part [of the instruction] is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties."

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Larisa M. Dinsmoor, President	Strike "I have determined that" to avoid ambiguity about a judge making a factual determination. Also, by striking this language it simply restates the law in a neutral way that Defendant is obligated to pay all wages owed at the end of an employee's employment, then proceeds to instruct the jury on the issue of penalties.	As also suggested by the California Lawyers Association, the committee has removed the phrasing.
2705. Independent Contractor—Affirmative Defense—Worker Was Not Hiring Entity's Employee (Revise)	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We suggest adding the words "*hiring entity*" after "*Name of defendant*" and "*worker*" after "*name of plaintiff*" within the brackets in the first sentence for greater clarity.	The committee does not see improved clarity in adding the suggested language in the brackets.
		b. As stated in the User Guide, elements of causes of action and affirmative defenses are listed by numbers, and factors to be considered by the jury are listed by letters. We believe the elements of this instruction should be listed as 1, 2, 3, rather than a, b, c.	The committee agrees that the three factors of the ABC test are being used as elements in this *CACI* instruction, and has made the change.
		c. The citation to *Dynamex* for the rule that the court decides as a matter of law whether an employment relationship exists seems inapt. Instead, we would cite *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 342-342, which states this rule more clearly.	Because the jury's role in determining whether the carriers were employees or independent contractors was waived by the appellant, the committee declines to add a citation to the *Espejo* case for this proposition.
	Bruce Greenlee Attorney Richmond	"[N]o authority is provided for the proposed changes. The instruction is still labelled as an affirmative defense, but Plaintiff and Defendant have been changed to Worker and Hiring Entity. If this instruction can now be used by a plaintiff, it is no longer an	The committee does not share the commenter's concern. The committee has not changed the parties' identities in the

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		affirmative defense. And the DforU should give an example of when it can be used by a plaintiff."	instruction; the revisions to the Directions for Use are intended to provide more clarity to users.
2750. Failure to Reimburse Employee for Necessary Expenditures or Losses—Essential Factual Elements (New)	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We would substitute "Reimburse" for "Compensate" in the title because we believe reimbursement for expenses is different from compensation for wages. (See Labor Code, § 200, subd. (a).)	The committee agrees, and has changed the name of the new instruction.
		b. We would modify the instruction for greater clarity, to consistently refer to reimbursement rather than compensation, and to avoid overemphasis by repetition of the requirement that the expenses be "necessary," as shown below.	To improve clarity and for consistency, the committee agrees and has refined the language of the instruction, but has not replaced the statutory term "expenditures" with the suggested term "expenses."
		c. We would revise the final paragraph for greater clarity and make it optional because in many cases the issue may not arise.	The committee agrees in part, and has bracketed the final paragraph, and has added a sentence to the Direction for Use about omitting it if not at issue. The committee, however, does not see improved clarity in revising the language of the definition.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

		d. Accordingly, we suggest the following: "[*Name of plaintiff*] claims that [*name of defendant*] ~~owes~~ failed to reimburse [him/her/*nonbinary pronoun*] ~~compensation~~ for necessary [expen~~ditures~~ses] [and] [losses] made as a direct consequence of [his/her/*nonbinary pronoun*] employment with [*name of defendant*]. To establish this claim, [*name of plaintiff*] must prove all of the following: "1. That [*name of plaintiff*] incurred necessary [expen~~ditures~~ses] [and] [losses] ~~in~~ as a direct consequence of [~~the~~ discharg~~e~~ing ~~of~~ [his/her/*nonbinary pronoun*] ~~employment~~ job duties/obe~~dience~~ying ~~to~~ the directions of [*name of defendant*]]; "2. That the ~~necessary~~ [expen~~ditures~~ses] [and] [losses] were reasonable in amount; "3. That [*name of defendant*] failed to reimburse [*name of plaintiff*] for the full amount of the ~~necessary~~ [expen~~ditures~~ses] [and] [losses]; and "4. The amount of the [expen~~ditures~~ses] [and] [losses] that [*name of defendant*] failed to ~~compensate~~ reimburse. ~~" 'Necessary [expenditures] [and] [losses]' may include [expenditures] [and] [losses] [*name of plaintiff*] would have incurred even if [he/she/*nonbinary pronoun*] did not also incur them in direct consequence of the discharge of [his/her/*nonbinary pronoun*] employment duties or obedience to the direction of [*name of defendant*].~~" "[The fact that [*name of plaintiff*] would have incurred the [expenses] [and] [losses] anyway cannot prevent you from finding that [*name of plaintiff*] incurred the [expenses] [and] [losses] as a direct consequence of [discharging [his/her/*nonbinary pronoun*] job duties/obeying the directions of [*name of defendant*]].]"	See responses to comments above. No further response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	1. Format this way: [expenditures/ [and] losses]	For consistency, the committee has made the formatting change.
		2. Element 1 is a mouthful. There should be a better way to say "in direct consequence of," but I can't come up with one at the moment.	For lack of a better alternative, the committee has hewed to the statutory language (with the modest change suggested by California Lawyers Association, discussed above).
		3. Change "obedience to" to "following."	The committee has changed the language based on the suggestion from California Lawyers Association, discussed above.
	Kenneth Yoon Attorney Yoon Law, APC Los Angeles	"Change the following in proposed CACI 2750: Delete 'failed' and replace with 'did not'. The term failed suggests there was a prior request or attempt for the employer to reimburse, but 2802 does not require a prior request for reimbursement. There is no legal requirement, per established case law, for prior notice or attempt to get reimbursed."	The committee does not see improved clarity in the suggested language. Although "did not" may be simpler, "failed" is used throughout *CACI* in this way.
2752. Tip Pool Conversion—Essential Factual Elements (New)	California Lawyers Association, Litigation Section, Civil Jury Instructions	a. We believe "Tip Pool Conversion" more accurately describes this claim and would modify the title accordingly.	The committee agrees, and has changed the name of the instruction.
		b. The instruction refers repeatedly to "gratuities." We believe the jury understands the nature of tips, and there is no need to use the	The committee agrees, and has changed

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Committee by Reuben A. Ginsburg, Chair Sacramento	word "gratuities," which may be unfamiliar to some jurors. We would use the term "money" or "tips" in place of "gratuities" as shown below.	"gratuities" to "money" where appropriate.
		c. Element 2 makes element 1 unnecessary because if plaintiff was defendant's employee, defendant was an employer. We would delete element 1 as unnecessary.	The committee disagrees. A defendant's status as an employer may be disputed. The committee has added a sentence to the Directions for Use, however, that element 1 may be omitted if there is no factual dispute.
		d. We believe that much of the information in element 3 is unnecessary and duplicative of element 4, which explains a tip pool.	To simplify the instruction and eliminate some overlap, the committee has merged the components of the two elements into a single element 3.
		e. Element 5 includes two option sentences, each of which should be bracketed.	The committee has made the suggested formatting change.
		f. We believe elements 6 and 7 are superfluous because plaintiff necessarily was harmed if defendant took or allowed someone to take money from a tip pool that plaintiff was entitled to receive (element 5), and defendant's conduct necessarily was a substantial factor in causing plaintiff's harm if that happened. We would delete elements 6 and 7 as unnecessary.	The committee agrees and has deleted elements 6 and 7.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		g. We would modify the paragraph following the elements in light of the above, as shown below.	The committee has refined the paragraph following the elements in the manner shown in comment i. below.
		h. We would move the final sentence of the instruction to the Directions for Use and change "gratuities" to "tips."	The committee has added "tips" to the final paragraph for improved clarity, but the committee believes that the jury should be instructed on the defendant's duty to keep records.
		i. Accordingly, we would modify the instruction as follows: "[*Name of plaintiff*] claims that [*name of defendant*] [took ~~gratuities~~ money/allowed [*specify ineligible individual(s) or class(es) of individuals*] to take ~~gratuities~~ money] from a tip pool that [*name of plaintiff*] was entitled to receive. [The court has determined that [*specify ineligible individual(s) or class(es) of individuals*] [was/were] not eligible to receive ~~gratuities~~ money from a tip pool.] "To establish this claim, [*name of plaintiff*] must prove all of the following: "~~1. That [*name of defendant*] was a[n] [employer/[*other covered entity*]];~~ "~~2~~1. That [*name of plaintiff*] was an employee of [*name of defendant*]; "~~3~~2. That [*name of plaintiff*] was entitled to a portion of tips ~~gratuities left for [him/her/*nonbinary pronoun*] as an amount over~~	No further response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		~~and above the actual amount due to [*name of defendant*] for [specify services rendered or goods, food, drink, or articles sold to the patron(s)]~~; "~~4~~3. That [*name of defendant*] maintained a tip pool for [his/her/*nonbinary pronoun*/its] employees in which ~~gratuities~~ tips left by patrons were pooled to be distributed among employees including [*name of plaintiff*]; and "~~5~~4. [That [*name of defendant*] took money from the tip pool that [*name of plaintiff*] was entitled to receive;] [or] [That [*name of defendant*] allowed [specify ineligible individual(s) or class(es) of individuals] to take money from the tip pool that [*name of plaintiff*] was entitled to receive;] "~~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.~~ "~~To establish harm,~~ [*N~~n~~ame of plaintiff*] does not have to prove the exact amount of money that was taken. ~~[*Name of plaintiff*] can establish harm by proving the taking of any amount of gratuity that [*name of plaintiff*] was entitled to receive.~~" ~~"[Name of defendant] is required to keep accurate records of all gratuities received by [him/her/nonbinary pronoun/it] for [his/her/nonbinary pronoun/its] employees."~~	

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	1. Element 1: Format this way: [a/an].	For consistency, the committee has made the formatting change.
		2. Element 4 and last paragraph: pronoun choices: I would move "its" to follow "his/her." It's easy to overlook it hanging out at the end after "nonbinary." It is probably the most common choice as most employers are entities rather than individuals.	The bracketed personal pronoun options are uniform throughout *CACI* without regard to how likely or unlikely a particular option may be in the context of an instruction. The committee, therefore, declines to make the suggested change.
2753. Failure to Pay All Vested Vacation Time—Essential Factual Elements (New)	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We believe that an employment relationship is essential to this claim, so we would add a new element 1 stating: "1. [*Name of plaintiff*] was an employee of [*name of defendant*]."	The committee agrees, and has added two elements: element 1 (defendant is an employer) and element 2 (plaintiff is defendant's employee). A sentence has also been added to the Direction for Use about omitting element 1 if it is not disputed.
		b. The word "vested" may be unfamiliar to some jurors. Moreover, vacation time vests as it is earned (i.e., as the labor is rendered), so there is no need to speak of vesting if what is meant is earned. The vacation time also must be unused for plaintiff to recover. We would modify the instruction as follows: "[*Name of plaintiff*] claims that	The committee agrees, and has used "earned" in the instruction instead of "vested," and has added "unused" as a modifier.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		[*name of defendant*] owes [him/her/*nonbinary pronoun*] compensation for ~~unpaid, vested~~ earned, unused vacation time. "To establish this claim, [*name of plaintiff*] must prove ~~both~~ all of the following: "1. [*Name of plaintiff*] was an employee of [*name of defendant*]. "~~1~~2. That [*name of defendant*] did not pay [him/her/*nonbinary pronoun*] all ~~vested~~ earned, unused vacation time at [his/her/*nonbinary pronoun*] final rate of pay in accordance with the [contract of employment/employer policy]; and "~~2~~3. The amount owed to [*name of plaintiff*] for ~~vested~~ earned, unused vacation time."	
		c. We would modify the first bullet point in the Sources and Authority to more fully describe the statute: "Vested Vacation Wages; Payment Upon Termination. Labor Code section 227.3"	The committee has refined the description of the statute in the Sources and Authority.
	Kenneth Yoon Attorney Yoon Law, APC Los Angeles	Add the following language to the end of the proposed CACI 2753: The term "vested vacation time" means vacation time that has been earned by the employee. A proportionate right to vacation time vests as the labor is provided, on a regular (for example daily) basis. Without a definition, there is likely to be many unnecessary disputes as to the jury instruction. The law requires vacation to vest as it is earned, such that a person who quits at 6 months is entitled to half a year's worth of vacation (e.g., 2.5 days if vacation was given at the rate of 5 days a year). Many regular workers might assume vacation under such a circumstance would only vest on the one year anniversary.	As suggested by the California Lawyers Association, the committee has used "earned" instead of "vested." The committee notes that the Directions for Use already address the potential need to instruct the jury on how to determine a pro rata share of vacation time if there is a dispute as to

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			how much vacation time has vested.
2754. Reporting Time Pay—Essential Factual Elements (New)	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We would clarify the first paragraph of the instruction by summarizing the claim without stating so much detail, as shown below.	The committee believes that the language suggested for the introductory paragraph (see comment d. below) would sacrifice accuracy for simplicity.
		b. Element 2 makes element 1 unnecessary because if plaintiff was defendant's employee, defendant was an employer. We would delete element 1 as unnecessary.	The committee believes both elements are required. The committee, however, has added a sentence to the Directions for Use that if the defendant's status as an employer is not disputed, element 1 may be omitted.
		c. We believe that element 4 should be separated into two elements, as shown below:	For improved clarity, the committee has separated element 4 into two elements, as suggested.
		d. Accordingly, we would modify the first paragraph and the elements as follows: "[*Name of plaintiff*] claims that [*name of defendant*] ~~scheduled or otherwise required [him/her/*nonbinary pronoun*] to [report to work] [and] [report to work for a second shift] but when [*name of plaintiff*] reported to work, [*name of defendant*] [failed to put [*name of*	See responses above. No further response required.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		~~*plaintiff*] to work] [and] [furnished a shortened [workday/shift]]~~ failed to pay [*name of plaintiff*] for reporting to work as required. To establish this claim, [*name of plaintiff*] must prove all of the following: "~~1. That [*name of defendant*] was a[n] [employer/[specify other covered entity]]~~; "~~2~~1. That [*name of plaintiff*] was an employee of [*name of defendant*]; "~~3~~2. That [*name of defendant*] required [*name of plaintiff*] to report to work for one or more [workdays] [and] [second shifts]; ~~and~~ "~~4~~3. That ~~after~~ [*name of plaintiff*] reported for work~~,~~; and "~~4.~~ That [*name of defendant*] [failed to put [*name of plaintiff*] to work] [and] [furnished less than [half of the usual day's work/ two hours of work on a second shift]]."	
		e. We believe that selecting the appropriate bracketed language is not modifying the instruction. Accordingly, we would modify the second paragraph of the Directions for Use as follows: "~~Modify~~ Select the appropriate bracketed language in the introductory paragraph and elements 3 and 4 if a second shift is at issue, and ~~modify~~ in the introductory paragraph and element 4 to indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both."	The committee has revised the language of the Directions for Use to reflect the options.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	1. Opening paragraph: Format this way: [report to work/ [and] report to work for a second shift]. Is this really an "and?" It seems unlikely that you would want both.	The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue.
		2. Format this way: [failed to put [*name of plaintiff*] to work/ [and] furnished a shortened [workday/shift]]. Again, it doesn't seem that you would want to include both options.	The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue.
		3. Element 1: format [a/an]	For consistency, the committee has made the formatting change.
		4. Element 3: format: [workdays/ [and] second shifts]. Same concern about "and."	The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for modification if both options are at issue.
		5. Element 4: format: [failed to put [*name of plaintiff*] to work/ [and] furnished less than [half of the usual day's work/ two hours of work on a second shift]]. Here particularly "and" seems wrong. I don't think you can both fail to put the person to work at all and also furnish inadequate hours.	The committee has deleted the bracketed "and," and has revised the Directions for Use to address the need for

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			modification if both options are at issue.
		6. Paragraph following elements: Note that here you have an "either/or." That makes a lot more sense. If you were to change this one to an "and," it wouldn't (make sense).	No response required.
		7. Next-to-last paragraph: I would make the first sentence on rate of pay a separate paragraph.	For improved clarity, the committee has made the sentence a separate paragraph.
		8. Next-to-last paragraph – optional sentence: delete the commas around "as required."	For improved clarity, the committee has rephrased the sentence.
		9. DforU second paragraph: These are not modifications; these are selections. A modification is when one has to deviate from or add more words to the provided text. Here, the user is selecting which options of the provided text to include.	The committee has revised the language of the Directions for Use to reflect the options.
3046. Violation of Pretrial Detainee's Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (New)	Bruce Greenlee Attorney Richmond	1. This new instruction is well done.	No response required.
		2. DforU: Cross refer to 3041 for prisoners with a cited sentence that says why prisoners and pretrial detainees are treated differently under 1983.	The committee does not believe a cross reference to CACI No. 3041 would be particularly helpful. The committee, however, has added a direct quote from *Castro* to the Sources and Authority that discusses the constitutional basis for

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			the different deliberate indifference standards.
		3. DforU: I would end the current first paragraph after the citation to *Castro*. Then I would say in a new paragraph: "The opening paragraph may be modified to specify the conditions of confinement or the needed but denied medical care at issue." Then continue with the "for example" sentence. Or I might actually revise the opening paragraph to include this information.	For improved clarity, the committee has revised the Directions for Use.
3050. Retaliation—Essential Factual Elements (Revise)	Bruce Greenlee Attorney Richmond	Is there some authority for the proposition that a person of "ordinary firmness" is just a "reasonable" person? "Ordinary firmness" comes from the *Tichinin* case and other 9th Circuit cases excerpted in the SandA. No case is cited for "reasonable." I don't think that you can make this change unless a court has said that that's all that "ordinary firmness" means.	One of the committee's goals is to explain the law in plain English. Though jurists regularly use the phrase "a person of ordinary firmness" in First Amendment retaliation cases, the committee understands that phrase to mean a "reasonable person" and believes that jurors will better understand the updated terminology.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
3709. Ostensible Agent (Revise)	Association of Southern California Defense Counsel by David P. Pruett Carroll, Kelly, Trotter & Franzen Sacramento	"In response to the Invitation to Comment, the Association of Southern California Defense Counsel ('ASCDC') submits the following comments regarding instructions on ostensible agency; the proposed revision of CACI 3709, 'Ostensible Agent,' and the newly proposed instruction of CACI 3714, 'Ostensible Agency—Physician-Hospital Relationship.' Based upon guidance from statutes and the Courts of Appeal, the newly proposed CACI 3714 should not be approved as it is unnecessary and is not a complete and accurate instruction. Otherwise, any approved instruction on ostensible agency should include changes, to achieve accuracy and completeness, to the text of the instruction, 'Directions for Use,' and 'Sources and Authorities.' "	See the committee's responses to ASCDC's specific comments, below.
		"ASCDC believes that the Sources and Authorities for an instruction on ostensible agency should include the case of *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, which the Advisory Committee has not, so far, included. Further, ASCDC believes that the Directions for Use and Sources and Authorities should reflect that the assessment of ostensible agency requires considering the 'totality of circumstances' of a patients' interactions with physician and hospital. ASCDC believes that approach is implicitly required by the Civil Code section 2300 and the pertinent cases discussing ostensible agency. Further, ASCDC directs attention to the discussion in the recent Second District decision of *Steger v. CSJ Providence St. Joseph Medical Center* (Cal. Ct. App., Aug. 16, 2021, No. B304043) 2021 WL 3615548, explicitly describing the totality of circumstances approach. Publication of the *Steger* decision has been requested; if it is published, it should also be noted in the Sources and Authorities."	The committee has added a quote from *Wicks* to the Sources and Authority of CACI No. 3714—the new instruction on hospital-physician ostensible agency. Because *Steger* is not certified for publication, the committee will not add it at this time. If the pending publication request is granted, the committee will consider the case in a future release cycle.
	California Lawyers Association,	a. The first sentence of the instruction names three individuals before using a personal pronoun to refer to one of those three individuals. We believe it would be clearer to refer to that person by	The committee agrees that using a specific name would be clearer than

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	name so as to remove any doubt: "[Name of plaintiff] claims that [name of defendant] is responsible for [name of agent]'s conduct because ~~[he/she/nonbinary pronoun]~~ [name of agent] was [name of defendant]'s apparent [employee/agent]."	using a personal pronoun; the committee has made the suggested change.
		b. Although it is beyond the scope of the invitation to comment, we believe this instruction, which should be given with CACI No. 3701, Tort Liability Asserted Against Principal—Essential Factual Elements, should be replaced by a stand-alone instruction stating all the essential factual elements, for the reasons stated below.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release.
3714. Ostensible Agency—Physician-Hospital Relationship (New)	Association of Southern California Defense Counsel by David P. Pruett Carroll, Kelly, Trotter & Franzen Sacramento	**"1. The Instructions Should Follow the Legislative Definition of Ostensible Agency, Codified by Civil Code § 2300; CACI 3714 Should Not Be Approved for Use** The primary basis for any instruction on ostensible agency emanates from Civil Code section 2300, which states: 'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' Giving effect to the Civil Code section 2300 statutory definition, CACI 3709 has included, as its first element: 'That [name of defendant] intentionally or carelessly created the impression that [name of agent] was [name of defendant]'s [employee/agent].' But, the fundamental rule of section 2300 has disappeared from the newly proposed CACI 3714. The phrasing of CACI 3714 gravitates towards a general proposition that physicians are ostensible agents of hospitals, because every hospital holds 'itself out the public as a provider of care' and that a patient looks to a hospital 'for services, rather than selecting [a particular physician] for services.' Proposed CACI 3714 would incorrectly suggest to jurors that physicians are ostensible agents because a hospital is itself is a provider of care.	The committee disagrees. The proposed instruction is consistent with the authority cited, including the *Wicks* case raised by the commenter (see comment to CACI No. 3709, above): "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		Candidly, that amounts to saying that because a hospital is a hospital that physicians are its ostensible agents. It is well-established that hospitals are providers of care. The Medical Injury Compensation Reform Act (MICRA) pertains to 'actions against " '[h]ealth care provider[s],' " generally, which it defined to include any licensed "clinic, health dispensary, or health facility." ' (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 81; quoting Code Civ. Proc. § 340.5(1)). A 'health facility' includes a hospital. (Health & Saf. Code § 1250(a).) ' " ' Provider' means any professional person, organization, health facility, or other person or institution licensed by the state to deliver or furnish health care services.'" (*PacifiCare of California v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1457; quoting Health & Saf. Code, § 1345, subd. (i).) The syllogism of hospital as provider as basis for vicarious liability for physicians as ostensible agents is inconsistent with Civil Code section 2300. CACI 3714 should not be adopted because it is not a complete and accurate instruction. In *Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804, the Court instructed: 'A party in a civil case is, upon request, entitled to correct jury instructions on every theory of the case that is supported by substantial evidence.' (*Id.* at 813; citing *Eng v. Brown* (2018) 21 Cal.App.5th 675, 704.) ' "It is elementary that a court may refuse a party's request for a jury instruction that misstates the law.' (*Ibid.*) Regarding statutory bases for instructions, *Olive* stated: "An instruction that clarifies the application of statutory language may not add to the words of a statute." (*Olive* at 813; citing *Torres v. Parkhouse Tire Service, Inc*. (2001) 26 Cal.4th 995, 1003-1004.)	the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, 882.)

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		Olive is consistent with other decisions. Statutes are sources of law for jury instructions. (*In re Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 523.) Moreover, failure to conform the standards of applicable statutes generally leads to error; "the general rule is that in construing a statute, we are not permitted to 'insert qualifying provisions not included' in the statute, nor edit it 'to conform to an assumed intention which does not appear from its language.'" (*Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 130; *Cadlerock Joint Venture, L.P. v. Lobel* (2012) 206 Cal.App.4th 1531, 1549, 143.) A Court of Appeal recently criticized a CACI instruction that did not include a required element for a theory of liability. In *Pinto v. Farmers Insurance Exchange* (2021) 61 Cal.App.5th 676, the Second District held that the CACI instruction for insurance bad faith did not correctly describe the applicable law, stating: "Although CACI No. 2334 describes three elements necessary for bad faith liability, it lacks a crucial element: Bad faith. To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Id.* at 692.) The Court observed: "Farmers proposed that a special verdict question mirroring CACI No. 2334 be modified to ask whether Farmers' failure to accept Pinto's settlement offer was 'the result of unreasonable conduct by Farmers,' which Farmers at all times argued was essential to Pinto's bad faith failure-to-settle theory. This would have been the correct question, but Pinto successfully objected to it." (*Id.* at 694.) In *Pinto*, the Court of Appeal concluded that the jury instruction was incorrect and led to a verdict that unfairly imposed bad faith liability without actually showing bad faith of the insurer. So, *Pinto* provides a recent example that efforts to shorten jury instructions should not give way to the ultimate obligation to correctly state the legal standards for determining whether a defendant is liable to a plaintiff. Further, *Pinto* illustrates	

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		that truncating the statements of law in a jury instruction prejudices the parties to litigation who necessarily depend upon correct instructions in the determination of liability. In *Pinto*, the Court of Appeal criticized CACI 2334 as leading to a conclusion that an insurer's "failure to accept a reasonable settlement offer is itself unreasonable per se." (*Pinto* at 687-688.) *Pinto* stated there was no "authority posits that failure to accept a reasonable settlement is unreasonable per se." (*Id.* at 690.) CACI 3714 should not be adopted because is posits that because a hospital is a provider that it is per se vicariously liable for physicians as ostensible agents. Therefore, CACI 3714 should not be approved. The issue of ostensible agency can be adequately addressed by CACI 3709, subject to case-specific modifications that parties may propose and the courts adopt to assure the proper application of legal principles, including in cases in which a plaintiff contends a hospital is vicariously liable for the negligence of physicians as ostensible agents."	The committee believes that a new ostensible agent instruction for the hospital-physician context is preferable to the alternative of modifying CACI No. 3709, and that the proposed instruction correctly states the applicable legal standard.
		"**2. The 'Directions for Use' and 'Sources and Authorities' Should Reflect the Need to Consider the Application of the Rule Based Upon the Circumstances Presented in the Case to Avoid an Instruction that Unduly Gravitates Towards Finding Ostensible Agency** For any instruction relative to ostensible agency, the terms of Civil Code section 2300 should be set forth in the Sources and Authorities, as a foundational matter, as indicated above**.**	The committee agrees to the extent that the commenter believes the instruction should reflect the requirements set forth in the cases and the Civil Code. That ostensible agency may be more easily proven in the

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			hospital-physician context is well-established by the authorities referenced. The committee notes that Civil Code section 2300 has been included in the Sources and Authority for this new instruction.
		The case of *Wicks v. Antelope Valley Healthcare District* (2020) 49 Cal.App.5th 866, should be included, as well as that Court's description of the significant published decisions on the topic. As mentioned in *Wicks*, the decision in *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448 "explained the required elements of ostensible agency: '(1) conduct by the hospital that would cause a reasonable person to believe there was an agency relationship and (2) reliance on that apparent agency relationship by the plaintiff.'" (*Wicks* at 882; quoting *Mejia* at 1457.) Wicks acknowledged: ""*Mejia* observed that California law has 'inferred ostensible agency from the mere fact that the plaintiff sought treatment at the hospital without being informed that the doctors were independent contractors.'" (Ibid.) "'Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.'" (*Wicks* at 882; quoting *Mejia* at 1454-1455.) The discussion in *Wicks* reflects that the assessment the issue of ostensible agency is affected by the circumstances of a particular patient's presentation to a particular physician at a particular hospital. Wicks' discussion in that regard included the Court's	The committee believes that the new instruction adequately sets forth the requirements of the cases referenced by the commenter, including the jury's need to assess "the circumstances of a particular patient's presentation to a particular physician at a particular hospital." As noted above in the response to ASCDC's comment to CACI No. 3709, the committee has added two direct quotations from *Wicks* to the Sources and Authority, and the *Mejia, Whitlow*, and *Markow* cases have already been included in the Sources

Instruction(s)	Commenter	Comment	Committee Response
		rejection of the proposition that "that no matter what circumstances bring a patient to an emergency room, an admission form notifying the patient that the ER doctor is not an employee or agent of the hospital cannot establish lack of agency as a matter of law." (*Wicks* at 883.) Explaining that circumstances must be assessed on a case-by-case basis, *Wicks* reviewed precedent and explained: "In *Mejia*, the hospital did not give the patient any notice that its staff physicians were independent contractors, and the patient had no reason to know they were not agents of the hospital." (*Wicks* at 883; citing *Mejia* at 1450.) "In contrast with *Mejia*, Mr. Wicks signed a straightforward notice, with no obtuse legalese, telling him the staff physicians were independent contractors and not employees or agents." (*Wicks* at 883.) Going on, *Wicks* recounted that in *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 63, "the patient was in no condition to understand the admission form she signed in the emergency room stating that all physicians furnishing services to her were independent contractors and not employees or agents of the hospital. Her son declared his mother was 'crying in horrible pain' when the hospital's registration processor told her to sign and initial the form, she was nauseous and unable to read it, and the processor did not explain the contents of the form or read it to her," pointing out that expert testimony showed that the "was suffering from a massive left temporal hemorrhage" at the time "and was incapable of understanding what was contained in the form." (*Wicks* at 883; citing *Whitlow* at 633-634.) Under the circumstances addressed in *Wicks*, however, that Court explained: "In contrast with *Whitlow*, there is nothing to suggest Mr. Wicks was incapable of understanding the admission form. He drove himself to the hospital." (*Wicks* at 883.)	and Authority for this new instruction.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		Continuing in the meaningful review of the circumstances presented in other cases, *Wicks* also explained: "At the factually opposite end of the spectrum from *Mejia* and *Whitlow* is *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, where the court found no basis to hold a hospital liable for the negligence of a staff physician. The physician had been the patient's chosen personal doctor for four and a half years. [Citation.] The patient signed 25 conditions of admission forms and other consent forms notifying him that his physician was an independent contractor, not an agent or employee of the hospital. [Citation.] The patient did not seek emergency care from the hospital. Despite evidence that the physician was the hospital's director of its pain clinic, used the hospital's name and logo on his business cards, wore a hospital badge, and treated patients in a building displaying the hospital's name and logo, the court found these facts were 'negated' by the actual notice the hospital gave the patient that his doctor was an independent contractor, not the hospital's agent or employee." (*Wicks* at 883; quoting *Markow* at 1041-1042.) Ultimately, again emphasizing that analysis of the totality of circumstances matters in the context of assessing whether a hospital is vicariously liable for a physician's negligence based on ostensible agency, *Wicks* summed up by saying: "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks* at 884.)	

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		This foregoing summation should be included in the Directions for Use or Sources and Authorities.	
		"Moreover, the Sources and Authorities should provide the additional legal underpinnings of the doctrine, by reference to the foundational general rule that 'a principal is not vicariously liable for the negligent acts of an independent contractor.' *(Hill Brothers Chemical Co. v. Superior Court* (2004) 123 Cal.App.4th 1001, 1008.) Indeed, publication has been requested of a recent Second District decision that recounted the foregoing rule, the case of *Steger v. CSJ Providence St. Joseph Medical Center* (Cal. Ct. App., Aug. 16, 2021, No. B304043) 2021 WL 3615548, which stated: "In our view, based on *Wicks* and *Whitlow*, it appears that the application of the doctrine is determined by the totality of the circumstances in which the notice was provided to the patient, not solely on whether the patient sought 'emergency care.'" (*Id.* at *10.) Whether the *Steger* decision becomes published or not, its conclusion that 'the application of the doctrine is determined by the totality of the circumstances in which the notice was provided to the patient' is supported by the other published authorities that were otherwise discussed in *Wicks*. It will be known whether the Court of Appeal orders the *Steger* decision to be published at least by September 15, 2021, the date of finality of the decision. If it is published, its instruction to consider the 'totality of the circumstances' should be included in the Sources and Authorities."	The committee disagrees. The committee believes that the final sentence of the new instruction correctly instructs the jury to consider the facts of the particular case. The authorities cited in the Sources and Authority recognize that a different rule applies in the medical context. For purposes of responding to this comment, the committee notes that even the unpublished case referenced by the commenter recognizes that the general rule does not apply in this context: "In general, a principal is not vicariously liable for the negligent acts of an independent contractor. [citation to *Hill Brothers* omitted] **However, in the medical context**, vicarious liability has been extended to a hospital entity under a

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
			theory of ostensible agency for the acts of non-employee physicians who perform services on hospital premises." (*Steger v. Csj Providence St. Joseph Med. Ctr.* (Aug. 16, 2021, No. B304043) _Cal.App.5th_, emphasis added.)
	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. The Directions for Use say to give this instruction with CACI No. 3701, Tort Liability Asserted Against Principal—Essential Factual Elements. No. 3701 states two essential elements: (1) another person was defendant's agent, and (2) the agent was acting within the scope of agency. We believe No. 3714 relates to only element 1, the existence of an agency relationship. But No. 3714 does not make this clear. Instead, No. 3714 reads like an essential factual element instruction and appears to state a separate claim, which is incomplete because it does not include the element that the ostensible agent was acting within the scope of the ostensible agency. We believe CACI No. 3714 should be revised to make it a separate claim (essential factual elements), including the element that the ostensible agent was acting within the scope of the ostensible agency.	This comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release.
		b. The language "held itself out to the public as a provider of care" may be unfamiliar to some jurors. We suggest "gave the public the appearance of offering health care services."	The committee does not see improved clarity in the language suggested.
		c. The language "looked to [name of hospital] for services" is not plain English. We suggest "sought health care services from [name of hospital] rather than from [name of physician]."	The committee does not see improved clarity in the language suggested.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		d. Similarly, we suggest changing the language "a hospital holds itself out to the public as a provider of care unless . . ." in the final, optional paragraph to "a hospital gives the public the appearance of offering health care services . . . ."	The committee does not see improved clarity in the language suggested.
		e. We believe the Sources and Authority should cite Civil Code section 2330 relating to the scope of actual or ostensible agency. ("An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.")	The committee does not believe inclusion of section 2330 in the Sources and Authority would be helpful to users.
	Bruce Greenlee Attorney Richmond	1. Good instruction and good idea to add it to CACI.	No response required.
		2. I would delete "Generally speaking" from the last paragraph. The paragraph goes on to specify the circumstances when notice might not be adequate, so "generally speaking" is not really needed.	The committee has made the suggested deletion.
		3. Maybe add a cross reference to 3709 to the DforU.	The committee does not believe the suggested cross reference would be helpful to users.
	Orange County Bar Association by Larisa M. Dinsmoor, President	"At 'Sources and Authority,' the sixth item: The proposed modification would correct the case citation based on the quote cited. As such, the amendment should be modified to reflect the proper case citation as *Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 641 [188 Cal.Rptr.3d 246]."	The committee has corrected the pinpoint citation for *Whitlow*.
4304. Termination for Violation of Terms of Lease/Agreement—	California Apartment Association by Heidi Palutke,	"The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 single family and apartment owners and operators who are responsible for nearly two million affordable	As suggested, the committee has refined the Directions for Use to cite Civil Code section

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
Essential Factual Elements (Revise)	Education, Policy and Compliance Counsel Sacramento	and market rate rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local forums. CAA offers the following comments on the proposed revised and new jury instructions: **4304 Termination for Violation of Terms of Lease/agreement – Essential Factual Elements** The 'Directions for Use' state that the instruction should be modified if the Tenant Protection Action of 2019 applies. The example provided specifies that element 5 should be modified for a just cause eviction 'involving a residential rental property tenancy of 12 months or more.' This description of the precondition to the application of the TPA's just cause protection based on the duration of tenancy is not accurate. The TPA provides that a tenancy is not protected until *after* a tenant has resided in the unit for 12 months: ["]Notwithstanding any other law, *after* a tenant has continuously and lawfully occupied a residential real property for 12 months, the owner of the residential real property shall not terminate the tenancy without just cause, which shall be stated in the written notice to terminate tenancy.' Civ. Code §1946.2(a) (emphasis added). Moreover, if additional roommates are added, the clock resets, until at least one tenant has lived in the unit for two years. If any additional adult tenants are added to the lease before an existing tenant has continuously and lawfully occupied the residential real property for 24 months, then this subdivision shall only apply if either of the following are satisfied:	1946(a), and to describe more fully the various lengths of tenancies referenced in that subdivision, rather than giving a single example.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		(1) All of the tenants have continuously and lawfully occupied the residential real property for 12 months or more. (2) One or more tenants have continuously and lawfully occupied the residential real property for 24 months or more. Civ. Code §1946.2(a) For example, if the first tenant has lived alone in the unit for 13 months, they are protected. However, if a new roommate moves in, the tenancy is no longer protected – until at least one tenant has lived there for two years. This distinction is important, given the purpose of the 'reset' when a new roommate moves in. The purpose of this provision is to make it easier for the landlord to address a new problem tenant, while also protecting the tenancies of long-term tenants. Given the likelihood of the final three-day notice to quit without opportunity to cure required by Civ. Code §1946(c) being invoked to address un-remedied conduct of a new problem tenant, this example should precisely track the language of the statute."	
	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	We believe the sixth paragraph of the Directions for Use should simply refer to Tenant Protection Act of 2019, rather than refer to the use note below: "If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5~~. See use note, below, concerning the Tenant Protection Act of 2019.~~, unless the Tenant Protection Act of 2019, noted below, requires otherwise. (See Civ. Code, § 1946.2, subd. (c).)"	As a result of refinements made to the instruction as suggested by Centro Legal de la Raza (discussed below), the committee has removed the sentence referring to the Tenant Protection Act of 2019 in the sixth paragraph of the Directions for Use.
	Centro Legal de la Raza	"Centro Legal de la Raza is a legal services agency protecting and advancing the rights of low-income, immigrant, Black, and Latinx	The committee has added a bracketed element 7, as

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
	Mihaela Gough Managing Attorney	communities through bilingual legal representation, education, and advocacy. As part of our mission, Centro represents clients in unlawful detainer jury trials. As such, accurate jury instructions are an integral part in assuring that defendants' rights are protected. Housing law can be very confusing and if the jury instructions are not clear a jury may choose to vote on a different outcome than they would have otherwise. AB1482, Tenant Protection Act of 2019, was passed to protect housing rights and to prevent homelessness. All jury instructions should clearly and accurately state the law. Along those lines, we have drafted clearer instructions which demonstrate the necessity of a separate three day notice in situations where AB 1482 applies. Where AB 1482 applies, it is the plaintiff's obligation to demonstrate that an additional notice to quit was also served after the initial three day notice to cure. See below our suggested edits in green to Jury Instruction number 4304. 4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements Where AB 1482 Applies [Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to perform [a] requirement(s) under [his/her/nonbinary pronoun/its] [lease/rental agreement/sublease]. To establish this claim, [name of plaintiff] must prove all of the following: 1. That [name of plaintiff] [owns/leases] the property; 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant];	suggested, and has added content to the Directions for Use concerning a second notice required under the Tenant Protection Act of 2019.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		3. That under the [lease/rental agreement/sublease], [name of defendant] agreed [insert required condition(s) that were not performed]; 4. That [name of defendant] failed to perform [that/those] requirement(s) by [insert description of alleged failure to perform]; 5. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days' written notice to [either [describe action to correct failure to perform] or] vacate the property; [and] [6. That [name of defendant] did not [describe action to correct failure to perform]; and] [X. That [name of plaintiff] did properly serve a 3 day notice to quit] 7. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property. [[Name of defendant]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]"	
	Bruce Greenlee Attorney Richmond	DforU fourth paragraph: I don't think that CACI has ever cross referred from one paragraph in the DforU to another. I don't really see that this is necessary. If it is, I wouldn't say "use note." While people do use this term, I believe it goes back to BAJI. "Directions for Use" I believe was selected to avoid copying BAJI. If you must, just say: "See the last paragraph below …"	As a result of refinements made to the instruction as suggested by CAA and Centro Legal de la Raza (discussed above), the committee has removed the sentence.
4330. Denial of Requested	Bruce Greenlee Attorney Richmond	1. This instruction is not an affirmative defense; it is the plaintiff-landlord's instruction. You can't say "to succeed on this defense, plaintiff must prove …"	The committee has changed the instruction's introductory language.

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
Accommodation (New)			
		2. Change title to: *Denial of Tenant's Requested Accommodation Was Proper*	The committee has changed the instruction's title.
		3. Rewrite this thing thus: [*Name of Plaintiff*] claims that [*name of defendant*]'s requested accommodation for [[*name of defendant*]'s/a member of [*name of defendant*]'s household's] disability was properly denied because of an exception to [*name of plaintiff*]'s duty to reasonably accommodate a tenant's disability. To succeed on this claim, [*name of plaintiff*] must prove:	The committee has refined the content of the introductory paragraph.
		4. Or better yet, pull it from the release and put it back on the drawing board.	The committee believes that the bench and bar would benefit from this instruction's inclusion in *CACI*, and that the refinements made in response to public comment have resolved the commenter's concerns.
	Orange County Bar Association by Larisa M. Dinsmoor, President	This new proposed instruction is designed for use with CACI 4329 "Affirmative Defense-Failure to Provide Reasonable Accommodation" in unlawful detainer cases. The plaintiff is the landlord, and the tenant defendant is claiming as a defense the landlord's failure to accommodate the disability of defendant under CACI 4329. This new proposed CACI 4330 attempts to provide a defense to the plaintiff landlord based on a regulatory exceptions found at 2 Cal.Code Reqs §12179. No other legal authority is cited. The only authority cited for 2 C.C.R. §12179 are general authorities	The committee believes the proposed new instruction serves the bench and bar by recognizing that there are exceptions in the regulation that may be jury issues. As the law concerning the defense

ITC CACI 21-02
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
		for the DFEH to implement regulations, prevent general discriminatory practices, and prosecute claims to prevent discrimination. The only specific statutory authority known for the duty of a landlord to provide "reasonable accommodations" to a disabled person are at Government Code §12927(c)(1) and 42 U.S.C. 3604(f)(3)(B). No statutory exceptions exist to this duty of reasonable accommodation, and the relevant cases all cite the proposition that "reasonable accommodation" can only be determined on a factual case-by-case basis. See, Auburn Woods I Homeowners Association vs Fair Employment & Housing Comm. (2004) 121 Cal. App 4th 1578; U.S. vs California Mobile Home Park Management Co. (9th Cir. 1997) 107 F.3d 1374, 1380-1381. The "exceptions" set forth at 2 C.C.R. §12179 may be proper interpretations, but support for the listed "exceptions" should be properly listed or explained. Currently, 2 C.C.R. §12179 lists six (6) regulatory exceptions, but none of the authorities listed relate to "exceptions" and the Government Code citations likewise have nothing to do with any exceptions. A better explanation of these regulatory exceptions is necessary together with proper cites to the disabled housing statutes rather than the employment discrimination statutes. See, e.g. Civil Code §51, Civil Code §54-55-32.	(see CACI No. 4329) and its exceptions develops, the committee will consider revisions to these unlawful detainer instructions.
All except as noted above	California Lawyers Association, Litigation Section, Civil Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree (2334, 2521A, 2521B, 2521C, 2522A, 2522B & 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF-2507C, 2702, 3041, 3046, 3050, and 4330)	No response required.

ITC CACI 21-02

Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)

All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
All except as noted above	Orange County Bar Association by Larisa M. Dinsmoor, President	Agree (2521A, 2521B, 2521C, 2522A, 2522B, 2522C, VF-2506A, VF-2506B, VF-2506C, VF-2507A, VF-2507B, VF2507C, 2702, 2705, 2750, 2752, 2753, 2754, 3041, 3046, 3050, 3709, and 4304)	No response required.

Item number: 03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]**:**
Approve

Rules Committee Meeting Date: October 8, 2021

Title of proposal: Civil Jury Instructions: Instructions with Minor or Nonsubstantive Revisions (Release 40)

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Civil Judicial Council of California Civil Jury Instructions (CACI)

Committee or other entity submitting the proposal:
Advisory Commitee on Civil Jury Instructions

Staff contact (name, phone and e-mail): Eric Long, Attorney, Legal Services, 415-865-7691 eric.long@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: November 2, 2020
Project description from annual agenda: Maintenance—Sources and Authority; Technical Corrections

If requesting July 1 or out of cycle, explain:
California Rules of Court, rules 2.1050(d) and 10.58(a), require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. The Judicial Council has given the Rules Committee final authority to approve instructions with changes to the Directions for Use or additions to the Sources and Authority under the provisions of the guidelines adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes. Pursuant to this delegation of authority, the advisory committee requests that the Rules Committee give final approval to 10 revised CACI instructions for release 40.

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
n/a

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:*
- *List any new forms that require translation by statute or that you will request to be translated:*

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
September 28, 2021

To
Members of the Rules Committee

From
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Subject
Civil Jury Instructions: Instructions with Minor or Nonsubstantive Revisions (Release 40)

Action Requested
Review and Approve Publication of Instructions

Deadline
October 8, 2021

Contact
Eric Long
415-865-7691 phone
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 10 instructions in this release, prepared by the advisory committee, contain the types of revisions that the Judicial Council has given the Rules Committee final authority to approve—primarily changes to the Sources and Authority that are nonsubstantive and unlikely to cause controversy. Also included within these instructions are grammatical, typographical, and citation corrections for which the Rules Committee has delegated authority to the Advisory Committee on Civil Jury Instructions.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve for publication revisions to 10 civil jury instructions, prepared by the advisory

committee, that contain changes that do not require posting for public comment or full Judicial Council approval: CACI Nos. 400, 533, 555, 1123, 1501, 1621, 1708, 1903, 3020, and 3231.

These instructions will be published in the 2022 edition of *CACI* and posted online on the California Courts website, and on Lexis and Westlaw.

The revised instructions are attached at pages 5–49.

Relevant Previous Council Action

In 2003, the Judicial Council approved civil jury instructions—drafted by the Task Force on Jury Instructions—for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[1]

In 2006, the Judicial Council approved the Rules Committee's delegation to the Advisory Committee on Civil Jury Instructions the authority to review and approve nonsubstantive grammatical and typographical corrections to the jury instructions, and authority for the Rules Committee to "review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to *Judicial Council of California Civil Jury Instructions* (CACI) and *Criminal Jury Instructions* (CALCRIM)."[2]

Under the implementing guidelines that the Rules Committee (formerly known as the Rules and Projects Committee or RUPRO) adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes*, the Rules Committee has final approval authority over the following:

(a) Additions of cases and statutes to the Sources and Authority;
(b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[3]
(c) Additions or changes to the Directions for Use;[4]

[1] Cal. Rules of Court, rules 2.1050(d), 10.58(a).

[2] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sept. 12, 2006), p. 1.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] The committee only presents nonsubstantive changes to the Directions for Use for the Rules Committee's final approval. Substantive changes are posted for public comment and presented to the council for approval.

(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy. A nonsubstantive change is one that does not affect or alter any fundamental legal basis of the instruction;
(e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and
(f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Analysis/Rationale

Overview of revisions

Of the 10 revised instructions in this release (Release 40) that are presented for final approval by the Rules Committee, 10 have revisions under category (a) above (additions of cases and statutes to the Sources and Authority) and 1 has a revision to the Secondary Sources (category (d) above).

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

Sources and Authority format cleanup

CACI format requires that case excerpts in the Sources and Authority be of directly quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the form of a legal statement with a citation rather than a direct quotation. Where found in instructions otherwise being revised or updated, these out-of-format excerpts have been converted to direct quotations.

CACI format also orders statutes, rules, and regulations first; then case excerpts; and then any other authorities, such as a Restatement excerpt. Where found in instructions otherwise being revised or updated, excerpts that were out of order have been moved to the proper location.

Policy implications

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, revise, and add topics to CACI and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

Because the revisions to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Alternatives considered

California Rules of Court, rules 2.1050 and 10.58, specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI*; and to submit its recommendations to the council for approval. The proposed revisions and additions meet this responsibility. There are no alternatives to be considered.

Fiscal and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis Matthew Bender, will pay royalties to the council.

Attachments

Full text of *CACI* instructions, at pages 5–49

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 40: November 2021

400. Negligence—Essential Factual Elements

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

1. **That [***name of defendant***] was negligent;**

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

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

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

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- " 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)
- "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)
- "The element of causation requires there to be a connection between the defendant's breach and the plaintiff's injury." (*Coyle, supra,* 24 Cal.App.5th at p. 645.)
- " 'In most cases, courts have fixed no standard of care for tort liability more precise than that of a

reasonably prudent person under like circumstances.' This is because '[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.' " (*Coyle, supra,* 24 Cal.App.5th at pp. 639–640, internal citation omitted.)

- " ' "[I]t is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform." [Citation.] [¶] The formulation of the standard of care is a question of law for the court. [Citations.] Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether the defendant's conduct has conformed to the standard. [Citations.]' " (*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 902–903 [240 Cal.Rptr.3d 675].)

- "The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' " (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)

- "[T]he existence of a duty is a question of law for the court." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

- "In the *Rowland* [*Rowland, supra,* 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)

- "[T]he analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. '[I]n analyzing duty, the court's task " ' "' " ' "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind* of harm experienced that liability may appropriately be imposed on the negligent party." ' " ' " ' " 'The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation omitted.)

- "A defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. In that circumstance, '[i]n addition to the special relationship ... , there must also be evidence showing facts from which the trier of fact could

reasonably infer that the [defendant] had prior *actual knowledge*, and thus *must have known*, of the offender's assaultive propensities. [Citation.]' In short, the third party's misconduct must be foreseeable to the defendant." (*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 682–683 [250 Cal.Rptr.3d 62], original italics.)

- "[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ' "foreseeability" in two more focused, fact-specific settings' to be resolved by a trier of fact. 'First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)

- "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. … While the court deciding duty assesses the foreseeability of injury from 'the category of negligent conduct at issue,' if the defendant did owe the plaintiff a duty of ordinary care the jury 'may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place.' An approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court … .' " (*Cabral, supra,* 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)

- "[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct', foreseeability in evaluating negligence and causation requires a 'more focused, fact-specific' inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)

- "The issue here is whether [defendant]—separate from other legal and practical reasons it had to prevent injury of any kind to the public—had a tort duty to guard against negligently causing what we and others have called 'purely economic loss[es].' We use that term as a shorthand for 'pecuniary or commercial loss that does not arise from actionable physical, emotional or reputational injury to persons or physical injury to property.' And although [defendant] of course had a tort duty to guard against the latter kinds of injury, we conclude it had no tort duty to guard against purely economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 398 [247 Cal.Rptr.3d 632, 441 P.3d 881], internal citations omitted.)

- "[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be

put in a position of peril of a kind from which the injuries occurred." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)

- "A defendant may owe a duty to protect the plaintiff from third party conduct if the defendant has a special relationship with either the plaintiff or the third party." (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 440 [241 Cal.Rptr.3d 616].)

- " 'Typically, in special relationships, "the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]" [Citation.] A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.' " (*Carlsen, supra,* 227 Cal.App.4th at p. 893.)

- "We agree that the same factors we discussed in *Giraldo* [*v. Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231] apply to the relationship between a law enforcement officer and arrestee: Once in custody, an arrestee is vulnerable, dependent, subject to the control of the officer and unable to attend to his or her own medical needs. Due to this special relationship, the officer owes a duty of reasonable care to the arrestee." (*Frausto v. Dept. of California Highway Patrol* (2020) 53 Cal.App.5th 973, 993 [267 Cal.Rptr.3d 889].)

- "Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties." (*Doe, supra,* 8 Cal.App.5th at p. 1129, internal citations omitted.)

- "[P]ostsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (~~*The*~~ *Regents of* ~~*the*~~ *University of California v. Superior Court* (2018) 4 Cal.5th 607, 624–625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)

- "[A] university's duty to protect students from foreseeable acts of violence is governed by the ordinary negligence standard of care, namely 'that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances.' " (*Regents of University of California, supra,* 29 Cal.App.5th at p. 904.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 956–964, 988–990, 993–996

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

533. Failure to Obtain Informed Consent—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she/***nonbinary pronoun***] performed [a/an] [***insert medical procedure***] on [***name of plaintiff***] without first obtaining [his/her/***nonbinary pronoun***] informed consent. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] performed [a/an] [***insert medical procedure***] on [***name of plaintiff***];**

2. **That [***name of defendant***] did not disclose to [***name of plaintiff***] the important potential results and risks of[~~,~~ and alternatives to] the [***insert medical procedure***];**

3. **That a reasonable person in [***name of plaintiff***]'s position would not have agreed to the [***insert medical procedure***] if that person had been adequately informed; and**

4. **That [***name of plaintiff***] was harmed by a result or risk that [***name of defendant***] should have explained.**

New September 2003; Revised June 2014, May 2020

Directions for Use

This instruction should be read in conjunction with CACI No. 532, *Informed Consent—Definition*. See also the Directions for Use and Sources and Authority to that instruction.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- "[W]hen there is a more complicated procedure, … the jury should be instructed that when a given procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 244−245 [104 Cal.Rptr. 505, 502 P.2d 1], internal citations omitted.

- "There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "[T]he 'burden of going forward' is different from the 'burden of proof,' and the burden of proof *always* remains with the plaintiff. Indeed, the only time the burden of proof on informed consent shifts to the defendant-physician is *after* the plaintiff has carried her burden of showing the nondisclosure of material information *and* when the defendant-physician is attempting to prove that 'even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, *this particular plaintiff* still would have consented to the procedure.' " (*Flores v. Liu* (2021) 60 Cal.App.5th 278, 298 [274 Cal.Rptr.3d 444], original italics, internal citations omitted.)

- "[E]ven though a physician has no general duty of disclosure with respect to nonrecommended procedures, he nevertheless must make such disclosures as are required for competent practice within the medical community" (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)

- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "[T]he objective test required of the plaintiff does not prevent the defendant-physician from showing, *by way of defense,* that even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, this particular plaintiff still would have consented to the procedure." (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573], original italics.)

- "[A]n action for failure to obtain informed consent lies where 'an *undisclosed* inherent complication ... occurs,' not where a disclosed complication occurs." (*Warren, supra,* 57 Cal.App.4th at p. 1202, original italics, internal citation omitted.)

- "[Plaintiff] is entitled to recover not only for the undisclosed complications, but also for the disclosed complications, because she would not have consented to either surgery had the true risk been disclosed, and therefore would not have suffered either category of complications." (*Warren, supra,* 57 Cal.App.4th at p. 1195.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 466, 471

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.23 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.23, 175.29 (Matthew Bender)

555. Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***], [***name of plaintiff***] discovered, or knew of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***] had suffered harm that was caused by someone's wrongful conduct.**

[If, however, [*name of plaintiff***] proves [***insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]***], the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] was absent from California***].]**

New April 2009; Revised May 2020

Directions for Use

Use CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*, if the three-year limitation provision is at issue.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitations period. (See Code Civ. Proc., § 364; *Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455].) Adjust the "date one year before the date of filing" in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the optional last paragraph if there is a question of fact concerning a tolling provision from the Code of Civil Procedure. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Contrary to the otherwise applicable rule (see CACI No. 455, *Statute of Limitations—Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant's wrongdoing more than one year before filing the action. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar Code Civ. Proc., § 340.6, on legal malpractice, to place burden regarding delayed discovery on the defendant and disapproving *Burgon v. Kaiser Foundation Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under Code Civ. Proc.,

§ 340.5].) See also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*.

Sources and Authority

- Statutes of Limitation for Medical Malpractice. Code of Civil Procedure section 340.5.
- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a).
- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d).
- "The one-year limitation period of section 340.5 is a codification of the discovery rule, under which a cause of action accrues when the plaintiff is aware, or reasonably should be aware, of 'injury,' a term of art which means 'both the negligent cause and the damaging effect of the alleged wrongful act.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 290 [170 Cal.Rptr.3d 125].)
- "When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' " (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)
- "Injury from the failure to diagnose a latent, progressive condition occurs 'when the undiagnosed condition develops into a more serious condition,' and that more serious condition is made manifest by an appreciable increase or alteration in symptoms. A patient's concerns or suspicions about a diagnosis do not trigger the statute of limitations when no more serious condition is manifest and no lack of diligence is shown." (*Filosa v. Alagappan* (2020) 59 Cal.App.5th 772, 781 [273 Cal.Rptr.3d 731], internal citations omitted.)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra,* 4 Cal.App.5th at p. 1190, internal citation omitted.)
- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does

not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)

- "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of Code of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)

- "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Memorial ~~1~~ Hospital~~.~~* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "That legislative purpose [re: Code Civ. Proc., § 364] is best effectuated by construing section 364(d) as tolling the one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of the one-year limitations period. Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the legislative objective of encouraging negotiated resolutions of disputes." (*Woods, supra,* 53 Cal.3d at p. 325.)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 838] [tripping over scale does not involve provision of medical care].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶ 5:109 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

~~1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.27~~

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

1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6)

[*Name of defendant***] claims that it is not responsible for harm to [***name of plaintiff***] caused by the plan or design of the [***insert type of property, e.g., highway***]. In order to prove this claim, [***name of defendant***] must prove both of the following:**

1. **That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [[***legislative body of the public entity, e.g., city council***]/[***other body or employee, e.g., city civil engineer***]] exercising [its/specifically delegated] discretionary authority to approve the plan or design; and**

2. **That the plan or design of the [***e.g., highway***] was a substantial factor in causing harm to [***name of plaintiff***].**

New December 2014; Revised June 2016

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id.* at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may be resolved as issues of law only if facts are undisputed].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Cornette, supra,* 26 Cal.4th at pp. 66−67; see Gov. Code, § 830.6.)

In element 1, select "its" if it is the governing body that has exercised its discretionary authority. Select "specifically delegated" if it is some other body or employee.

The discretionary authority to approve the plan or design must be "vested," which means that the body or employee actually had the express authority to approve it. This authority cannot be implied from the circumstances. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457 [192 Cal.Rptr 3d 376],)

Sources and Authority

- Design Immunity. Government Code section 830.6.

- "The purpose of design immunity 'is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]' ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette, supra,* 26 Cal.4th at p. 66.)

- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved … .' 'Approval … is a vital precondition of the design immunity.' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "A detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval." (*Rodriguez v. Department of Transportation* (2018) 21 Cal.App.5th 947, 955 [230 Cal.Rptr.3d 852].)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. … When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez, supra,* 225 Cal.App.4th at pp. 370−371, internal citations omitted.)

- "Discretionary approval need not be established with testimony of the individual who approved the project. A former employee may testify to the entity's 'discretionary approval custom and practice' even if the employee was not involved in the approval process at the time the challenged plan was approved." (*Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 947 [212 Cal.Rptr.3d 137], internal citation omitted.)

- "[T]he focus of discretional authority to approve a plan or design is fixed by law and will not be implied. '[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing "implied" discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.' " (*Castro, supra,* 239 Cal.App.4th at p. 1457.)

- "We conclude that the discretionary approval element of section 830.6 does not implicate the question whether the employee who approved the plans was aware of design standards or was

aware that the design deviated from those standards. The issue of the adequacy of the deliberative process with respect to design standards may be considered in connection with the court's determination whether there is substantial evidence that the design was reasonable. In addition, the discretionary approval element does not require the entity to demonstrate in its prima facie case that the employee who had authority to and did approve the plans also had authority to disregard applicable standards." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 343 [195 Cal.Rptr.3d 773, 362 P.3d 417].)

- "[A] case involving design immunity does not function as a typical summary judgment case would. The court's role in evaluating the third element of the design immunity is not to provide a de novo interpretation of the design, but instead to decide whether there is 'any substantial evidence' supporting its reasonableness." (*Menges v. Dept. of Transportation* (2020) 59 Cal.App.5th 13, 21 [273 Cal.Rptr.3d 231].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 234 et seq., 273.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.85[2] (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

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

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

4. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the earlier lawsuit ended in [his/her/***nonbinary pronoun***/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/***nonbinary pronoun***/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that

the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the

additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- "[The litigation privilege of Civil Code section 47] has been interpreted to apply to virtually all torts except malicious prosecution." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

- "Liability for malicious prosecution is not limited to one who initiates an action. A person who did not file a complaint may be liable for malicious prosecution if he or she 'instigated' the suit or 'participated in it at a later time.' " (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 873 [193 Cal.Rptr.3d 912].)

- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may … be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 [109 Cal.Rptr.3d 143].)

- "[F]avorable termination requires favorable resolution of the underlying action in its entirety, not merely a single cause of action. '[I]f the defendant in the underlying action prevails on all of the plaintiff's claims, he or she may successfully sue for malicious prosecution if any one of those claims was subjectively malicious and objectively unreasonable. But if the underlying plaintiff succeeds on any of his or her claims, the favorable termination requirement is unsatisfied and the malicious prosecution action cannot be maintained.' " (*Citizens of Humanity, LLC v. Ramirez* (2021) 63 Cal.App.5th 117, 128 [277 Cal.Rptr.3d 501], internal citation omitted.)

- "[A] lawyer is not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged. That achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim." (*Franklin Mint Co., supra,* 184 Cal.App.4th at p. 346.)

- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate … that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)

- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in

nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)

- " 'The entry of summary judgment for the defense on an underlying claim on grounds of insufficient evidence does not establish as a matter of law that the litigant necessarily can "state[] and substantiate[]" … a subsequent malicious prosecution claim.' " (*Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1120 [248 Cal.Rptr.3d 200].)

- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim. … ' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)

- "[Code of Civil Procedure] Section 581c, subdivision (c) provides that where a motion for judgment of nonsuit is granted, 'unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.' … [¶] We acknowledge that not every judgment of nonsuit should be grounds for a subsequent malicious prosecution action. Some will be purely technical or procedural and will not reflect the merits of the action. In such cases, trial courts should exercise their discretion to specify that the judgment of nonsuit shall not operate as an adjudication upon the merits." (*Nunez, supra,* 241 Cal.App.4th at p. 874.)

- " ' "[T]hat a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause [citation] does not alter the rule there must first be a favorable termination of the entire action." ' Thus, if the defendant in the underlying action prevails on all of the plaintiff's claims, he or she may successfully sue for malicious prosecution if any one of those claims was subjectively malicious and objectively unreasonable. But if the underlying plaintiff succeeds on any of his or her claims, the favorable termination requirement is unsatisfied and the malicious prosecution action cannot be maintained." (*Lane v. Bell* (2018) 20 Cal.App.5th 61, 64 [228 Cal.Rptr.3d 605], original italics.)

- " ' "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] 'It is not enough, however, merely to show that the proceeding was dismissed.' [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits." [Citations.]' Whether that dismissal is a favorable termination for purposes of a malicious prosecution claim depends on whether the dismissal of the [earlier] Lawsuit is considered to be on the merits reflecting [plaintiff's 'innocence' of the misconduct alleged." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 [141 Cal.Rptr.3d 338], internal citations omitted.)

- "If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established … ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)

- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury …. [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)

- " 'The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.]' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [151 Cal.Rptr.3d 117], internal citation omitted.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)

- "[W]e reject their contention that unpled hidden theories of liability are sufficient to create probable

cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [161 Cal.Rptr.3d 700].)

- "California courts have held that victory at *trial,* though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)

- "California courts have long embraced the so-called interim adverse judgment rule, under which 'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' Although the rule arose from cases that had been resolved after trial, the rule has also been applied to the 'denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.' " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777 [221 Cal.Rptr.3d 432, 400 P.3d 1], internal citations omitted.)

- "[T]he fraud exception requires ' "knowing use of false and perjured testimony." ' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452 [117 Cal.Rptr.3d 3].)

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts, supra,* 76 Cal.App.4th at p. 382.)

- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)

- "Although attorneys may rely on their clients' allegations at the outset of a case, they may not continue to do so if the evidence developed through discovery indicates the allegations are unfounded or unreliable." (*Cuevas-Martinez, supra,* 35 Cal.App.5th at p. 1121.)

- "[W]here several claims are advanced in the underlying action, each must be based on probable cause." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459 [197 Cal.Rptr.3d 227].)

- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim

'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)

- "A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence." (*Silas v. Arden* (2013) 213 Cal.App.4th 75, 90 [152 Cal.Rptr.3d 255].)

- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)

- " 'Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence.' '[M]alice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause.' " (*Cuevas-Martinez, supra*, 35 Cal.App.5th at p. 1122, original italics.)

- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference. [Citations.]" ' " (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113–1114 [142 Cal.Rptr.3d 646], internal citations omitted.)

- " ' "Suits with the hallmark of an improper purpose"' include, but are not necessarily limited to, '"those in which: ' "' '… (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." ' "' " ' [Citation.] [¶] Evidence tending to show that the defendants did not subjectively believe that the action was tenable is relevant to whether an action was instituted or maintained with malice. [Citation.]' " (*Oviedo, supra,* 212 Cal.App.4th at pp. 113–114.)

- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra,* 182 Cal.App.4th at p. 226.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 554, 557, 562–569, 571–606

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Liability For Unfair Collection Practices—Tort Liability,* ¶ 2:428 (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01-43.10 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, § 357.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, § 147.20 et seq. (Matthew Bender)

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

---

[*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 present at the scene;**

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.

New September 2003; Revised December 2013, June 2014, December 2014, December 2015

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.

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

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

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

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)

- "As an introductory note, we observe that plaintiffs … framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort … .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman, supra,* 212 Cal.App.4th at p. 836.)

- "Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a 'plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative', so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child's] abuse, but with their senses technologically extended beyond the walls of their home." (*Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906], internal citation omitted.)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird, supra,* 28 Cal.4th at p. 920.)

- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when … caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys, supra,* 235 Cal.App.4th at p. 489.)

- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra,* 235 Cal.App.4th at p. 490.)

- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman, supra,* 212 Cal.App.4th at p. 841, fn. 4.)

- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman, supra,* 212 Cal.App.4th at pp. 843−844.)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)

- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)

- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks, supra,* 2 Cal.App.4th at p. 1271.)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra,* 189 Cal.App.4th at p. 1378.)

- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [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)

1708. Coerced Self-Publication

[*Name of plaintiff*] claims that [*name of defendant*] is responsible for [his/her/*nonbinary pronoun*] harm even though [*name of defendant*] did not communicate the statement(s) to anyone other than [*name of plaintiff*]. To succeed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made the statement(s) to [*name of plaintiff*];**

2. **That [*name of plaintiff*] was under strong pressure to communicate [*name of defendant*]'s statement(s) to another person; and**

3. **That when [*name of defendant*] made the statements, [he/she/*nonbinary pronoun*] should have known that [*name of plaintiff*] would be under strong pressure to communicate them to another person.**

If [*name of plaintiff*] has proved all of the above, then you must find that [*name of defendant*] was responsible for the communication of the statement(s).

New September 2003

Sources and Authority

- The general rule is that "[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." The exception to the rule occurs "when it [is] foreseeable that the defendant's act would result in plaintiff's publication to a third person." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198].)

- [A] "self-publication of the alleged defamatory statement may be imputed to the originator of the statement if 'the person defamed is operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.' " (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [34 Cal.Rptr.2d 438], quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797-798 [168 Cal.Rptr. 89].)

- "This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1285.)

- To determine if the coercion exception applies, the test is "whether 'because of some necessity he was under to communicate the matter to others, it was reasonably to be anticipated that he would do so.' " (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1285.)

- "[W]hile compelled self-published defamation per se technically eliminates the need for publication

by the defendant to a third party, a plaintiff cannot manufacture the defamation claim by simply publishing statements to a third party because the plaintiff must disclose contents of the employer's statement to a third party *after* reading or being informed of the contents. The originator of the statement is liable for the foreseeable repetition because of the causal link between the originator and the presumed damage to the plaintiff's reputation, but the publication must be foreseeable. The presumed injury is no less damaging because the plaintiff was compelled to make the statement instead of the employer making it directly to the third party." (*Tilkey v. Allstate Ins. Co.* (2020) 56 Cal.App.5th 521, 542 [270 Cal.Rptr.3d 559], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 633, 722

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.22 (Matthew Bender)

California Civil Practice: Torts § 21:15 (Thomson Reuters)

1903. Negligent Misrepresentation

[*Name of plaintiff***] claims [he/she/***nonbinary pronoun***/it] was harmed because [***name of defendant***] negligently misrepresented a fact. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] represented to [***name of plaintiff***] that a fact was true;**

2. **That [***name of defendant***]'s representation was not true;**

3. **That [although [***name of defendant***] may have honestly believed that the representation was true,] [[***name of defendant***]/he/she/***nonbinary pronoun***] had no reasonable grounds for believing the representation was true when [he/she/***nonbinary pronoun***] made it;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on this representation;**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation;**

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

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation was a substantial factor in causing [his/her/***nonbinary pronoun***/its] harm.**

New September 2003; Revised December 2009, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made certain representations with no reason to believe that they were true. (See Civ. Code, § 1710(2).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*.

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give both this instruction and CACI No.1900, *Intentional Misrepresentation*. If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Sources and Authority

- Negligent Misrepresentation. Civil Code section 1710.

- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra,* 3

Cal.4th at p. 407, internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629], original italics, internal citations omitted.)

- "Negligent misrepresentation requires an assertion of fact, falsity of that assertion, and the tortfeasor's lack of reasonable grounds for believing the assertion to be true. It also requires the tortfeasor's intent to induce reliance, justifiable reliance by the person to whom the false assertion of fact was made, and damages to that person. An implied assertion of fact is 'not enough' to support liability." *(SI 59 LLC v. Variel Warner Ventures, LLC* (2018) 29 Cal.App.5th 146, 154 [239 Cal.Rptr.3d 788], internal citation omitted.)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. ..." ' The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)

- "[Plaintiffs] do not allege negligence. They allege negligent misrepresentation. They are different torts, as the Supreme Court expressly observed in [*Bily, supra,* 3 Cal.4th at p. 407]: '[N]either the courts (ourselves included), the commentators, nor the authors of the Restatement Second of Torts have made clear or careful distinctions between the tort of negligence and the separate tort of negligent misrepresentation. The distinction is important not only because of the different statutory bases of the two torts, but also because it has practical implications for the trial of cases in complex areas … . [¶] Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit.' In short, the elements of each tort are different. Perhaps more importantly, the policies behind each tort sometimes call for different results even when applied to the same conduct." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227−228 [170 Cal.Rptr.3d 293].)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or an intent to defraud. … [T]he same elements of intentional fraud also comprise a cause of action for negligent misrepresentation, with the exception that there is no requirement of intent to induce

reliance … .” (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845 [199 Cal.Rptr.3d 901], internal citation omitted.)

- “In our view, and to clarify, the proper formulation of the elements is that negligent misrepresentation *does* require proof of ‘ “intent to induce another’s reliance on the fact misrepresented[.]” ’ However, negligent misrepresentation does *not* require proof of an intent to defraud.” (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1061 [273 Cal.Rptr.3d 868], original italics, internal citation omitted.)

- “ ‘ “Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.” ’ If defendant’s belief ‘is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.’ ” (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)

- “[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion.” (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458].)

- “Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact.” (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)

- “[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 v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [141 Cal.Rptr.3d 142].)

- “The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable.” (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)

- “Where, as here, a negligent misrepresentation claim is brought against the provider of a professional opinion based on special knowledge, information or expertise regarding a company’s value, the California Supreme Court requires the following: ‘The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client’s] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. [However,] [i]f others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.’ ” (*Public Employees’ Retirement System v. Moody’s Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 667−668 [172 Cal.Rptr.3d 238].)

- “[P]laintiffs rely on section 311 of the Restatement Second of Torts (section 311), which addresses negligent misrepresentation involving physical harm. Under section 311(1), ‘[o]ne who negligently

> gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results [¶] … [¶] to such third persons as the actor should expect to be put in peril by the action taken.' [¶] Section 311's theory of liability is intended to be 'somewhat broader' than that for mere pecuniary loss. It 'finds particular application where it is a part of the actor's business or profession to give information upon which the safety of the recipient or a third person depends.' This court applied and followed section 311 … " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162–163 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 940–942, 946–949

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-H,, *Negligent Misrepresentation*, ¶ 5:781 et seq. (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-D, *Negligent Misrepresentation*, ¶ 11:41 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.14 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.270 et seq. (Matthew Bender)

California Civil Practice: Torts §§ 22:13–22:15 (Thomson Reuters)

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her/*nonbinary pronoun*] in violation of the Fourth Amendment to the United States Constitution. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force in [arresting/detaining] [*name of plaintiff*];**

2. **That the force used by [*name of defendant*] was excessive;**

3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her/*nonbinary pronoun*] official duties;**

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

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

Under the Fourth Amendment, force is excessive if it is not reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

(a) Whether [*name of plaintiff*] reasonably appeared to pose an immediate threat to the safety of [*name of defendant*] or others;

(b) The seriousness of the crime at issue [or other circumstances known to [*name of defendant*] at the time force was applied];

(c) Whether [*name of plaintiff*] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight];

(d) The amount of time [*name of defendant*] had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that time period[; and/.]

[(e) The type and amount of force used[; and/.]]

[(f) [*Specify other factors particular to the case*].]

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised

June 2015, June 2016, May 2020, November 2020

Directions for Use

The Fourth Amendment's "objective reasonableness" standard applies to all claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure brought under Title 42 United States Code section 1983, whether deadly or not. (*Scott v. Harris* (2007) 550 U.S. 372, 381–385 [127 S.Ct. 1769, 167 L.Ed.2d 686].)

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 673 F.3d 864, 872.) Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given, and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. (*Id.*) These and other additional factors may be added if appropriate to the facts of the case.

Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) 576 U.S. 389 [135 S.Ct. 2466, 2473, 192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction. For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force*.

The legality or illegality of the use of deadly force under state law is not relevant to the constitutional question. (Cf. *People v. McKay* (2002) 27 Cal.4th 601, 610 [117 Cal.Rptr.2d 236, 41 P.3d 59] ["[T]he [United States Supreme Court] has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law"]; see also Pen. Code, § 835a.)

For instructions for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, and CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard." (*Kingsley, supra,* 576 U.S. at p. 396, original italics.)

- "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The question in this case is whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting. The answer is yes: The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." (*Torres v. Madrid* (2021) ___ U.S. ___ [141 S.Ct. 989, 993-994, 209 L.Ed.2d 190].)

- " 'The intrusiveness of a seizure by means of deadly force is unmatched.' 'The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." ' " (*Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1031.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers

that the person they used force against was emotionally disturbed." (*Glenn, supra,* 673 F.3d at p. 872, internal citations omitted.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

- "Although officers are not required to use the least intrusive degree of force available, 'the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.' " (*Vos, supra,* 892 F.3d at p. 1033, internal citation omitted.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark County* (9th Cir. 2016) 828 F.3d 910, 920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.' At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott, supra,* 550 U.S. at p. 381, fn. 8, original italics, internal citations omitted.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry, supra,* 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The district court found that [plaintiff] stated a claim for excessive use of force, but that governmental interests in officer safety, investigating a possible crime, and controlling an interaction

with a potential domestic abuser outweighed the intrusion upon [plaintiff]'s rights. In reaching this conclusion, the court improperly 'weigh[ed] conflicting evidence with respect to . . . disputed material fact[s].' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 880.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes v. County of San Diego* 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis." (*Vos, supra,* 892 F.3d at p. 1034, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' " (*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. County of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "Where … 'an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact.' '[W]hether the mistake was an honest one is not the concern, only whether it was a reasonable one.' " (*Nehad v. Browder* (9th Cir. 2019) 929 F.3d 1125, 1133, original italics, internal citation and footnote omitted.)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 673 F.3d at p. 872.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis." (*Nehad, supra,* 929 F.3d at p. 1137.)

- "By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- • "Sometimes, however, officers themselves may 'unnecessarily creat[e] [their] own sense of urgency.' Reasonable triers of fact can, taking the totality of the circumstances into account, conclude that an officer's poor judgment or lack of preparedness caused him or her to act unreasonably, 'with undue haste.' " (*Nehad, supra,* 929 F.3d at p. 1135, internal citation and footnote omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence

invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. County of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury

> the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 981, 985

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

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

3231. Continuation of Express or Implied Warranty During Repairs (Civ. Code, § 1795.6)

Regardless of what the warranty says, if a defect exists within the warranty period and the [*consumer good/new motor vehicle*] has been returned for repairs, the warranty will not expire until the defect has been fixed. [*Name of plaintiff*] must have notified [*name of defendant*] of the failure of the repairs within 60 days after they were completed. The warranty period will also be extended for the amount of time that the warranty repairs have not been performed because of delays caused by circumstances beyond the control of [*name of plaintiff*].

New June 2012

Directions for Use

Give this instruction if it might appear to the jury from the language of an express or implied warranty that the warranty should have expired during the course of repairs. By statute, the warranty cannot expire until the problem has been resolved as long as the defendant had notice that the defect had not been repaired. (Civ. Code, § 1795.6(b).)

Sources and Authority

- Continuation of Express Warranty During Repairs. Civil Code section 1795.6.
- Notice Required in Work Order or Repair Invoice. Civil Code section 1793.1(a)(2).
- "There is no support in the law for instructing the jury that if a defect exists within the warranty period, the warranty continues in perpetuity until the defect has been diagnosed and fixed. It was error to give the special instruction, an incomplete and misleading statement that does not comport with the law of express warranty or with the lemon law provision on tolling. The proper instruction was CACI No. 3231." (*Ruiz Nunez v. FCA US LLC* (2021) 61 Cal.App.5th 385, 396 [275 Cal.Rptr.3d 618].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 323

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 539, 760

44 California Forms of Pleading and Practice, Ch. 502, *Sales*, § 502.52 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.100, 206.102 (Matthew Bender)

21 California Legal Forms: Transaction Guide, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.128 (Matthew Bender)

30 California Legal Forms: Transaction Guide, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)